

(2006) 07 KL CK 0004
In the High Court Of Kerala
Case No : W.A. No. 1728 of 2005

P. Devaki

APPELLANT

Vs

State of Kerala and Others

RESPONDENT

Date of Decision : 27-07-2006

Acts Referred:

Constitution of India, 1950 — Article 14, 16

Kerala State and Subordinate Services Rules, 1958 — Rule 28

Citation : (2006) 07 KL CK 0004

Hon'ble Judges : K.P. Balachandran, J;K.A. Abdul Gafoor, J

Bench : Division Bench

Advocate : M. Chathukutty Nambiar, for the Appellant; S. Mohandas and Waheeda Babu, Govt. Pleader, for the Respondent

Final Decision : Allowed

Judgement

K.A. Abdul Gafoor, J.—The Appellant/Petitioner contends that the third Respondent was not even qualified to be appointed as a Nursing Superintendent, much less for promotion to the next higher post of Assistant Director; because she did not have 10 months training which has been made essential in terms of Ext. P-1 Special Rules applicable for candidates recruited under Special Recruitment for members of Scheduled Castes and Scheduled Tribes. He also submitted that when the third Respondent was further promoted as Assistant Director, she had not even completed the period of probation nor acquired the obligatory test prescribed in that regard. As per Rule 28(a)(i) of the General Rules in Part II of the Kerala State and Subordinate Services Rules, 1958, no one shall be granted promotion unless she has satisfactorily completed the period of probation. When she came to know about it, she represented; but was not acted upon in time. It was in the above circumstances, she approached this Court seeking promotion as Assistant Director in preference to the 3rd Respondent and consequential seniority. But the learned Single Judge was of the view that there was delay and laches on the part of the Appellant, though it was found that she was the rightful claimant. Therefore, this appeal.

2. Going by the dates of appointment, the third Respondent was senior as she joined duty on 28-1-1995 and the Appellant joined duty on 24-8-1995. The third Respondent was given relaxation from the requirement of qualification in Ext. P-1, only by Ext. R-3(a) dt. 21-4-1999, though with retrospective effect. That, it is illegal is the first contention of the Appellant. We are not moved by that, because the third Respondent was admittedly a B.Sc. degree holder in nursing and it is discernable from the explanatory note in Ext. R-3(a) that though she was selected and sent for training, she had not been admitted for that training as she did possess a higher qualification than for which the training was intended. Accordingly, she was duly appointed as Nursing Superintendent as if a fully qualified hand. Therefore, at this distance of time, it is not fair to undertake an enquiry with reference to Ext. P-1 in its strict sense, as to whether the third Respondent was fully qualified for the post for being appointed on 28-1-1995. Therefore, we hold that she was duly qualified for such appointment as Nursing Superintendent on the strength of the possession of B.Sc. degree qualification in nursing, which was subsequently prescribed as per R-3 (a), as substitute qualification for the training prescribed in Ext. P-1. Therefore, the first contention of the Appellant is not sustainable.

3. The second contention of the Appellant is that, even if she had been so duly qualified for appointment as Nursing Superintendent on 28-1-1995, she could not have been promoted to the next higher post of Assistant Director against the vacancy that had occurred on 1-7-1997, as she had not acquired the obligatory test qualification and had not satisfactorily completed the probation. She successfully completed the probation and the probation was declared only on 2-1-1999 on her acquisition of the obligatory test qualification in that regard on 1-1-1999, as is revealed from Ext. R-3(e) order dated 29-4-2000. Therefore, her promotion was opposed to Rule 28(a)(i). On the other hand, according to the Appellant, she joined duty on 24-8-1995 and completed probation on 24-8-1997, though declared later; but even earlier than that of the third Respondent. Therefore, she being the first among the two, becoming eligible first for promotion to the post of Assistant Director, she ought to have been promoted, it is contended by the Appellant.

4. The third Respondent resists this contention mainly on the ground of delay and laches on the part of the Appellant, heavily relying on the decision in Mohd. Siddiq Ali Vs. High Court of A.P. through Registrar and Others, . It is submitted that her promotion was effected in the year 1997. It was after three years, the objection was raised by the Appellant and it was still after three years the original petition was filed. In the said decision, the belated challenge, after one year, against a notification for appointment was rejected on the ground of laches. Therefore, in this case, there was gross laches as rightly found by the learned Single Judge, on the part of the Appellant. So there is no reason for any interference, it is submitted.

5. This contention of delay and laches is replied by the Appellant urging that

there was nothing to be objected when the promotion was granted to the third Respondent initially; because she had been admittedly senior in the category of Nursing Superintendent as having been appointed on 28-1-1995, as against the date of appointment of the Appellant on 24-8-1995. It is supposed always that the authorities including Government do the right thing. There was nothing to be doubted of a favoured treatment towards the third Respondent by the authorities who were bound to act in accordance with law. It was not possible for the Appellant to gather whether the 3rd Respondent had completed the probation or passed the obligatory test qualification. These were known to the Government alone from the service book of the 3rd Respondent which was not open for references, to the Appellant. Therefore, promotion of the third Respondent could normally be believed to be rightly made. The Appellant had made a representation against the promotion of the third Respondent on the ground of her inadequacy of the basic qualification and lack of completion of probation in Ext. P-10 dt.25-8-1997. It is submitted that she came to know about the lack of test qualification later and when she represented to the authorities on 27-10-2000, she was informed in Ext. P-12 that her case would be considered as and when the DPC meets. This was on 28-5-2001. Thereafter, there was no further communication regarding meeting of the DPC. It was in the above circumstances, she approached this Court. Therefore, there was no laches or delay on her part, she submits.

6. Going by the facts revealed, the Appellant was appointed as a Nursing Superintendent on 24-8-1995 and the third Respondent was appointed on 28-1-1995. Thus the third Respondent was senior to the Appellant in the category of Nursing Superintendent. When the senior incumbent was promoted to the next higher post of Assistant Director, there was nothing to object it. Normally, the incumbent to be promoted was the third Respondent, because she was senior. Later it was revealed that she completed the period of probation only with effect from 2-1-1999 as per Ext. R-3(e) order issued on 29-4-2000. It was only at that point of time, the Appellant could object to the promotion of the third Respondent, as the Appellant did not have possibility of knowing whether the third Respondent had not completed the period of probation or had not acquired the obligatory test qualification for promotion. These are facts known only to the Government and the departmental authorities from the service records of the third Respondent to which the Appellant did have no access. But a detailed objection was rightly made on 27-10-2000 as indicated in Ext. P-12 wherein the Petitioner was informed that her contention would be considered by the DPC. Therefore, it cannot be said that there was delay and laches in this regard from the part of the Appellant to court out her in spite of her showing a case of arbitrary and discriminatory treatment as alleged. Even she had represented her apprehension and grievances in Ext. P-10 on 28-8-1997 when she smelt that the third Respondent might be promoted without completing probation. But the lack of test qualification of the third Respondent was not known to her. This was a matter to be verified by the authorities. So the

Appellant cannot be accused of delay and laches. The ruling cited by the third Respondent cannot be thus applied to the fact situation of this case.

7. Rule 28(a)(i) of the General Rules in Part II of the Kerala State & Subordinate Services Rules, 1958 provides that "Except in the case of appointment to the posts of Heads of Departments no member of a service or class of a service shall be eligible for promotion from the category in which he was appointed to the service unless he has satisfactorily completed his probation in that category". Therefore, probation is an essential requirement for promotion. The only exception is that provided in the proviso which reads as under:

Provided that a probationer in a class, category or grade shall not be superseded for promotion to a higher class, category or grade by his junior, if the vacancy in the higher class, category or grade arises within the period specified in the Special Rules for completion of probation in the class, category or grade in which he is probationer and if he has passed the test or tests prescribed for successful completion of probation and is otherwise eligible and suitable for such promotion; but his promotion shall be subject to the condition that he satisfactorily completes the probation in the class, category or grade from which he was promoted within the period prescribed therefor, and for this purpose the period of service put in by him in the higher class, category or grade shall be reckoned towards probation in the class, category or grade from which he was promoted and also in the class, category or grade to which he was promoted:

Provided further that if a probationer promoted in pursuance of the above proviso fails to complete his probation in the class, category or grade from which he was promoted within the period prescribed therefor, his probation in the higher class, category or grade shall be terminated and he shall be reverted to the class, category or grade from which he was promoted, and any subsequent promotion of such person to the higher class, category or grade shall not also entitle such person to claim seniority in the higher class, category or grade by reason only of his previous promotion in pursuance of the preceding proviso and he shall commence probation afresh in that class, category or grade from the date of such subsequent promotion.

8. The first among these provisos can be pressed into service only by a person who had not completed the period of probation only if two conditions are satisfied namely;

- (a) that the occasion for promotion arises during the period of probation and
- (b) that the incumbent had passed obligatory test.

9. Going by the details discussed above, the vacancy of Asst. Director arose on 1-7-1997. This was within the period of probation so far as the Appellant who joined duty on 24-8-1995 is concerned. But so far as the 3rd Respondent, who joined duty on 28-1-1995 is concerned, this was beyond the normal period fixed for her probation viz. two years of duty within a period of three years. So she

cannot get the benefit of that proviso ordinarily. Not only that the third Respondent, had not passed the obligatory tests as revealed by Ext. R-3(e). This is a requirement to draw the benefit of the said proviso. Therefore, on any count, the third Respondent was not entitled for the benefit of that proviso.

10. Even if she was eligible for promotion as Assistant Director, on the basis of the first proviso, if the vacancy had arisen during the period of her probation, she was liable for reversion, on the basis of the second among the two provisos under Rule 28(a)(i) of the Rules, quoted above, as she did not satisfactorily complete the probation.

11. Even though she had been promoted on 1-7-1997, having later found by the authorities that she had not completed probation until 2-1-1999 as is revealed by R-3(e), and having noted in Ext. P-8 dated 28-7-1998 that the Appellant had completed satisfactorily his probation on 24-8-1997, the third Respondent ought to have been reverted and the Appellant ought to have been accommodated in that place.

12. The Appellant completed the probation on 24-8-1997 and the third Respondent completed it by passing the obligatory test prescribed for probation as is revealed by Ext. R-3(e) only on 2-1-1999. On that reason also, the Appellant was entitled to replace the third Respondent, who was liable to face reversion in terms of the 2nd proviso under Rule 28(a)(i) of the General Rules.

13. The facts discussed above reveal that the Appellant had been grossly discriminated against, allowing an ineligible hand to supersede her unjustifiably, offending her rights under Articles 14 and 16 of the Constitution of India. The facts now disclosed reveal that both the incumbents are at present working in the equated category of Assistant Director and District Nursing Officer. Therefore, what remains is adjustment of seniority inter se between them. It shall be so adjusted as if the Appellant is senior to the third Respondent. Further promotion shall be governed by such seniority. We direct so.

14. With the above direction, we allow this writ appeal.