

(2001) 12 KL CK 0006

In the High Court Of Kerala

Case No : W.A. No"s. 2614/98 and 91/99 O.P. No"s. 13788/97 and 4823, 6259, 22582 and 31314 of 2000

Karthikeyan and Another

APPELLANT

Vs

State of Kerala and Others

RESPONDENT

Date of Decision : 02-12-2001

Acts Referred:

Kerala Forest Subordinate Service Rules, 1966 — Rule 10, 19, 2, 20, 21
Kerala State and Subordinate Services (Amendment) Rules, 1992 — Rule 21

Citation : (2001) 12 KL CK 0006

Hon'ble Judges : K.S. Radhakrishnan, J;Balakrishnan Nair, J

Bench : Division Bench

Advocate : K.P. Kylasanatha Pillay, P. Sreekumar, B. Prabath Kumar and Sreedevi Kylasanath, B. Gopakumar, in W.A. 31/9 and A.N. Rajan Babu, S. Chandrasenan, S. Sajith, B. Gopakumar and Chincy Gopakumar, for the Appellant; Thomaskutty, M.A., Government Pleader for Respondent No. 1 and V.N. Achthakurup, Ashok M. Cherian, P.C. Sasidharan, C.P. Sudhakaraprasad, P.N. Narayana Pillai, N. James Koshy and P.K. Vijaya Menon, for the Respondent

Final Decision : Dismissed

Judgement

K.S. Radhakrishnan, J.—The inter seniority among Range Officers recruited through various methods of recruitment as prescribed in the Kerala Forest Subordinate Services Rules (in short, Forest Service Rules) is the question that arises for consideration in all these cases.

2. For disposal of these cases we may deal with the facts in O.P. No. 11341/97 against which W.A. 2614/98 and W.A. 31/99 are preferred. O.P. 11341/97 was preferred by one Karthikeyan and another seeking a direction to the Respondents to recast the seniority list of Forest Rangers as on 1st January 1992 in accordance with the principle laid down by this Court: in Appukuttan Nair v. State of Kerala 1990 (2) KLT 806, and Somarajan v. State of Kerala 1992 (1) KLT 690. Petitioners wanted to place persons who did not complete probation within the maximum period of 4 years below them and to give them further promotion as

Assistant Conservator of Forests recasting the seniority list. A writ of certiorari was also prayed for challenging Ext. P-5, provisional seniority list of Forest Rangers as on 1st January 1992. Challenge was also made against Ext. P-12 final combined seniority list of Forest Rangers as on 1st January 1992 and to rearrange those lists accordingly and to give them rightful placement. Learned Single Judge did not grant the reliefs prayed for and dismissed the writ petition, against which these appeals have been preferred. The seniority of Rangers are regulated by Rules 2, 9 and 10 of the Kerala Forest Service Rules read with General Rules 2 and 27 of K.S. and S.S.R. As per Rule 2 of Kerala Forest Service Rules there are four categories of Rangers depending upon the methods of recruitment. The post of Rangers could be filled up by direct recruitment or by promotion of eligible officers from feeder category of Deputy Rangers etc. We need not elaborate the modes of appointment. Suffice it to say/several persons were promoted as Rangers, after 1st November 1956 through different channels. With regard to those persons who were appointed as Rangers after 1st November 1956 a combined final seniority list of Rangers as on 1st January 1984 was published in the Kerala Gazette, dated 5th November 1965 after duly disposing of all appeals preferred by the incumbents. The said list was published vide office Order No. E7/48163/84, dated 26th August 1985. First Petitioner Karthikeyan was appointed as Forest Ranger on 3rd November 1983 and second Petitioner on 1st January 1987. First Petitioner completed his probation in the category of Forest Ranger with effect from 3rd November 1985 and probation was declared by Order, dated 25th September 1987. Probation of the second Petitioner was declared with effect from 20th June 1990. In the final combined seniority lists as on 1st January 1984 Petitioners name did not figure. At that time the first Petitioner had completed only two months service as Forest Ranger and second Petitioner was not in service. Third Respondent was shown as serial No. 296 in the final seniority list. As per Special Rules for the Kerala Forest Service the period of probation for Forest Rangers is two years on duty within a continuous period of three years. The total three years period on probation can be extended for a period of one year as per Rule 21 of the K.S. and S.S.R. Since the first Petitioner had passed the tests in time he was declared to have completed the probation with effect from 3rd November 1985. Second Petitioner also completed probation within a period of four year from the date on which probationary service was started and his probation was declared with effect from 20th June 1990. According to them they are therefore entitled to consider their seniority in the category of Forest Ranger from 3rd November 1983 and 1st January 1987 respectively. As we have already indicated third Respondent had commenced service as Forest Ranger on 31st October 1980 and therefore he was shown as serial No. 296 in the final seniority list of Forest Rangers as on 1st January 1984. He had not completed the probation within the maximum period of 4 years. It was pointed out third Respondent has passed the requisite test qualifications prescribed under Rule 7 of the Special Rules only in 1997. Therefore the contention is that his name should not have been included in the final seniority list of Rangers as on 1st January 1984.

3. In final seniority list of Rangers as on 1st January 1984 third Respondent and several others where even their placement even though they did not possess the requisite test qualification. The list was however finalised as on 1st January 1984 after disposing of all the appeals. Second Respondent later published provisional seniority list of Forest Rangers as on 1st January 1987 vide proceedings No. El-26731/87, dated 4th February 1988. First Petitioner then filed Ext. P-2 representation, dated 21st October 1991 as against the above mentioned seniority list. Reference was also made to the decision of this Court in Appukuttan Nair v. State of Kerala 1990 (2) KLT 806, and wanted the seniority list published as per proceedings, dated 29th March 1988 be reviewed and the Petitioner be given proper place in the seniority list. We may at this juncture point out in Ext. P-2 representation he had not made any challenge against the final seniority list of Rangers published as on 1st January 1984. Chief Conservator of Forests replied to the said letter vide proceedings, dated 9th January 1992. Pursuant to the said letter, dated 9th January 1992 first Petitioner filed another representation, dated 27th January 1992. Placing reliance on Rules 7 and 8 of the Special Rules it was pointed out by the first Petitioner that relative positions of persons in the seniority list have to be refixed if a senior person fails to acquire the test qualification and satisfactorily complete the probation within 4 years of service. In that representation also we may point out, no challenge was made as against final seniority list of Rangers as on 1st January 1984 in which third Respondent was given his place. The second Respondent then published provisional seniority list of rangers as on 1st January 1992. The same was published vide Order No. E1-16223/92, dated 25th June 1992. In the said provisional seniority list third Respondent was shown as serial No. 91. His date of appointment/promotion to the post of Ranger was shown as 31st October 1980. First Petitioner was shown as serial No. 135 and his date of appointment was shown as 1st November 1983. Second Petitioner was shown as serial No. 197 and his date of appointment was shown as 1st January 1987. Petitioner filed objections to the provisional seniority list vide Ext. P-6, dated 8th January 1993 for revision of seniority list on the basis of the Judgment of this Court in Appnkuttan Nair's case (supra).

4. Petitioners then approached this Court filed O.P. 12034/94 and wanted to have their representations disposed of in the light of the principle laid down by this Court in Appnkuttan Nair's case (supra) as well as Somarajan's case (supra). This Court disposed of the writ petition on 1st September 1994 directing the second Respondent to consider the Petitioners representation, dated 8th January 1993 in accordance with law and on the basis of the principle laid down by this Court in the abovementioned decisions within a stipulated time.

5. Second Respondent as directed by this Court examined the grievance raised by the Petitioners in the light of the abovementioned decisions and reached the following conclusions:

1. In view of G.O. (P) 62/92/P. and A.R.D., dated 16th December 1992 (S.R.O.

No. 692/93) Government have powers to order extension of probation beyond one year (allowable by appointing authority) if found necessary. As such the contention of the Petitioner that probation cannot be extended beyond one year and above the 3 year grace period falls.

2. Since administrative delay in declaring probation shall not affect the eligibility of a probationer to become an approved probationer with effect from, from the due date, the Petitioner and the two co-Petitioners in O.P. 12034/94 shall be considered as seniors to those Range Officers if any presently ranked senior to them but who have failed to acquire the prescribed special qualification before the Petitioners become entitled to be approved probationers.

Necessary details will be gathered and above orders will be implemented/soon. Question of discharge of unqualified persons or extension of their probation will be dealt with separately, but immediately.

Second Respondent then issued a revised provisional seniority list of Rangers as on 1st January 1992 in the light of principles laid down by this Court in 1992 (1) KLT 690 (supra) keeping final seniority list of Range Officers as on 1st January 1984 in tact. Second Respondent in its Order, dated 15th January 1996 by which revised provisional seniority list of Rangers as on 1st January 1992 was issued ordered as follows:

Final gradation list of Range Officers available in the department is the one as on 1st January 1984. This was finalised observing all formalities including due disposal of appeals. As such it is a Settled position by virtue of G.O. (P) 61/92/P and A.R.D., dated 16th December 1992. Therefore, it will be adopted as such. Since the provisional list as on 1st January 1992 was directed to be reviewed, it is hereby, decided to reviewed recast that list in accordance with the directions contained in the Judgment of Honourable High Court, dated 1st September 1994 in O.P. 12034/94. Second Respondent then called for objections if any against that provisional list. In the abovementioned provisional list third Respondent was shown as serial No. 91 and his date of appointment was shown as 31st October 1980. First Petitioner was shown as serial No. 135 and second Petitioner as serial No. 197.

6. Petitioner filed his objections to the provisional seniority list vide his representation, dated 4th March 1996. It was pointed out by Petitioner that G.O. (P) 62/92/P and A.R.D., dated 16th December 1992 has no retrospective effect, and the Government cannot extend the probation of an employee for a period failing prior to the said date. It was stated that the said order does not provide for any absolute protection to a seniority list from being reviewed or altered in the light of an emerging legal or factual position. With regard to the final seniority list as on 1st January 1984 it was pointed out that as on 1st January 1984 he had a service of only 2 months as Ranger and consequently he could not challenge the said list at that time. It was pointed out second Respondent is bound to recast the list as on 1st January 1984 and also on the basis of the

principles laid down by this Court in 1992 (1) KLT 690 (supra). Objections filed against the provisional list were considered by the second Respondent and a final combined seniority list of Rangers as on 1st January 1992 was published vide order No. E. 1-42632/93, dated 4th March 1997. In the final combined seniority list third Respondent was shown as serial No. 92. It was noted in the remarks column that he was not qualified. First Petitioner was shown as serial No. 136 and second Petitioner as serial No. 189 respectively. Date of acquiring test qualification was shown as 3rd November 1985 and 1st July 1990 respectively. It was decided not to make any change in positions of the incumbents included in the seniority list as on 1st January 1984 since it was a settled position. It was ordered that Rangers appointed on or after 1st January 1984 was placed in the final list in accordance with the Judgment, dated 1st September 1994 in O.P. No. 12034/94.

7. Counsel appearing for the writ Petitioners contended that the principles laid down by this Court in Appukuttan Nair's case and Somarajan's case were not properly applied by the second Respondent in preparing the final seniority list of Rangers as on 1st January 1992 as well as 1st January 1987 and 1st January 1984. It was pointed out even though as per G.O. (P) 61/92/P and A.R.D., dated 16th December 1992 Government have got power to extend the period of probation beyond one year, the same cannot have any retrospective operation. Therefore validity of the final seniority list as on 1st January 1984, 1st January 1987 and 1st January 1992 have to be tested in the light of the rules which were in force at the relevant time. Counsel submitted all those persons who have not completed the probation within the stipulated time will have to find a place lower down in the seniority of persons who have completed probation earlier after having passed the requisite test. Counsel submitted mere fact that third Respondent and other similarly placed persons who were included in a seniority list of Range Officers as on 1st January 1984 does not mean that they would carry the seniority in the subsequent list as well. Passing of the required test is a statutory requirement. Declaration of probation is depending upon passing of the obligatory departmental test. Under Rule 21 of K.S. and S.S.R. Government could intend the period of probation by one year. That means, within a period of four years. Further it was stated even during the extended period person like the third Respondent could not pass the obligatory test.

8. Placing reliance on the decision of the Supreme Court in A.N. Sehgal and others Vs. Raje Ram Sheoram and others, . Counsel contended a person who is holding a post on fortuitous condition stands excluded and period of unapproved service cannot be counted for seniority. Reliance was also placed on the decision of the Apex Court in M.P. Chandoria Vs. State of M.P. and others, Counsel contended until a person's probation is declared-and confirmed in the post he does not become a member of the service. Counsel also submitted that in the absence of any provision for deemed confirmation third Respondent and others had to be discharged from service or to take position lower in the seniority list as against persons who have passed the departmental test. Reliance was also

placed by the counsel on the decision of the Supreme Court in High Court of High Court of Madhya Pradesh thru. Registrar and Others Vs. Satya Narayan Jhavar, . Counsel also placed reliance on certain passages in the Administrative Law by Wade 7th Edition. Reference was also made to the decision of the House of Lords in Regina v. Secretary of State for the Home Department, Ex parte Daly (2001) 4 K.H.L. 26, to explain the retrogressive decision in English Law in Wedensbury's case insofar as it suggested that there are degrees of unreasonableness.

9. Counsel appearing for the contesting Respondents as well as learned Government Pleader submitted that the principle laid down by this Court in Appukuttan Nair's case and Somarajan's case (supra) was properly applied in preparing the seniority list in respect of those persons who were appointed after 1st January 1984. Counsel submitted there is no justification to unsettle a settled senior by list. Further it was pointed out Government have got the power to extend the period of probation by G.O. (P) 62/92/P and A.R.D., dated 16th December 1992. Further it was pointed out Government have got paramount power to extend probation under Rule 19, 21 and 39 of the K.S. and S.S.R. Reference was also made to the decision of this Court in Namboothiri v. State of Kerala ILR 1982 Ker 550, and contended that there is no prohibition in Rules 19 to 21 against continuing a person "as probationer beyond any particular period. Reference was also made to the decision of this Court in Ramachandran Nair v. State of Kerala 1980 KLT 804, and contended that the Government is competent to extend the period of probation retrospectively even after the expiry of the probation. Further it was stated that passing of departmental test is only one among the requirement for declaration of probation. It was also pointed out there had been no practice or precedent in discharging a probationary Ranger in the forest department due to want of departmental test qualification.

10. In this case the question was raised whether under Rule 21 of K.S. and S.S.R. Government have got power to extend the period of probation retrospectively even after the expiry of the period of probation. We may refer Rule 21 of Kerala State and Subordinate Services (Amendment) Rules, 1992. In Rule 21, for the first and second sentences, by the Amentment Act, following has been substituted.

In the case of any probationer falling under Sub-rule (b) of Rule 19 or Sub-rule (c) of Rule 20, the appointing authority may extend his probation for a maximum period of one year to enable him to acquire special qualifications or pass the prescribed tests, as the case may be, or to enable the appointing authority to decide whether the probationer is suitable for full membership or not. Extension of probation beyond one year may, however, be ordered by Government if found necessary.

A contention was raised that since the abovementioned amendment has been effected in the year 1992 the same will have only prospective operation and consequently persons like third Respondent ought to have been discharged from service or in the alternative would take place lower as against persons who have

passed the test earlier.

11. We are of the view the said contention cannot be accepted considering the facts and circumstances of the case. The practice followed by the department all along was not to discharge a probationary Ranger for want of test qualification. It is on the basis of the said practice the final seniority list as on 1st January 1984 was prepared. The list was prepared after disposing of all the appeals. The said list has become final. Petitioner had never challenged the said list at any point of time, not even in this proceedings. Now that the third Respondent and others have already passed the departmental test. It is for the Government to pass appropriate orders extending the period of probation. Identical question came up for consideration before the Apex Court in 1999 (1) SCC 249. . In that case challenge was made against preparation of seniority list, dated 22nd May 1979 of Sub Inspectors of Prohibition and Excise. Relevant rule provided that every person appointed to the clerical and non-gazetted executive service of the prohibition and excise department was required to take the prescribed departmental examination under the rules unless he was exempted from taking the examination. Rules require that the candidates must pass the departmental examination within the period of three years from the date of his appointment. In case of failure to pass the examination within the said period he was liable to be removed from the department. No candidate would be allowed to appear again in the examination after the expiry of 3 years without any special sanction of the Government for any additional chance to appear which would be given only in very exceptional circumstance. Apex Court found that the date of passing of departmental examination was never the criteria in the matter of fixation of seniority. Apex Court held that this has also been the view taken by the department right from the year 1977 onwards although prior to 1977 the department has interpreted the rule as contended by the Appellant. Seniority lists have been prepared on the basis of continuous officiation right from 1977 onwards. The Apex Court found no reason to disturb the seniority list so prepared.

12. We find no reason to take a different [view in the instant case. Position is similar as far as third Respondent is concerned. His position as Range Officer was settled as on 1st January 1984 vide office order, dated 26th May 1985 and the list was published in the Kerala Gazette dated 5th November 1985. The same was settled after disposing of all the appeals. That position remains unchallenged even in this proceedings. Many of the persons and third Respondent have subsequently acquired the test qualification. Government has also got power to extend the period of probation. If the seniority of persons like third Respondent and similarly placed persons is unsettled at this distance of time that will be unjust and illegal.

13. The Apex Court had occasion to examine the challenge against seniority list of Income Tax Officers of Class I Grade II on the basis of the Seniority Rules of 1949 and 1950 in Rabindranath Bose and Others Vs. The Union of India (UOI)

and Others, .

Challenge was made against the said seniority list after a number of years. Applying sit back theory the Court held it would be unjust to deprive the Respondents of the rights which have accrued to them. Each person ought to be entitled to sit back and consider that his appointment and promotion effected a long time ago would not be set aside after the lapse of a number of years. This was the principle followed by the Apex Court in S.G. Jaisinghani Vs. Union of India (UOI) and Others, .

14. We are therefore of the view that second Respondent is justified in not unsettling the seniority list of Ranger Officers as on 1st January 1934. In fact, in several cases even though many of the persons just like the third Respondent had subsequently acquired the test qualification, there has been considerable delay on the part of the authorities to declare their probation. Administrative delay in declaring probation shall not affect the eligibility of a qualified probationer from becoming an approved probationer with effect from the date on which he becomes qualified. Now that the Government have got the power to extend the period of probation and to declare probation accordingly. We therefore leave the matter to the Government to pass appropriate orders.

15. This Court in Appukuttan Nair's case considered the scope of Rule 21 and 39 of the K.S. and S.S.R, Rule 21 of General Rules gives power to extend the period of probation for one year or three years period prescribed in the special rules. This Court took the view that Government have no power to pass such an order extending the period of probation of officers till they acquire the test qualification without applying its mind to the number of years taken by them for passing the test. It was ordered that Rule 39 of the General Rules does not confer power on the State Government to fix a different norm regulating seniority of a few employees when everyone else is governed by the appropriate statutory provision in that behalf. In Somarajan's case this Court held the effect of Rule 1.9 read with Rule 21 of the General Rule is that a person should be discharged, if he fails to complete the test qualification within the normal period of probation or the extended period of probation. If the officer fails to pass the test, it is the duty of the appointing authority to discharge him from service. The fact that appointing authority did not pass an Order discharging the probationer does not entitle him to claim that he had (Continued in the higher post and that he should get seniority on the basis of first appointment.

16. We are of the view the principle laid down by this Court in the abovementioned decision would not apply in the case of those persons whose seniority in the cadre of Rangers had already been settled as on 1st January 1984 by order, dated 26th August 1985. We also notice persons who have completed 50 years of age have been permanently exempted from acquiring obligatory departmental tests for probation and promotion and those persons were given appropriate place in the final list.

In view of the abovementioned circumstance we find no legal infirmity in the Orders under challenge. We therefore dismiss all these Writ Appeals and Writ Petitions. Let the Government take appropriate steps for declaring probation of those persons whose seniority have already been settled as on 1st January 1984 and pass appropriate orders.