
(2005) 06 KL CK 0009
In the High Court Of Kerala
Case No : W.A. No. 1011 of 2004

Kerala Public Service Commission

APPELLANT

Vs

Tessymole Sebastian and Another

RESPONDENT

Date of Decision : 13-06-2005

Acts Referred:

Kerala Engineering Subordinate Service Rules — Rule 3
Kerala Public Service Commission (Consultation) Regulations, 1957 — Regulation 4
Kerala Public Service Commission (Consultation) Rules, 1957 — Rule 4
Kerala State and Subordinate Services Rules, 1958 — Rule 39

Citation : (2005) 06 KL CK 0009

Hon'ble Judges : K.T. Sankaran, J;J.B. Koshy, J

Bench : Division Bench

Advocate : P.C. Sasidharan, S.C. for P.S.C, for the Appellant; C.P. Sudhakara Prasad, Elvin Peter, P.J., P.N. Santhosh, Issac M. Petumpillil and Jijo George for Respondent 2 and Vaheeda Babu, Government Pleader for Respondent 1, for the Respondent

Final Decision : Dismissed

Judgement

J.B. Koshy, J.—Petitioner (first Respondent in the appeal) was working in the Public Works Department as Lower Division Clerk. She commenced her service with effect from 27-10-1997. Prior to her service as a Government employee, she had worked in the Kerala State Electricity Board for a period of two years as Assistant Engineer and Sub Engineer. Petitioner is a first class graduate in Civil Engineering and she had completed graduate apprenticeship for a period of one year in P.W.D itself. The post of Assistant Engineer (Civil) in P.W.D. is 3 category included in the Kerala Engineering Subordinate Service Rules. The method of appointment for the post is by direct recruitment from the open market and recruitment from departmental candidates. 6% vacancies were reserved for departmental candidates. Qualifications prescribed for the post are as follows:

A. B.Sc/B.Tech. Degree in Engineering (Civil) of the Kerala University or B.E. Degree (Civil) of the Madras University or any other qualification recognised as

equivalent thereto.

B. Associate Membership Diploma of the Institution of Engineers, India in Civil Engineering or any other Diploma recognised as equivalent thereto.

OR

C. Pass in Section "A" and "B" of the Associate Membership examination of the Institution of Engineers, India in Civil Engineering.

For the departmental candidates from the clerical cadre, apart from qualification, six year's experience is also necessary. Appellant Public Service Commission invited applications for the post of Assistant Engineer (Civil) from departmental candidates in the P.W.D. as per gazette notification dated 26-9-2000. Last date for receipt of application was 22-11-2000. Petitioner applied for the above post. A petition was also pending before the Government for exempting from the minimum service of six years for appointment to the post from among the departmental candidates and at the time of application Petitioner informed the P.S.C. that her application for exemption to the Government is pending. Since Petitioner's application was pending with the Government, P.S.C. allowed her to appear in the test and interview and she was provisionally ranked as 13B. Before her selection but after the last date fixed for submission of application, order was issued exempting her from the above experience.

2. Ext. P-2 is the exemption order which reads as follows:

Smt. Tessymole Sebastian, N., Lower Division Clerk, Public Works Department, Roads Sub Division, Thodupuzha, who is a 1st class graduate in Civil Engineering, have requested for relaxation of the existing provision in the Kerala Engineering Subordinate Service Rules that minimum service of six years is required for appointment as Assistant Engineer against the quota of 6% to be filled up by direct recruitment from among Draftsman/Overseers/Clerks working in Public Works Department.

Government have examined the request in detail and are pleased to exempt Smt. Tessymole Sebastian, N.L.D.C., Roads Sub Division, P.W.D., Thodupuzha from the condition regarding the minimum service of six years as Clerk for direct recruitment as Assistant Engineer prescribed in Note 3(1) under Rule 3(b) of Kerala Engineering Subordinate Service Rules by invoking Rule 39 of General Rules as a special case.

The order itself states that Rule 39 of General Rules was invoked as a special case which was issued in view of Ext. P-1 recommendation of the Chief Engineer. The Chief Engineer has specifically recommended the case before her appointment. She worked as an Assistant Engineer in K.S.E.B. for eight months and as Sub Engineer in K.S.E.B. for 16 months and prior to her appointment she had completed graduate apprenticeship in P.W.D. for one year. Taking all these aspects and dearth of departmental candidates, special order was passed in her case invoking Rule 39 of the General Rules. It has also come out in evidence that

as per P.S.C. notification, 37 vacancies should have been filled up by departmental candidates; but only 26 vacancies were filled up. Therefore dearth in the availability of departmental candidates were there even though it is stated that applications from some of the departmental candidates were rejected. It was not stated in the counter that those applications were rejected only because of lack of experience. Rule 39 Part II of the Kerala State and Subordinate Services Rules reads as follows:

39. Notwithstanding anything contained in these rules or in the Special Rules or in any other Rules or Government Orders the Government shall have power to deal with the case of any person or persons serving in a civil capacity under the Government of Kerala or any candidate for appointment to a service in such manner as may appear to the Government to be just and equitable:

Provided that where such rules or orders are applicable to the case of any person or persons, the case shall not be dealt with in any manner less favourable to him or them than that provided by those rules or orders.

The Supreme Court in *Government of Andhra Pradesh and Others Vs. Sri D. Janardhana Rao and Another*, held that in the interest of justice and equity, power of relaxation can be exercised even with retrospective effect. In this case, considering Ext. P-1 recommendation of the Chief Engineer and considering the previous experience of the Petitioner in P.W.D. and in K.S.E.B. and also considering the dearth of departmental candidates for valid and equitable reason, the order was passed and nobody has challenged the above order. P.S.C. is also not sitting in appeal over the orders passed by the Government. P.S.C. is not given the power of judicial review over the orders passed under Rule 39 of K.S.S.S.R. Not a single instance was also pointed out that any of the departmental candidates were not treated equally. Petitioner had previous experience, though not fully with the P.W.D. and had first class B.Tech. degree in Civil Engineering. Ext. P-2 order was passed as a special case considering the special circumstances. After consideration of dearth of qualified departmental hands and all circumstances, Ext. P-2 was passed in the interest of justice and equity. For passing order under Rule 39 consultation with P.S.C. is not required in view of Rule 4 of the Kerala Public Service Commission (Consultation) Regulations. Considering all these aspects, the learned Judge held as follows:

Person or persons serving in a civil capacity under the Government of Kerala as well as any candidate for appointment to a service under the Government of Kerala are brought within the purview of the aforesaid rule. The over riding effect of Rule 39 is clear from the non obstante clause. The object behind the conferment of such a power on the Government is also clear from the language of the rule, namely, that the Government may, deal with the case of any person or persons serving in a civil capacity or any candidate for appointment to a service, in such manner as may appear to the Government just and equitable. It cannot be contended that the Government does not have the power to issue* an order in the nature of Ext. P-2 invoking the power under Rule 39 of the Rules.

Thereafter, it was held as follows:

No provision of law is pointed out in support of the stand taken by the Commission that the Government should consult the Commission before issuing an order under Rule 39 of the Rules. On the other hand, Regulation 4(ff) of the Kerala Public Service Commission (Consultation) Regulation, 1957 clearly says that it is not necessary that the Commission should be consulted when Government issues an order in exercise of its power conferred under Rule 39 of the Rules.

The learned Judge also held that the Government is the appointing authority which has to fill up the post as per rules and Rule 39 forms part of the special rules. The learned Judge further held as follows:

...Ext. P-5 communication dated 3-4-2002 issued by the Commission directing the Petitioner to appear for the written test. In fact the Commission was informed by the Petitioner at the time of submission of her application itself that the application for exemption from minimum service of six years was pending with the Government (See: Ext. P-15). The Commission which got the opportunity to advert to the factum of the Petitioner not possessing the service qualification of six years was specifically informed of the order issued by the Government dated 6-6-2001. The Commission which was well aware of the fact that the last date fixed for receipt of applications was 22-11-2000 did not choose to reject the application on that ground.

Thereafter, the learned Judge perused other exhibits produced and found that the Commission has also previously accepted such cases on the basis of Government orders and advised persons who do not have the minimum period of service and also noticed that the Commission was also not able to fill up all vacancies reserved for candidates in the departmental quota as can be seen from the ranked list. Taking all these aspects into consideration, the learned Judge directed the P.S.C. to advise the Petitioner for the post of Assistant Engineer in accordance with the rank assigned to her as per the rules of communal rotation. We see no ground to differ from the order of the learned Single Judge.

It is stated that in view of the stay order passed in the writ appeal, the Judgment was not so far implemented. The Judgment should be implemented within two weeks from today. Writ appeal dismissed.