

(1980) 08 KL CK 0018
In the High Court Of Kerala
Case No : O.P. 4865 of 1977K

M. Shadananan Nair

APPELLANT

Vs

State of Kerala and Others

RESPONDENT

Date of Decision : 11-08-1980

Acts Referred:

Administrative Service/Indian Police Service (Appointment by Promotion) Regulations, 1955 — Regulation 5, 5(2), 5(3), 5(5)
Constitution of India, 1950 — Article 14, 16
Kerala State and Subordinate Services Rules, 1958 — Rule 28

Citation : (1980) 08 KL CK 0018

Hon'ble Judges : Kochu Thommen, J

Bench : Single Bench

Advocate : C.P. Sudhakara Prasad, K.K. Babu and V.K. Raveendran, for the Appellant; Government Pleader, for the Respondent

Final Decision : Dismissed

Judgement

Kochu Thommen, J.—The Petitioner was a Section Officer in the Administrative Secretariat of the Kerala Government. The post to which he could aspire to be promoted was that of an Under Secretary. But that is a selection post. Promotions have therefore to be made in accordance with Rule (28){b}(i) of the Kerala State and Subordinate Services Rules. The Departmental Promotion Committee (D.P.C.) did not include the Petitioner's name in Ext. P-6 list which was published on 31st July 1975; nor in Ext. P-7 list published on 6th November 1976. Aggrieved by the non-inclusion of his name, the Petitioner challenged Exts. P-6 and P-7 in O.P. No. 3743 of 1975. One of his principal contentions therein was that neither Ext. P-6 nor Ext. P-7 revealed the reasons for non-inclusion of his name. This Court accepting the contention that reasons had to be recorded, disposed of the Original Petition with a direction to the D.P.C. (2nd Respondent therein) to reconsider Exts. P-6 and P-7. Accordingly the matter was reconsidered by the D.P.C. on the basis of which the Government passed Ext. P-8 dated 28th September 1977 stating that the D.P.C. had found the Petitioner not

suitable for inclusion in the select list published in the notification dated 6th November 1976. Ext. P-8 refers to the reasons which prompted the D.P.C. to reach their conclusion. Ext. P-8 is challenged in the present petition. Exts. P-6 and P-7 are also challenged for the reason that Ext. P-8 is based on them.

2. The reasons stated in Ext. P-8 for non-inclusion of the Petitioner's name in the two lists prepared for the years 1975 and 1976 respectively (Exts. P-6 and P-7) are: In respect of the list for the year 1975, the Petitioner's confidential reports for the three preceding years, viz., 1972, 1973 and 1974, were considered and compared with those of 22 other persons. The report for the year 1972 showed that the Petitioner's capacity for control over the staff was a mere "average" and that the general remark about him was "an officer of average ability". For the year 1973 the remark about him was "fair". For the year 1974 it was "an officer of fair capacity". The D.P.C. was of the view that the Petitioner compared unfavourably with 22 other persons whose names were included in the select list for 1975. For the subsequent year also, the D.P.C. was of the view that the Petitioner's name could not be included in the select list published on 6th November 1976, for even during the year 1975 the confidential report showed that the Petitioner did not compare favourably with 15 other persons whose names were included in the list for 1976.

3. These reasons are more elaborately discussed in the counter-affidavit filed on behalf of Respondents 1 and 2. The minutes maintained by the D.P.C. have been shown to me. The reasons stated in Ext. P-8 are fully borne out by the remarks of the D.P.C. in the minutes.

4. The Petitioner's counsel Sri C.P. Sudhakara Prasad submits that the reasons stated in Ext. P-8 do not show that the D.P.C. had directed themselves to the relevant question. Reasons stated should reveal an application of the mind to relative seniority and experience. Counsel says that the Petitioner was superseded by his juniors for reasons which cannot be justified. Experience which is the result of seniority is an aspect which, he says, should be considered by the D.P.C. in evaluating the comparative merits of persons. This, counsel submits, does not seem to have been done. As stated by the Supreme Court in Union of India (UOI) Vs. Mohan Lal Capoor and Others, , seniority should be one of the several factors affecting assessment of merits. This observation of the Supreme Court, counsel says, was relied on by this Court in O.P. No. 3743 of 1975. The reasons stated by the D.P.C. he points out, do not show that seniority and experience had been duly considered by them.

5. Rule 28(b){i) of the Kerala State and Subordinate Services Rules (as it stood at the time of Ext. P-6) reads:

Promotion and appointment by transfer according to merit.-- 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. Persons included in the select list shall be ranked in the order of their seniority in the lower category or grade.

* * * *

(Emphasis supplied)

By S.R.O. No. 214 of 1976 published on 13th February 1976. Rule 28(b)(i) was amended. The last sentence in the old Rule 28(b)(i) is now transferred to Clause (7) of the new Rule 28(b)(i). The procedure laid down under G.O.(P) 420/67/PD., dated 29th December 1967 has now become part of the new Rule. However no material alteration has been made in the new Rule 28(b)(i) on the point in issue, namely the principle of selection. Ext. P-7 list was prepared after the new rule came into force. The effect of Rule 28(b)(i) is that selection has to be made on the basis of merit and ability. In evaluating comparative merit and ability, seniority is not a relevant factor, except where merit and ability are approximately equal. That means, unless merit and ability of the concerned persons are approximately equal, their relative seniority should be disregarded at the time of selection. However, persons included in the "select list" are ranked in the order of their seniority in the lower category or grade. The principle therefore is that insofar as Rule 28(b)(i) is concerned, where a person is demonstrably superior in merit and ability, his relative juniority is not a disqualification.

6. The observation of the Supreme Court in Union of India (UOI) Vs. Mohan Lal Capoor and Others, , which is relied on by Shri Prasad, is as follows:

Seniority would, however, only be one of the several factors affecting assessment of merit as comparative experience in service should be. There could be a certain number of marks allotted, for purposes of facilitating evaluation, to each year of experience gained in the service.

(emphasis supplied.)

This observation which was made in relation to the relevant rule that was considered in that case is to the effect that seniority is one of the several factors which have to be taken into account in assessing merit. Comparative experience resulting from the relative seniority is a pertinent question to be considered in determining the merits of persons. The rule on the basis of which it was so stated by the Supreme Court reads differently from Rule 28(b) of the Kerala Rules. The Supreme Court relied on Regulation 5 of the Indian Administrative Service/Indian Police Service (appointment by promotion) Regulations 1955. Regulation 5 reads:

5. Prtpartion of a list of suitable officers:

(1) * * *

(2) The selection for inclusion in such list shall be based on merit and suitability in all respects with dm regard to seniority.

(3) The names of the officers included in the list shall be arranged in order of seniority in the State Civil Service:

Provided that any junior officer who in the opinion of the Committee is of exceptional merit and suitability may be assigned a place in the list higher than that of officers senior to him.

(4) * * *

(5) * * *

(emphasis supplied.)

While under Rule 28(b) seniority is not relevant, unless merit and ability are approximately equal, seniority is one of the matters which have to be taken into account for the purpose of assessing merit and suitability under Regulation 5(2). Every time the merit and suitability of a person is considered in terms of the Regulation due regard is to be had to his seniority. It is for that reason that the Supreme Court stated that comparative seniority, and experience derived from seniority, are matters which should not be lost sight of in assessing merits and suitability. Under Regulation 5(3) the names of officers are placed in the list in the order of seniority, provided that a junior of exceptional merit and suitability can be assigned a place higher than that of a senior.

7. The basic difference between the Kerala Rule and the Indian Administrative Service/Indian Police Service Regulations considered by the Supreme Court is that, while in the case of the former, seniority is irrelevant unless merit and ability are approximately equal, under the latter, seniority is a factor which has to be borne in mind in the assessment of merit. Another difference is that while under the Kerala Rule seniority alone shall determine the order in which the selected names are ranked in the list, under the Indian Administrative Service/Indian Police Service Regulations exceptional merit may be taken into account in assigning places in the Hat.

8. Regulation 5(5) was also considered by the Supreme Court. The Court stated that reasons had to be mentioned for the supersession of a senior by a junior. Regulation 5(5) reads:

If in the process of selection, review or revision it is proposed to supersede any member of the State Civil Service, the Committee shall record its reasons for the proposed supersession.

Such a provision is absent in the Kerala Rules. Nevertheless, as stated by the Supreme Court, protection afforded under Articles 14 and 16 of the Constitution requires the Departmental Promotion Committee should record reasons "in a manner which would disclose how the record of each officer superseded stood in relation to records of others who were to be preferred, particularly as this is practically the only remaining visible safeguard against possible injustice and arbitrariness in making selections. Union of India (UOI) Vs. Mohan Lal Capoor

and Others,

9. This principle must perforce govern the preparation of select list under the Kerala Rules. The record should show that the Departmental Promotion Committee had duly considered the confidential reports concerning various persons and formed their conclusions on the basis of such materials, and the reasons for the Departmental Promotion Committee to reach their conclusions. In the absence of such reasons having been recorded in the relevant files it would not be possible to determine whether the Departmental Promotion Committee had directed themselves to the relevant questions. It is however unnecessary, nor is there any such contention, that the reasons should be communicated. The reasons do not have to be shown on the face of the order itself. But the reasons should be discernible from the relevant records. That is all that the principle of fairness in these matters requires.

10. Ext. P-8 in the present case is a speaking order. The reasons have been stated in the order itself. I have perused the relevant papers on the basis of which Ext. P-8 was made. The averments contained on the point in the counter-affidavit are fully borne out by the materials available in the records. In the circumstances I am satisfied that the Departmental Promotion Committee has taken into account relevant materials and it is on the basis of those materials that they reached their conclusions.

11. The confidential reports, in the opinion of the Departmental Promotion Committee showed that the Petitioner was demonstrably inferior in merit and ability to the other persons considered by the Departmental Promotion Committee. The satisfaction of the Departmental Promotion Committee is a subjective satisfaction. So long as that satisfaction is based on a rational consideration of relevant facts, it is not open to question.

12. The Departmental Promotion Committee having come to the view that the Petitioner was inferior to the others in merit and ability, his seniority or experience was irrelevant. The challenge against Exts. P-16 to P-8 accordingly fails. The Original Petition is dismissed. No costs.