

(1991) 02 KL CK 0052

In the High Court Of Kerala

Case No : W.A. No. 982 of 1988 and 963 of 1988 and 992 of 1988

P. Kunju Krishnan Nair and Another

APPELLANT

Vs

State of Kerala and Others

RESPONDENT

Date of Decision : 19-02-1991

Acts Referred:

Kerala State and Subordinate Services Rules, 1958 — Rule 31

Citation : (1991) 1 KLJ 731

Hon'ble Judges : V.S. Malimath, C.J;T.L. Viswanatha Iyer, J

Bench : Division Bench

Advocate : C.P. Sudhakara Prasad and P. Ravindran, for the Appellant; K.R.B. Kaimal, Govt. Pleader K.K. Babu, P. Gopalakrishnan Nair, S. Sreekumar and Kunnathukal v. Sukumaran Nair, for the Respondent

Judgement

Malimath, C.J.—These three appeals are directed against the common judgment rendered in O.P. Nos. 413 of 1987, 8296 of 1988 and 9146 of 1987 respectively. We shall advert more particularly to the parties in the first writ appeal, namely, Writ Appeal No. 982 of 1988, as also the documents produced in the said case, for the sake of convenience. We are concerned in these case with the problem regarding promotion to the cadre of Assistant Foremen (Binding) in the Kerala Government Presses, Subordinate Service. Promotions are governed by the Special Rules for the Kerala Government Presses Subordinate Service dated the 22nd of September, 1976, published in the Kerala Gazette No. 40 dated 12th October, 1976. The Special Rules provide that the posts of Assistant Foremen (Binding) could be filled up by promotion from among Binders (Upper Division), in the absence of qualified Binders, Upper Division, by promotion from among Binders, Lower Division and in the absence of qualified hands as above, by resort to direct recruitment. The qualifications prescribed for the post of Assistant Foreman (Binding) for promotion are (1) Pass in S. S. L. C. or equivalent examination and (2) pass in K. G T. E. or M. G. T. E. in Book Binding (Higher).

2. There was no final Gradation List of Binders (Upper Division) during the

relevant period, that is in the year 1986 and there was only a provisional gradation list produced as Ext. P3 (a), reflecting the position of the employees as on 1-1-1983. The relevant order Ext. P3 in this behalf, to which the provisional Gradation List is enclosed, expressly states that the rank and seniority shown in the list are only provisional and are subject to revision and corrections depending upon the decisions in some of the pending Writ Petitions and consideration of complaints, if any, received about the rankings assigned in the provisional gradation list. That there was no final Gradation List till the end of the year 1986 of Binders, Upper Division, in the first feeder category for Assistant Foreman is not and cannot be disputed.

3. Notwithstanding that there is no final, Gradation List of Binders, Upper Division, the administration had to be carried on and the vacancies (temporary and permanent) had to be filled up from time to time in the cadre of Assistant Foreman and other categories. Several temporary vacancies occurred in the months of February and March, 1986. These were admittedly not regular but temporary vacancies that occurred on the incumbents holding higher positions going on leave for different periods. These leave vacancies were filled up as stated in the orders of appointment purely on a provisional basis pending finalisation of the Gradation List and in the leave vacancies that occurred consequent upon the Assistant Foreman (Binding) going on leave. Respondents 3 to 16 are persons who were appointed under different orders in these leave vacancies on a provisional basis pending finalisation of the Gradation List. All of them were in the feeder category of Binders, Upper Division, and possessed both the qualifications prescribed. They were not however the senior most among the Binders, Upper Division. The petitioner in O. P. No. 413 of 1987 and petitioners in O. P. No. 9146 of 1987 are all seniors in the feeder category of Binders, Upper Division to the fourteen persons who were provisionally promoted in February and March, 1986 in preference to their seniors as they had acquired all the prescribed qualifications, whereas their seniors had not. All those who were provisionally promoted in leave vacancies stood reverted on the expiry of the leave, except the petitioner in O. P. No. 8296 of 1987 who happened to be continued in another leave vacancy and reverted on the expiry of that provisional appointment as well. The petitioner in O. P. No. 413 of 1987 and the petitioners in O. P. No. 9146 of 1987 however acquired all the qualifications by passing the prescribed technical test in July 1986 and June, 1986 respectively. The regular vacancies in the cadre of Assistant Foreman (Binding) occurred only after 1-8-1986. As by that time the petitioner in O. P. 413 of 1987 had become fully qualified for promotion, he made representations for consideration of his case. As his representations were not heeded to, he came to the Court in O. P. No. 6351 of 1986. That Writ Petition was allowed and his representations were directed to be considered by judgment dated 29-8-1986, Ext. P16. His representations were however rejected by order Ext. P 18 dated 13-11-1986. On the very same day by order, Ext. P 17, the Director of Printing & Stationary regularised the service of respondents 4 to 16 with effect from the dates on which they were provisionally

promoted in leave vacancies to the cadre of Assistant Foreman (Binding). As three regular vacancies of Assistant Foreman (Binding) occurred they were filled up by promoting respondents 4, 5 and 6 as Assistant Foreman (Binding) by order Ext. P19 dated 14-11-1986. It is in this background that the petitioner in O. P. No-413 of 1987 approached this Court challenging Exts. P17, P18 and P19 and seeking appropriate directions for consideration of his case for promotion. Substantially similar reliefs are claimed in O. P. No. 9146 of 1987. During the pendency of these O. Ps. there was an interim direction to effect promotion solely on the basis of seniority. It is in obedience to that interim direction, that certain promotions were effected, which came to be challenged by the petitioner, in O. P. No. 8296 of 1988. All the Writ Petitions were heard together and disposed of by the learned Single Judge by his common Judgment.

4. The learned Single Judge has held that the leave vacancies which arose in the post of Assistant Foreman (Binding) in the year 1986 should have been filled up by regular promotions. Hence he has held that regularisation of these provisional promotions by the impugned order Ext. P17 is justified. The learned Single Judge has further declared that all those who "were provisionally promoted in 1986, which provisional promotions were subsequently regularised by Ext. P17, have a preferential claim for reappointment as against the seniors who had become qualified on the dates on which the leave vacancies arose in the year 1986. It is further declared that the vacancies if any that would arise in the year 1987 shall also be filled up by applying the same principle. Consequently, Exts. P9, P17, P18 and P19 in O. P. No. 413 of 1987 were sustained and Ext. P2 in O. P. No. 8296 of 1988 was quashed, annulling the promotions made in pursuance of the interim order granted in O. P. No. 9146 of 1987. It is the said decision that is challenged in these appeals.

5. The principal question for consideration is as to whether the learned Single Judge was right in taking the view that the leave vacancies in the post of Assistant Foreman (Binding) should not have been filled up on a provisional basis, but that they should have been filled up by effecting regular promotions. The further question for examination is as to whether the learned Judge is right in taking the view that those juniors promoted in leave vacancies are entitled to preference for reappointment in the subsequently arising regular vacancies in preference to their seniors who had become qualified by the time the subsequent regular vacancies occurred.

6. The principal contention of the learned counsel for the appellants is that there are binding decisions of this Court on both the questions against the view taken by the learned Single Judge. It was submitted that there are two Division Bench decisions of this Court, and the copies of those judgments were produced by the petitioner in O. P. No. 413 of 1987, and were relied on during the course of the arguments. It was submitted that apart from the fact that two binding decisions have not been followed, there is no advertence to these judgments in the judgment under appeal. We shall first examine as to whether counsel is right in

the contention that the matter stands concluded by two Division Bench decisions of this Court. We shall first advert to the judgment rendered in W. A. 422 of 1981 en 30-5-1986 between G. Somqsekharan Nair and State of Kerala, the Superintendent of Government Presses, and another. That was -also a case concerning Printing -Press department. That was a case in which a temporary vacancy for 45 days in the post of Head Computer had occurred on 27-4-1974. A junior in the feeder category came to be promoted to that vacancy on a provisional basis, as the person, senior to him not having passed the Account Test (Lower) examination was not. qualified for promotion. The person promoted in the leave vacancy stood reverted on the expiry of the leave. Thereafter a regular vacancy occurred sometime in the year 1978. That vacancy was filled up by giving promotion to the junior who had the benefit of provisional promotion in the leave vacancy that had occurred in the year 1974. He was given promotion Ignoring the claim of his seniors, who though not qualified on the earlier occasion when the leave vacancy bad occurred had acquired the qualification in the meanwhile, and become duly qualified for promotion on the date on which the regular vacancy occurred in (he year 1978. The senior who thus lost the promotion when a regular vacancy arose in favour of his junior, though he was qualified on the date of occurrence of the regular vacancy, challenged the action of the authorities in O. P. No. 877 of 1978. The learned Judge allowed the Writ Petition and directed the authorities for consideration of the case of the senior for promotion as on the date on which the regular vacancy occurred. That decision was challenged in W. A. No. 422 of 1981. The Appeal was dismissed affirming the view taken by the learned Single Judge dealing with the contention as follows;

So far as the seniority is concerned, it is not and cannot be disputed that the 3rd respondent was at all points of time senior to the appellant. It is no doubt true that the appellant passed the Account Test (Lower) Examination earlier than the 3rd respondent. But when the occasion for filling up regular vacancies arose, the cases of every one eligible on that day has to be considered and if the senior most person is eligible and suitable for promotion, be has to be promoted earlier than those who might have passed the qualifying examination earlier. It is also necessary to point out that the fact that the appellant was promoted in the year. 1974 in a leave vacancy does not give him any preferential right, as that promotion was only a provisional one and in a temporal y leave vacancy. Hence he did not have any right to come back to that post when regular vacancy arose. Hence the learned Single Judge was right in allowing the Original petition of the 3rd respondent.

This is a clear authority for the proposition that a person who secures provisional promotion in a leave vacancy is not entitled to claim any preference in the matter of promotion when a regular vacancy arises against his senior, who has become qualified for promotion as on the date on which the regular vacancy has occurred. The crucial point to be noticed is that everyone who is duly qualified is entitled to have his case considered as on the date on which a regular vacancy arises, depending upon his seniority in the feeder category. The right to

consideration depends upon the further question as to whether the person is seniormost in the feeder category and as to whether he has all the qualifications prescribed for the post. The fact that a junior has qualified himself by passing the prescribed test earlier than his senior is not relevant. What is relevant is as to who are all qualified on the date of occurrence of the regular vacancy. The date on which qualifications are acquired is not of relevance. It is also not relevant as to whether a particular person, junior or senior, had been promoted earlier on a provisional basis in situations such as the occurrence of the leave vacancy. Such a provisional promotion does not confer any right or preference in the matter of consideration for promotion when a regular vacancy arises. The only relevant question- is as to whether the senior-most person is duly qualified as on the date on which regular vacancy has occurred, and is suitable in every other respect for promotion. It is only if he is not duly qualified or found unsuitable that the question of considering the case of the person next in seniority would arise for consideration. This being the direct authority on the aforesaid propositions, which have a bearing on the decision of these cases, the same was rightly pressed into service for consideration. It is needless to emphasise that binding decisions of this Court have to be followed, as that is the Principle of Precedents by which all of us are governed.

7. The view taken in W. A. No. 422 of 1981 has been taken by another Learned Judge of this Court in an earlier judgment in O. P. No. 4215 of 1979, which is produced as Ext. P12, and which decision has been affirmed by a Division Bench in W. A; No. 228 of 1982 by judgment rendered on 29-7-1983. When the State and the authorities of the Government Printing" Press were parties to these decisions, we are surprised that ignoring these decisions, the impugned orders came to be made by the Director of Printing & Stationery.

8. Instead of acting in compliance with the principle laid down by this Court, an attempt was made to circumvent the same by giving preference in the matter of giving promotion in favour of respondents 3 to 16 in regular vacancies which arose subsequently, even though by that time their seniors had become duly qualified. By passing Ext. P 17 order the provisional promotions of respondents 3 to 16 made in leave vacancies have been converted into regular promotions. The reason given for this extraordinary step is quite interesting. In Ext. P17, it is stated that the provisional promotions were made earlier only because the gradation list as on 1-1-1983 which was relied upon in ordering; the promotions was a preliminary one, ignoring the existence of a finalised gradation list of technical employees of the Printing Department as on 21-9-1976. It is stated that if this gradation list was relied upon, there would have been no need to treat the, promotions ordered in the vacancies then existed as provisional. We have also noticed that under the Special Rules governing promotion to the cadre of Assistant Foreman Binding), the feeder category is that of Binder, Upper Division. It is only if there is none duly qualified in this feeder category that resort can be had to. the lower category of Binder, Lower Division. There were any number of persons in the first feeder category of Binder, Upper Division, and therefore the

question of resorting or looking into the lower category of Binder, Lower Division, did not arise. The finalised list mentioned in Ext. PI 7 does not contain the name of anyone of the parties to these proceedings in the feeder category of Binder, Upper Division, as they came into that Division long after the finalised gradation list as on 21-9-1976 was prepared and finalised. What had to be looked into is the gradation list of Upper Division, as there were any number of persons in that cadre for consideration to the cadre of Assistant Foreman (Binding). As far as that cadre is concerned, there was no final gradation list available when the leave vacancies occurred in February and March, 1986. The only list available at that time was the provisional gradation list as on 1-1-1983 of the Binders, Upper Division. Hence we fail to see how the Director of Printing & Stationery can say that a mistake was committed in not making use of the final gradation list dated 21-9-1976 when the provisional promotions were made in 1986 to fill up the leave vacancies. As the gradation list of Binders, Upper Division as on 1-1-1983 was only a provisional one, it could not be relied upon for the purpose of making regular promotions on a permanent basis. The gradation list as on 1-1-1983 was admittedly a provisional gradation list and the rankings were liable to be altered as stated in Ext. P3, depending upon the decision in the pending Wait Petitions, and the decision to be taken on the objections raised by the officials concerned. It is not stated in the orders speaking of provisional promotions that regular promotions were not made in leave vacancies only because there was no finalised gradation list in the Department, which could be looked into. That the vacancies were leave vacancies for a short period is also a factor which has been emphasised in the orders making provisional promotions. We are, therefore, not in hesitation in holding, that the reason assigned in Ext. P17 for not effecting regular promotions with effect from the dates on which the provisional promotions were made to leave vacancies is an imaginary and untenable reason. It cannot be disputed that the vacancies in which provisional promotions were made were all leave vacancies for very short periods. It is a matter of common practice, well recognised in service law, of effecting only provisional promotions or temporary promotions in such Short-term vacancies, such as leave vacancies. Ext. P17 is indeed an attempt to convert the provisional promotions in leave vacancies into regular promotions, so as to circumvent the principle laid down by this Court in the aforesaid two decisions, wherein this Court has pointed out that juniors securing provisional promotions cannot get advantage over their seniors for regular vacancies, if, by that time, their seniors acquired the prescribed qualification for promotion.

9. The learned Single Judge has taken the view that it was wrong on the part of the Director to have made provisional promotions to fill up leave vacancies. The reason given for this view is that Rule 31 of the K. S. & S. S. R. which provides for making provisional promotions, can be invoked only when there would be undue delay in making promotions in accordance with the Rules. The learned Judge says that there were qualified persons when the leave vacancies arose, and that therefore there was no occasion for any delay in filling up the leave

vacancies by promoting the juniors who were duly qualified. Actually, the assumption of the learned] Single Judge may not be correct because even the seniority of those in the feeder category was not finalised, as what held the field was only the provisional gradation list. If one has to make promotions in accordance " with the Rules, the seniority of the persons in the feeder category should be finalised. As long as the gradation list is only provisional, it is obvious that ranks are liable to change. Till the gradation list is finalised, one may, therefore, make promotions provisionally in accordance with the rule?, as it would, undoubtedly, cause delay in making regular promotions in accordance with the Rules. The emphasis of Rule 31 is to meet the situation which requires immediate filling up of the vacancy in public interest. Filling up of regular vacancy requires proper consideration of the past records of the persons concerned, to take a decision in regard to suitability of the persons concerned for promotions. in the usual course of administration, this itself takes some time. If the duration of the leave is short, such as the leave vacancy, and the situation is such that the vacancy cannot be allowed to remain without being filled having regard to the public interest involved, it will not be feasible to resort to the process of filling up the post in accordance with the sales. That there are duly qualified. hands is itself not a sufficient answer. The process of consideration of the cases of qualified candidates in a proper manner and in accordance with the Rules is bound to take some time; Having regard to the shortness of the vacancy, and the emergent situation of the post being required to be filled up immediately, the authorities can legitimately resort to provisional promotions invoking Rule 31 of the K S. & S. S. R. Hence, with respect, it is not possible for us to agree with the view taken by the learned single Judge that merely because there were eligible, persons available" for promotion, there would not be any delay, and therefore provisional promotions ought not to have been made, under Rule 31 of the- K. S. & S. S. R. Besides, one should not forget the fact that when promotions were made on a provisional basis those promotions were accepted by respondents 4 to 16 without a demur. They did not complain about their not being given regular promotions. In this background we see no good reasons for the Director to convert the provisional promotions made in February and March, 1966 into regular promotions, nearly eight months later. We have no hesitation in taking the view that according of provisional promotions in leave vacancies invoking Rule 31 of the K. S. & S. 3 R. was the proper exercise of powers by the authorities. The conversion of the said provisional promotions into regular promotions by the impugned order Ext. P17 is indeed an arbitrary action conferring unjust and unmerited benefit on respondents 4 to 16. The situation becomes all the more aggravated, "When -such action is taken to circumvent the principles laid down by this, Court in the two decisions, to which the Printing Press Department was a party.

10. For the reasons stated above, W. A. Nos. 982, 992 and 963 of 1988 are allowed, and the judgment of the learned Single Judge in O. P. Nos. 413 and 9146 of 1987, and 8296 of 1988, is set aside, and all the Writ Petitions shall

stand disposed of with the following directions: 1. The orders, Exts. P17, P18 and P19, produced in O. ". No. 413 of 1957, are quashed.

2. The Director of Printing & Stationery, Trivandrum, the second respondent in O. P. No. 413 of 1987, is directed to review the promotions to the cadre of Assistant Fat man (Binding by considering the case of the persons in the feeder category, who were- duly- qualified- as-on- the- respective dates on which, regular vacancies occurred in the cadre of Assistant Foremas (Binding), ignoring the provisional promotions given to respondents 3 to 16 in the leave vacancies.

3. On review of promotions as aforesaid, the Director shall assign deemed dates of promotion to the petitioners in the Writ Petitions and shall afford them the benefit of seniority, and consideration for further promotion, and the consequential benefits flowing from the same, within a period of three months from the date of receipt of a copy of this judgment.

The appellants in W. A. Nos. 982 of 1988 and 992 of 198S shall be entitled to costs from the Director of Printing and Stationery, Trivandrum, advocate's fee fixed at Rs. 1,000/- in each of these two cases.