

(2003) 11 KL CK 0016
In the High Court Of Kerala
Case No : C.A. No. 4100/98

Premachandran, P.

APPELLANT

Vs

The State of Kerala and Others

RESPONDENT

Date of Decision : 06-11-2003

Acts Referred:

Kerala State and Subordinate Services Rules, 1958 — Rule 17A, 18, 31, 39

Citation : (2003) 11 KL CK 0016

Hon'ble Judges : V.N. Khare, C.J;S.B. Sinha, J

Bench : Division Bench

Advocate : C.S. Rajan, for the Appellant;

Final Decision : Dismissed

Judgement

1. In the Department of Agriculture (Soil Conservation Unit) in the State of Kerala, there are number of posts of Assistant Director (Soil Survey). The State Government in exercise of the powers conferred under Rule 17A of the Kerala State and Subordinate Service rules, 1958 (for short "the rules"), decided to reserve one post to be filled up from amongst the members of Scheduled Castes and Scheduled Tribes through direct recruitment. The other posts of Assistant Director (Soil Survey) were to be filled up by promotion from amongst the Soil Survey Assistant on the basis of selection. For the purpose of selection for promotion to the post of Assistant Director (Soil Survey), the Government decided to temporarily fill up the vacancy by promotion from amongst the Soil Survey Assistant. Consequently, the Respondents were temporarily promoted from the year 1964 to 1980 as Assistant Director (Soil Survey). Although the decision has been taken by the Respondents to fill up one post of Assistant Director (Soil Survey) by way of direct recruitment purported to be Rule 17A of the rules, but as no qualified person was available the qualification therefore was relaxed in the year 1980. The Appellant undisputedly fulfilled only the qualification, which has been relaxed by the State. He was appointed directly to the post of Assistant Director (Soil Survey), reserved for the post of Scheduled

Castes/Scheduled Tribes on or about 19th August 1982. It is not in dispute that although the private Respondents therein have been working in the post of Assistant Director (Soil Survey) from the year 1964-1980, no Departmental Promotion Committee was constituted for considering their cases for promotion on a regular basis. Subsequently, the Government convened the Departmental Promotion Committee and it after considering the case of those who are temporarily promoted as Assistant Director (Soil Survey), prepared the select list. In the said select list, the Respondents were found fit for regular promotion to the post of Assistant Director (Soil Survey). The Government, therefore, promoted the Respondents with effect from the dates on which they were temporarily promoted.

2. The Appellant herein filed a petition before the Kerala High Court challenging the promotion of the Respondents with effect from the date of their temporary appointment. The said writ petition was dismissed. It is against the said judgment, the Appellant is in appeal before us by means of special leave petition.

3. Shri C.S. Rajan, learned Senior Counsel, appearing on behalf of the Appellant contended that having regard to Rules 18 and 31 of the rules, the private Respondents could not have been promoted with retrospective effect. Drawing our attention to the counter-affidavit filed by the State, learned Counsel submitted that having not exercised its residual power under Rule 39 of the rules, the High Court must be held to have committed a manifest error in passing the impugned judgment. Learned Counsel has further drawn our attention to an order of promotion dated 31st May 1977 and submitted that from a perusal thereof it would appear that the concerned officer was informed that he would be reverted to the cadre of S.S.A. when the candidate selected by direct recruitment from S.C./S.T. through P.S.C. for the post of Assistant Director (Soil Survey) reports for duty. It is not in dispute that the State constituted a Departmental Promotion Committee and it upon considering the respective cases of the private Respondents herein, prepared a select list. The said select list was approved by the State and was published in the Kerala Gazette dated 20th November 1984. The private Respondents, therefore, were promoted to the post of the Assistant Director (Soil Survey)/Senior Chemist with retrospective effect from the date from which they were holding the said post i.e. from 1964 to 1980.

4. The State of Kerala in its counter-affidavit stated that since there was an administrative delay in conducting the D.P.C., Rule 31 (a)(i) of the rules was resorted to for temporarily promoting the Departmental candidates and they were promoted as Assistant Director on a temporary basis under the said rules pending convening of the D.P.C. The D.P.C. was convened on 5th July 1984 and the promotions made from the year 1964 to 1980 were regularised with effect from 1964.

5. In view of the aforesaid statements, we do not find any irregularity in the matter of grant to promote the Respondents with effect from 1964 onwards. Assuming that the contention to the effect that the Government does not have

such powers under Rule 31(a)(i) of the rules is correct, but despite the same the order of promotion cannot be invalidated one, the said power is traceable under Rule 39 of the rules. Rule 39 of the rules reads as under:

39. Notwithstanding anything contained in these rules or in the Special rules or in any other rules or Government Orders the Government shall have power to deal with the case of any person or persons serving in a civil capacity under the Government of Kerala or any candidate for appointment to a Service in such manner as may appear to the Government to be just and equitable:

Provided that where such rules, or orders are applicable to the case of any person or persons, the case shall not be dealt with in any manner less favourable to him or them than that provided by those rules or orders.

6. Rule 39 of the rules is a residuary provision conferring overriding power and this in terms thereof grant of promotion/appointment with retrospective effect is permissible.

7. It is not in dispute that the posts were to be filled up by promotion. We fail to understand how the Appellant, keeping in view the facts and circumstances of this case, could question the retrospective promotion granted to the private Respondents herein. It is not disputed that in view of the administrative lapse, the Departmental Promotion Committee did not hold a sitting from 1964 to 1980. The Respondents cannot suffer owing to such administrative lapse on the part of the State of Kerala for no fault on their part. It is also not disputed, that in ordinary course they were entitled to be promoted to the posts of Assistant Directors, in the event, a Departmental Promotion Committee had been constituted in due time. In that view of the matter, it must be held that the State of Kerala took a conscious decision to the effect that those who have been acting in a higher post for a long time, although on a temporary basis, but were qualified at the time when they were so promoted and found to be eligible by the Departmental Promotion Committee at a later date, should be promoted with retrospective effect.

8. Such exercise of power on the part of the State is not unknown in service jurisprudence. Even assuming that such a power did not exceed in Rule 31 of the rules, the same can be traced to Rule 39 of the rules, as noted hereinbefore. It is relevant to note that in *A. Janardhana Vs. Union of India (UOI) and Others*, this Court held as under:

But avoiding any humanitarian approach to the problem, we shall strictly go by the relevant rules and precedents and the impact of the rules on the members of the service and determine whether the impugned seniority lists is valid or not. But, having done that we do propose to examine and expose an extremely undesirable, unjust and inequitable situation emerging in service jurisprudence from the precedents namely, that a person already rendering service as a promotee has to go down below a person who comes into service decades after the promotee enters the service and who may be a scholiar, if not in embryo,

when the promotee on being promoted on account of the exigencies of service as required by the Government started rendering service. A time has come to recast service jurisprudence on more just and equitable foundation by examining all precedents on the subject to retrieve this situation.

9. The Appellant was appointed in the year 1984 and was not even qualified to hold for the post in 1964, thus, cannot be permitted to question the promotion of the private Respondents.

10. For the aforesaid reasons, we do not find any merit in the appeal. The appeal is dismissed. There shall be no order as to costs.