

**(2023) 03 KL CK 0281**

**In the High Court Of Kerala**

**Case No : Writ Petition (C) No. 31110 Of 2016**

Pramod S.

APPELLANT

Vs

State Of Kerala

RESPONDENT

**Date of Decision : 29-03-2023**

**Acts Referred:**

**Citation : (2023) 03 KL CK 0281**

**Hon'ble Judges : Sathish Ninan, J**

**Bench : Single Bench**

**Advocate :** Pirappancode V.S.Sudhir, Jelson J.Edampadam, S.Sreekumar, K.S.Anil, C.P.Mahesh, Shindo Varghese, Surin George, Asok M. Cherian, S.P.Aravindakshan Pillay, S.A.Anand, L.Annapoorna, K.A.Balan, C.P.Mahesh, Peter Jose Christo, N.Santha, P.C.Sasidharan, V.Varghese, K.B.Sony

## **Judgement**

Sathish Ninan, J

1. The petitioners entered the services of the second respondent University in the year 2009 as Assistant, Grade-II. Ext.P1 is the order dated 14.12.2009 whereunder the Registrar accorded sanction for such appointment. The next promotion post of Assistant Grade-II is Senior Assistant Grade-I.

2. Statute 12 of Part II, Chapter IV of the Mahatma Gandhi University Statutes, 1997 (hereinafter referred to as "the Statutes") provides the eligibility criteria for promotion as, satisfactory completion of probation and passing of the prescribed test.

3. Ext.P6 is the gradation list dated 15.03.2011, Ext.P6(a) is the provisional seniority list of Assistant Grade-II who have passed the departmental test and completed the period of probation satisfactorily. Ext.P11 is the final seniority list. The petitioners were not included therein.

4. As per Ext.P12 order dated 16.05.2011, 106 persons were promoted from Ext.P6(a) seniority list. Subsequently on 09.03.2012, as per Ext.P13, petitioners 1 to 7 were provisionally promoted. Thereafter, on 24.09.2013, as per Ext.P16

order, the earlier orders of promotion-Ext.P12 and Ext.P13 were recalled, cancelled and fresh order of promotion issued.

5. On 08.07.2016, as per Ext.P23, 25 Senior Grade Assistants were promoted to the next promotion post of Assistant Section Officers. It is at that stage that the petitioners have approached this Court by way of this writ petition challenging Ext.P6 gradation list, Ext.P6(a) provisional seniority list, Ext.P11 final seniority list, Ext.P16 order of cancellation and fresh promotion, and Ext.P23 order of promotion.

6. I have heard learned Senior Counsel Sri.S.Sreekumar and Sri.Pirappancode V.S. Sudheer on behalf of the petitioners, Sri.Surin George Ipe, learned Standing Counsel for the M.G.University, and Sri.S.P. Aravindakshan Pillai and Sri.Shindo Varghese, for the party respondents.

7. Sri.S.Sreekumar, the learned Senior Counsel for the petitioners would contend that, though Statutes 11 and 12 of Part II Chapter IV of the Statutes provide for pass in the departmental test prescribed by the Syndicate as an eligibility criteria for promotion, no such departmental test was prescribed by the Syndicate. The learned Senior Counsel would further draw the attention of this Court to Section 2(15) of the Act to contend that, "prescribe" means, "prescribed by the Statutes, Ordinances, Regulations, Rules or bye-laws made under this Act". Ext.P6 gradation list, Ext.P6(a) provisional seniority list and Ext.P11 final list followed by Exts.P16 and P23 orders were based on the departmental test. Such test having not been prescribed by the Syndicate, are bad in law. Promotions ought to be effected based on the Seniority, it is contended.

8. The respondents do not dispute that the Syndicate has not prescribed any departmental test by means of Statute, ordinances, regulation, rules or bye-laws made under the Act.

9. In Vinod V. v. University of Kerala, 2020 SCC OnLine Ker 3851, this Court while interpreting the pari material provisions under the Kerala University Act and Statues held that, "prescribe" means prescribed by the Statutes, Ordinance, Regulations, Rules or bye-laws made under the Act, and if no departmental test was prescribed by the Syndicate in the manner as afore, then promotion is to be effected based on seniority. Relying on the said judgment, the petitioner would contend that the gradation list, seniority list and orders of promotion are liable to be quashed and promotion is to be effected in terms of the seniority observed in Ext.P1 rank list.

10. The learned counsel for the contesting respondents and the University would contend that, the challenge raised in this writ petition is against a gradation list and seniority list published in March-May 2011, on the ground that there is no prescribed departmental test. The writ petition is filed only in the year 2016. Rights have accrued to third parties. Such promotions were based on the acquisition of the prescribed qualification of passing of the departmental test. As per Ext.P23 further promotions have also been effected. The rights having

accrued to third parties, is not liable to be interfered with on a belated challenge, it is contended.

11. Here, it is to be noticed that the challenge against Seniority on the ground of non-prescription of departmental test was urged for the first time through amendment of the writ petition sought on 20.10.2022 vide I.A. No.1/2022. Till then, there was no such contention. Though as per Exts.P7, P10 and P14, the petitioners had objected to the rank list, it was on the ground that, departmental test need be cleared only within a period of two years as provided for under statute 10(1) of the Statutes and till then the right based on seniority will not be affected. Statute 10(1) relied on by the petitioner reads thus:-

"10(1) Every person appointed to class I, II and III posts shall, from the date on which he joins duty, be on probation for a period of one year within a continuous period of two years:

Provided that it shall be competent for the Vice-Chancellor to extend the period of probation for a period not exceeding one year for good and sufficient reasons."

However, as rightly contended by the learned counsel for the respondents, the period provided under Statute 10(1) is for the successful completion of probation, within which period the employee is to qualify the departmental test. The earlier an employee qualifies for promotion he may steal a march over the other employees. The mere fact that a senior among employees completed probation later in time than junior employee does not disentitle a junior employee who having acquired the eligibility earlier in point of time, being considered for promotion. That the law is thus, has been accepted in Varghese K.P. v. George K.M., 2021 SCC OnLine Ker 7152. The objection to the gradation list, seniority list and orders of promotion were on the said ground. At no point of time there was any objection raised with regard to lack of prescribed departmental test.

12. It is also to be noted that, the writ petition was filed only in the wake of the subsequent promotion granted to Senior Grade Assistants as Assistant Section Officers. Therefore, interference with the gradation list, seniority list and the order of promotion at this distance of time is not called for. In service jurisprudence, delay and laches interfering with the rights vested in third parties have been frowned upon. The Apex Court in Union of India v. Tarseem Singh, 2008 (8) SCC 648, stated thus:

"To summarise, normally, a belated service related claim will be rejected on the ground of delay and laches (where remedy is sought by filing a writ petition) or limitation (where remedy is sought by an application to the Administrative Tribunal). One of the exceptions to the said rule is cases relating to a continuing wrong. Where a service related claim is based on a continuing wrong, relief can be granted even if there is a long delay in seeking remedy, with reference to the date on which the continuing wrong commenced, if such continuing wrong creates a continuing source of injury. But there is an exception to the exception.

If the grievance is in respect of any order or administrative decision which related to or affected several others also, and if the re-opening of the issue would affect the settled rights of third parties, then the claim will not be entertained. For example, if the issue relates to payment or re-fixation of pay or pension, relief may be granted in spite of delay as it does not affect the rights of third parties. But if the claim involved issues relating to seniority or promotion etc., affecting others, delay would render the claim stale and doctrine of laches/limitation will be applied."

This Court in *Santosh Kumar R. v. State of Kerala & Ors.* 2011 (4) KLJ 866, while referring to *Taresem Singh* case (supra) held thus:

"The petitioner is accused of delay and laches and it is a fit case wherein the doctrine of limitation should apply. The inordinate delay in the matter would render the claim of the petitioner stale and the doctrine of laches/limitation has to be applied to reject the said stale claim in the light of the decision of the Hon'ble Apex court in *Union of India v. Tarsem Singh* reported in 2008(8) SCC 468."

(Also, see, *State of M.P. v. Nandalal Jaiswal*, (1986) 4 SCC 566, *Chennai Metropolitan Water Supply and Sewerage Board & Ors. v. T.T. Murali Babu*, (2014) 4 SCC 108, *State of Jammu & Kashmir v. R.K. Zalpuri & Ors.*, (2015) 15 SCC 602).

13. Relief No.3 sought for in the writ petition reads thus :-

"Declare that the respondents 2 and 3 are bound in letter and spirit to follow Ext.P1 ranked list, for promotion to the post of Senior Grade Assistants and Assistant Section Officers, following the passing of the departmental tests, by the petitioners, within their prescribed period of probation."

14. The respondents have no objection in granting the said relief and considering the petitioners for promotion in terms thereof. Their only contention is that such reckoning of passing of the departmental test is to be in the light of the statement of law referred to in paragraph 12 above.

In the result, while declining the challenge against Exts.P6, P6(a) P11, P16 and P23 orders, respondents 2 and 3 are directed to consider the claim of petitioners for promotion with reference to their date of passing of departmental test with reference to Ext.P1 ranked list and the findings in paragraph 11 of this judgment, and pass appropriate orders expeditiously.