
(2016) 09 KL CK 0068
In the High Court Of Kerala
Case No : W.P.(C) No.19313 of 2009

Nijeesh K.K.

APPELLANT

Vs

High Court of Kerala

RESPONDENT

Date of Decision : 29-09-2016

Acts Referred:

Constitution of India, 1950 — Article 16(4), Article 335, Article 46
Kerala State and Subordinate Services Rules, 1958 — Rule 13A(1)(a)

Citation : (2017) 1 ILRKerala 339

Hon'ble Judges : Smt. P.V. Asha, J.

Bench : Single Bench

Advocate : Sri. S.P. Aravindakshan Pillay, Sri. S.A. Anand, Sri. Peter Jose Christo, Sri. Ramesh, C.R., Smt. N. Santha and Sri. K.V. Vimal, Advocates, for the Petitioner; Sri. C.S. Manu and Sri. S.K. Premraj, Advocates, for the Respondent No. 6; Sri. Elvin Peter P.J

Final Decision : Allowed

Judgement

P.V. Asha, J. - The petitioner belongs to Scheduled Caste community. He entered service as LD Clerk in the Civil Judicial Department in Kozhikode District on 23.3.2000. His probation was declared with effect from 23.4.2002 as per order dated 16.8.2002 of the District Judge, Kozhikkode. When a vacancy of UD Clerk arose on 1.5.2002, his immediate junior who was test qualified, was promoted. He passed the obligatory departmental test conducted by the Public Service Commission on 31.12.2003. He got promotion as UD Clerk on 8.7.2004. The grievance of the petitioner herein is that he was denied the benefit of temporary exemption from acquiring test qualification in terms of Rule 13A(1)(a) of the Kerala State and Subordinate Services Rules (KS&SSR for short), according to which a scheduled caste employee shall not be denied promotion only for want of test qualification in case he is eligible for promotion on the basis of his seniority on condition that he will be reverted in case he does not qualify in the test within a period of three years.

2. According to the petitioner he came to know about the exemption available to him under the provisions contained in Rule 13A (1)(a) of the KS&SSR, only when he happened to see another order passed in favour of a scheduled caste employee in another department. Immediately on coming to know about this he submitted Ext.P2 representation on 23.11.2007 before the District Judge, Kozhikkode. According to the petitioner, on declaration of his probation on 23.4.2002, and on the basis of the temporary exemption he was entitled to be promoted as UD Clerk against the vacancy which arose on 1.5.2002. But he was granted promotion as UD Clerk only with effect from 8.7.2004, after he passed the test. It is the case of the petitioner that as on the date of his representation, 29 of his juniors were granted promotion as UD Clerk during the period from 1.5.2002 to 23.11.2007 and all of them were continuing as UD Clerks. However the District Judge rejected his representation as per Ext.P3 saying that the SC/ST employees who entered service on or after 1.1.1986 are not entitled to any test exemption and hence he was not entitled to promotion as claimed by him. Thereupon he submitted Ext.P5 appeal before the Registrar of the High Court on 23.1.2008. On receipt of the appeal, the Registrar of this Court called for a report from the District Judge and the District Judge had as per Ext.P8 forwarded a report regarding his juniors who got promotion after 1.5.2002 and before promotion was granted to the petitioner. However by Ext.P9 order dated 21.3.2009, the Registrar of the High Court rejected the representation, saying that the representation claiming promotion with effect from 1.5.2002 was submitted only after a period of 5 years and the reason stated by him as to the long delay is ignorance of rule position, which cannot be accepted. It was also stated that the petitioner claimed promotion and seniority over 29 staff members in the cadre of UD Clerks. Relying on the judgments of this Court in Ushadevi v. State of Kerala [2002 (1) KLT 615], Radhakrishnan Nair & others v. State of Kerala [1988 (2) KLT SN11] and P.S.Gopinathan v. State of Kerala & Others [ILR 2008 (2) Kerala 682] it was stated that the petitioner acquiesced to his position without raising his claim at the proper time and accordingly the appeal was rejected in the light of those decisions. This writ petition is filed at this stage challenging the orders Exts.P3 and P9.

3. The petitioner relies on Ext.P10 judgment of this Court in W.P. (C) No.11804 of 2007 as well as the judgments Exts.P4 and P11 judgments. In Ext.P10 judgment, this Court had taken note of the constitutional obligation and the purpose behind granting such benefits to the members of Scheduled Castes and directed the Government to consider the claims of the petitioner therein despite the delay in raising their claims observing that their statutory rights were denied by the authorities who had a statutory duty to provide the same when they were sidelined and marginalised from the main stream for centuries.

4. The petitioner has produced Ext.P12 circular dated 24.02.2012, along with I.A.No.13475 of 2012 by which the Government, seeing that several persons belonging to the SC/ST were being denied the benefit of temporary exemption available under rule 13A(1)(a), on the ground of date of entry in service, issued

instructions to all the Departments to see that the benefits of test exemption for the purpose of promotion provided in the said rule shall be given to all the employees who were denied the same at the relevant time and to see that they are granted promotion as well as restoration of seniority as if they were granted the promotion at the relevant time. Ext.P12 circular was issued when the writ petition was pending before this Court. The Registrar of this Court forwarded a copy of the circular to all the District Officers as per Ext.P13 letter for necessary action. Thereupon the petitioner submitted a representation Ext.P14 in the light of the circular. The said representation was not considered in view of the pendency of the writ petition. However on the basis of an interim order passed by this Court the said representation was considered thereafter.

5. Learned counsel for the respondents made available a copy of the order passed pursuant to the interim order passed by this Court again rejecting the representation of the petitioner. It is stated therein that 29 persons were granted promotion in between and seniority lists were published four times since 2002 till 2007 and the petitioner had not objected to any of those promotions granted. It was further stated that some of them got promotion to the post of Head Clerk/ Bench Clerk Grade II and some of them retired from service. Stating that the settled seniority cannot be disturbed at this stage the representation was rejected, relying on the judgments which were relied on in Ext.P9 order.

6. The petitioner stated that there was no final seniority list published for the ministerial staff in the District. The respondent has also not stated that there was any final seniority list of LD Clerks for Kozhikkode District. Respondents 3 to 25 are persons who were promoted superseding the petitioner. Even though notice was served on the respondents, 6th respondent alone has filed a counter affidavit. In the counter affidavit filed by respondents 1 and 2, the right of the petitioner to get promotion under the provisions contained in rule 13A (1)(a) is not denied. The contention raised is that the petitioner did not raise his grievance at the relevant time and during the period from 1.5.2002 to 23.11.2007, 29 of his juniors were granted promotion and at this distance of time any revision of seniority or grant of promotion to the petitioner will result in unsettling of the settled position of those 29 persons in the seniority list. The respondents relied on the judgments of the apex court regarding the sit back theory. Referring to the judgments in Mohanan v. State of Kerala [2000(2) KLT 798] and Amarjeet Singh and others v. Devi Ratan and others [2010(1) SCC 417] etc. it was further stated that ignorance of the rule position cannot be accepted as a valid explanation for delay in claiming promotion. The counter affidavit also states that even though petitioner has sought for retrospective promotion as UD Clerk he did not claim such seniority and did not choose to challenge the seniority list or order of promotion of any of those 29 persons and therefore the writ petition is liable to be dismissed on that ground.

7. In the counter affidavit filed by the 6th respondent also similar contentions are raised.

8. I heard the learned counsel appearing for the petitioner, learned counsel appearing for respondents and considered the pleadings and contentions. The learned counsel appearing for the petitioner relies on the judgments Exts.P4, P10 and P11 of this court. The learned Counsel for the respondents 1 and 2 relied on various judgments relating to sit back theory, absence of challenge against the orders of promotion, etc.

9. It is admitted on all sides that the petitioner who belongs to scheduled caste community was entitled to the benefit of exemption from test qualification temporarily for a period of 3 years and hence entitled to promotion against the first vacancy which arose as and when his turn reached on the basis of the seniority list or in other words he was not liable to be superseded for promotion as UD Clerk irrespective of the acquisition of test qualification. It was the duty of the respondents to see that he was granted promotion granting him the benefit of temporary exemption, when the vacancy of UD Clerk arose on 1.5.1982. But the 2nd respondent did not grant it; when the petitioner came to know about the provision for exemption, he approached the respondents. It is relevant to note that at the time when the petitioner submitted the representation in 2007, the petitioner as well as his juniors who were granted promotion in preference to him were working as UD Clerks. Further promotions were made only after the writ petition was filed. The District Judge before whom the representation was submitted rejected his claim saying that the exemption was not available since he entered service subsequent to 1.1.1986. Under these circumstances, it cannot be said that the petitioner who was only an LD Clerk was ignorant of the rule position in order to raise his claim for temporary exemption when the appointing authority itself was of the view that he was not entitled to exemption, apparently due to the misunderstanding with respect to the applicability of Rule 13AA and 13A of KS&SSR. At any rate the petitioner submitted his representation within a period of five years. None of the respondents have pointed out that there was a final seniority list of UD Clerks in force. Rule 13A(1)(a) of KS&SSR reads as follows:

Where a pass in a special or departmental test is prescribed by the Special Rules of a service for any category, grade or post therein or in any class thereof, a member of a service belonging to any of the Scheduled Castes and suitable for appointment to such class, category, grade or post may be appointed thereto temporarily.

10. In view of this rule the petitioner was entitled to the promotion as against the vacancy which arose on 1.5.2002. Regarding the question of delay this Court has, while considering similar claim raised by Selection Grade Assistants, belonging to scheduled caste community, in the Secretariat, for exemption under rule 13A(1)(a), for the purpose of promotion, observed in paragraph 3 of Ext.P10 judgment in W.P.(C) No.11804 of 2007 as follows:

"Assuming the submission of the learned counsel for the party respondents that the Government has taken a conscious decision not to dispose of Exts.P1 to P4

representation, is correct, I feel that such a stand from the part of the Government is unjustified. The Rules governing exemption from test qualification have been included for the benefit of the candidates, belonging to the Scheduled Caste, who were sidelined and marginalised from the main stream for centuries. So, even if there is some delay to assert their rights, the same cannot be pressed into service as a ground to reject their claim, if they are otherwise eligible. The claim made by the petitioners is based on a statutory rule. That means, it is a statutory right. Therefore, the official respondents have a corresponding duty to respect their rights in this regard. They cannot take any conscious decision and sleep over the rights of the petitioners, which are secured by statutory provisions. The concept of conscious decision, not to make promotions, appointments, cannot be pressed into service here.

11. Ext.P11 judgment dated 7.1.2008 in W.P.(C) No.33842 of 2006 is in respect of a Project Assistant of Kerala State Backward Classes Development Corporation, who claimed seniority and promotion under similar circumstances when respondents 4 to 25 superseded her in the matter of promotion. This court following the judgment in Ext.P10, directed to grant her promotion notwithstanding the delay involved in the matter.

12. More over in Ext.P12 circular issued on 24.02.2012, the Government, on coming across instances of denying the benefit of temporary exemption for promotion available to members of scheduled caste community, directed to take appropriate action in the matter for restoration of seniority and grant of promotion in terms of the provisions contained in Rule 13 A(1)(a) wherever it was found that the promotion was denied at the relevant time. The High Court after forwarding the circular Ext.P12 to all the District Officers under it as per Ext.P13 letter for appropriate action, has denied the benefit of the same to the petitioner on the ground of delay, which is highly unreasonable. Ext.P12 circular does not say that the benefit need not be granted in cases involving delay. On the other hand what is directed is, to restore the seniority and promotion in all cases where exemption was denied on account of the misunderstanding by the authorities in interpreting rule 13A(1)(a) that it is available only to those who entered service before 1.1.1986.

13. The judgments Amarjeet Singh and others v. Devi Ratan and others [2010 (1) SCC 417] and Pavithran v. State of Kerala [2009 (4) KLT 20], relied on by the learned counsel for respondents 1 and 2 or the judgments relied on in the orders impugned, do not involve the cases of scheduled caste employees or any claim based on the denial of any statutory or constitutional right by the appointing authority, as in the present case. In Amarjeet's case promotions were made by selection through DPCs under different rules by different DPCs which were conducted for each year of selection and seniority was to be determined on the basis of the year for which promotion was made. Rule 13 A(1)(a) is incorporated in the rules in discharge of constitutional obligation of the State under Article 46 read with Article 16(4) and Article 335 of the Constitution of India, to advance

the interest of weakest section of the community and to bring them to the main stream in consideration of the claims of members of the Scheduled Castes and Scheduled Tribe communities in the making of appointments to the services and posts in connection with affairs of the State consistent with the maintenance of efficiency of administration. Respondents 1 and 2 who did not discharge their constitutional obligations by granting the petitioner the benefit of exemption at the relevant time, cannot refuse to remedy the injustice done to the petitioner on the ground of delay. In the peculiar circumstances of this case, where there is not even a final seniority list, the normal theory of sit back is inapplicable. Therefore the technical objections as to non-production of orders of promotion or seniority list (which is only provisional one) or absence of challenge against those orders or any other order subsequently passed on the very same issue cannot nonsuit the petitioner.

14. All the more it is to be taken note of that none among the party respondents except the 6th respondent filed a counter affidavit apparently because they are aware of the annihilation of petitioner's constitutional rights.

In the above circumstances, I quash Exts.P3 and P9 orders. It is declared that the petitioner is entitled to be promoted as UD Clerk with effect from 1.5.2002 and for further promotions, reckoning his seniority in the cadre of UD Clerks with effect from 1.5.2002; I direct respondents 1 and 2 to antedate his promotion as UD Clerk to 1.5.2002; assign him seniority in the cadre of UD Clerks with effect 1.5.2002 and to grant him further promotions based on such seniority; and grant him all consequential benefits except arrears of pay and complete all these proceedings within a period of two months from the date of receipt of a copy of the judgment.

The writ petition is accordingly allowed.