

(2024) 06 KL CK 0012

In the High Court Of Kerala

Case No : Writ Petition (C) No. 24173 Of 2017

Rasha K

APPELLANT

Vs

Kerala State Beverages (M&M) Corporation Ltd

RESPONDENT

Date of Decision : 03-06-2024

Acts Referred:

Citation : (2024) 06 KL CK 0012

Hon'ble Judges : Sathish Ninan,? J

Bench : Single Bench

Advocate : K.Praveen Kumar, S. P. Aravindakshan Pillay, N.Santha, V.Varghese, Peter Jose Christo, S.A.Anand, K.N.Remya, L.Annapoorna, Naveen.T., Shyam Kumar K.T., U.Balagangadharan, Harish R. Menon, K.N.Abha, A.G.Prasanth, Aleena Sebastian, Mary Hedwig Baby

Final Decision : Allowed

Judgement

Sathish Ninan, J

1. Dispute regarding inter-se seniority between the petitioner and respondents 4 to 10, in the post of Assistant Manager/Accountant in the first respondent, Kerala State Beverages (M&M) Corporation Ltd., is the subject matter of this writ petition.

2. The petitioner entered the services of the first respondent on 12.12.2011 as Assistant Gr.-II. Her probation was declared on 11.12.2012. She was promoted as Assistant Gr.-I with effect from 12.12.2012. As per proceedings dated 24.07.2014, the probation was declared with effect from 26.12.2013. Assistant-I is the feeder category of Assistant Manager/Accountant. Rule 38 of the Special Rules of the Corporation stipulates the qualification for the post of Assistant Manager/ Accountant, by promotion as, "I class M.Com/ MBA/Inter ICWA/Inter CA/holding certificate proving successful pass in training conducted by the IMG". The petitioner had obtained MBA degree and was duly qualified as on the date of declaration of probation. On declaration of probation she became eligible for

promotion. According to the petitioner, although eleven vacancies of Assistant Manager/Accountant existed in the Corporation on the date she became eligible for promotion, she was not being promoted.

3. Thereupon the petitioner gave a representation to the Managing Director of the Corporation seeking promotion. This was replied as per Ext.P6. Therein it was stated that, the other employees in the feeder category have not acquired the necessary qualification and that, upon completion of the IMG training (which is one among the optional qualifications) promotions will be made based on the PSC advice seniority for the original appointment. Seeking grant of promotion, the petitioner approached this Court in W.P.(c) No.19952/2014. Therein the first respondent Corporation filed a counter stating that, for effecting promotion, performance appraisal is to be conducted by the advisory committee and that on completion of such procedural formality, promotion will be effected. As per Ext.P9 judgment dated 03.02.2015, this Court directed promotion to be effected within a period of two months from the date of receipt of a copy of the judgment. Thereafter, as per Ext.P10 proceedings dated 29.06.2015, promotions were effected. In Ext.P10 the petitioner was placed at seniority No.8. The petitioner has approached this Court seeking a declaration that the petitioner is entitled to get preference in seniority over respondents 4 to 10, she being the first to be qualified.

4. I have heard learned counsel Sri. S.P.Arvindakshan Pillai on behalf of the petitioner, Sri. Naveen T. on behalf of respondents 1 to 3 and Sri.K.T.Shyam Kumar and Sri.U.Balagangadharan, on behalf of the other contesting respondents. I have also perused the counter affidavit filed by the respondents.

5. According to the petitioner, as on the date of the declaration of probation in the post of Assistant Gr.-I, which is the feeder category to the post of Assistant Manager/Accountant, she was duly qualified and eligible for promotion. The other employees in the feeder category were not qualified. There existed 11 vacancies in the promotion post. Promotions were not effected and it was delayed till the others in the feeder category also got qualified. Therefore, the petitioner is entitled for preference in seniority. This is so in accordance with the relevant provisions of the Kerala State and Subordinate Service Rules, 1958(KS&SSR) which is made applicable to the Corporation. The stand of the Corporation that seniority in promotion will be in accordance with the original PSC advice seniority, is illegal. Promotions are to be decided upon with reference to the time of occurrence of the vacancies and not the time of making appointments, it is urged.

6. The learned counsel for the Corporation and the contesting party respondents would contend that, the conditions of service of employees of the Corporation are regulated by the Special Rules. The Special Rules provide for promotion, seniority etc. Therefore, the general rule under the KS&SSR is not applicable. Many persons senior to the petitioner and working in the feeder category became qualified by the time the petitioner's candidature was considered for promotion.

Rules 38 and 35 of the Special Rules deal with promotions and seniority respectively. The employees are bound by the Special Rules. Going by the special rules, it is the date of appointment that is relevant. The petitioner is not entitled to claim seniority relying on the provisions in the KS&SSR, it is contended.

7. The fact that, on declaration of probation, the petitioner was duly qualified and eligible for promotion, is not in dispute. That as on the said date there existed vacancies in the post of Assistant Manager/Accountant, is also not in dispute. So also, the fact that as on the date when the petitioner became qualified and eligible, none of the other employees in the feeder category were qualified, is not in dispute. The allegation is that, the authorities waited till the other employees in the feeder category acquired the necessary qualification. Thereafter promotions were effected fixing the seniority based on the original PSC advice.

8. I first proceed to refer to the contention of the petitioner based on the provisions in the KS&SSR. The petitioner relies on Rule 28(b)(iA) and Rule 28(bb) of Part II KS&SSR to contend that, in matters of promotion what is relevant is, qualification and eligibility at the time of occurrence of vacancy, and if no qualified and eligible candidates are available at such point of time, the eligible employee who first acquires qualification thereafter is liable to be considered for promotion. The aforesaid Rules read thus :-

“(iA) Preparation of select list subsequent to the occurrence of vacancy.- When a select list is prepared subsequent to the occurrence of a vacancy, no person who was not qualified for inclusion in the select list at the time of occurrence of the vacancy shall be included in the select list for appointment against that vacancy.

Note:- If there are no qualified persons for promotion to a post on the date of occurrence of the vacancy, the person who gets qualified first thereafter, shall be considered for promotion to that post :

Provided that where the Special Rules in respect of the post provide that direct recruitment shall be resorted to in the absence of qualified candidates for promotion on the date of occurrence of the vacancy, recruitment to the post shall be made accordingly.

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(bb) Promotion which depends upon the passing of any examination.- Promotion in a service or class which depends upon the passing of any examination (General or Departmental) shall ordinarily be made with reference to the conditions existing at the time of occurrence of the vacancies and not with reference to those at the time when the question of promotion is taken up.”

In the case at hand, there were no qualified and eligible hands as on the date of occurrence of vacancy. The Note to Rule 28(iA) above stipulates that, if as on the date of occurrence of the vacancy there are no qualified hands for promotion,

then the person who gets qualified first thereafter is to be considered. Rule 28(bb) provides that, if promotion is dependent on the passing of any general or departmental examination, the conditions existing at the time of occurrence of the vacancy is relevant and not when the question of promotion is taken up.

9. In *James Thomas v. Chief Justice* (1977 KLT 622), a Full Bench of this Court declared that, the general rule is, promotions are to be decided upon with reference to the time of occurrence of vacancies and not the time of making the appointments. In *Varghese and Ors. v. State of Kerala and Ors.* (1981 KLT 458), another Full Bench of this Court, while concurring with the above, held that the 'relevant date' must be definite and not depending upon the volition of the authorities, as otherwise the determination will be arbitrary. It was held that there is definiteness in considering the date of occurrence of the vacancy as the 'relevant date' and that it would determine the title of the person to be considered for promotion.

10. Therefore, going by the provisions in the KS&SSR and the general principles, it is the date of occurrence of the vacancies that is relevant for deciding upon the question of promotion. Going by Rule 28(iA) KS&SSR, if on the date of occurrence of the vacancy no qualified persons are available then the person who gets qualified first thereafter is liable to be considered. If the said principle is applied then it cannot be disputed that, the petitioner stands first in the queue.

11. Now I proceed to consider the defence of the respondents founded on the Special Rules of the Corporation.

12. Rules 38(1) and 38(5) of the Special Rules read thus:-

"38. Promotion

(1) All promotions shall be made on grounds of merit and ability; seniority being considered only where merit and ability are approximately equal. In cases where promotion is provided for to any category by the rules, the Board may decide that the vacancy be filled up by deputation or direct recruitment, in which case, no employee can claim that the post should be filled up by promotion only.

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(5) Promotion shall be effected by the competent authority who may constitute an Advisory Committee for the purpose when considered necessary, but the recommendations of the Committee shall be only advisory and not mandatory."

It provides that promotions are based on merit and ability, and that seniority will be considered only where merit and ability are approximately equal. Sub-rule (5) provides for appointment of an appraisal-cum-advisory committee, whose recommendations are only advisory in nature. Rule 35 of the Special Rules reads thus:-

"35.Seniority-Appointment by promotion

Seniority of a person appointed by promotion will be determined by the date of order of promotion, provided the promotee joins the higher post within admissible joining time. Otherwise his/her seniority will be reckoned with effect from the date of joining duty only provided that the Board may, in cases when due to reasons beyond control an employee could not join the duty in time, relax and assign seniority to the employee as though he/she joined duty in the post in time."

It provides that, seniority will be determined with reference to the date of order of promotion. According to the respondents, going by the above rules, seniority of the promotees is to be determined with reference to the date of order of promotion. There is repugnancy between the provisions in the Special Rules and the KS&SSR, and hence the Special Rules prevail, is the contention.

13. There is no dispute between the parties regarding the applicability of KS&SSR to the employees of the Corporation, where the Special Rules are silent. Rule 8 of the Special Rules provides that in matters not covered by the Special Rules similar Rules in Government Service shall be followed. The relevant Rule being Rule 8(1) is extracted hereunder :-

"8. Matters relating to services not covered by the Rules

1. In respect of matters not covered in these Rules, similar rules in Government services shall be followed."

2.

Rule 2 of Part II KS&SSR provides that if any of the provisions therein are repugnant to any Special Rule, then that Special Rule will prevail. It is beyond cavil that in case of repugnancy between a general rule and a special rule, the latter prevails (*Generalia specialibus non derogant*).

14. Now what is to be considered is, whether the Special Rules provide for such a contingency as has arisen in the present case, and if so, whether there is any repugnancy between the Special Rules and the KS&SSR on the same. The learned counsel for the respondents would argue that, Rules 38 and 35 indicate that what is relevant is the date of appointment and that is contradictory to the provision in the KS&SSR. Therefore, Special Rule has to prevail.

15. I am unable to agree with the contention of the learned counsel. As noticed supra, Rule 38 of the Special Rules provide that, seniority will be relevant/considered only when merit and ability of the candidates are approximately equal. It has been laid down in James Thomas's case and Varghese's case supra by the Full Benches of this Court that, promotions are to be decided with reference to the time of occurrence of vacancy and not the time of making appointments; the relevant date must be definite and not depending on the volition of the authorities. Bearing that principle in mind, if Rule 38(1) in the Special Rule is understood, it can only mean that, if as on the date of occurrence of the vacancy there are more than one qualified and eligible hands in the feeder

category, then promotions will be made on the basis of merit and ability and seniority will be considered only when merit and ability are approximately equal. Therefore, it can only be held that there is no incongruity or repugnance between Rule 38(1) of the Special Rules and Rules 28(iA) and 28(bb) of Part II KS&SSR.

16. Answering the contention based on Rule 35 of the Special Rules regarding the inter-se seniority between the promotees, it is held that, the petitioner and respondents 4 to 10 having been promoted on the same date and under the very same order of promotion, the said Rule has no relevance to the case at hand.

17. Having found that there is no repugnancy between the Special Rules and the relevant rules in the KS&SSR, it is to be held that the provisions in the KS&SSR referred to supra applies to the situation at hand. In terms of the note to Rule 28(iA), which has already been adverted to, the petitioner having secured the qualification first in point of time after the arising of the vacancy, is liable to be considered for promotion.

18. The learned counsel for the respondents urge that, in Ext.P6 reply dated 11.06.2014, the Corporation had intimated the petitioner that promotions could be made only on the other employees in the feeder category also acquiring the requisite qualification and on the basis of the PSC advice seniority. The same was not challenged by the petitioner. The same having become final, the petitioner cannot be heard to contend against the same, it is contended.

19. In Ext.P6 it has been stated that seniority will be fixed on the basis of PSC advice seniority after the employees in the feeder category also attain such qualification. It is thereafter that the petitioner approached this Court in W.P.(c) No.19952/2014 seeking promotion. A reading of Ext.P9 judgment reveals that, at that time the Corporation did not take the stand as stated in Ext.P6. The only submission before the court was that, the non-completion of the procedural formality of conducting a performance appraisal by the advisory committee resulted in the delay in effecting promotion. This Court as per Ext.P9 judgment directed the promotion to be effected within two months from the date of receipt of a copy of this judgment. At that point of time, admittedly respondents 4 to 10 had not secured the requisite qualification and the only person qualified and eligible for promotion was the petitioner. It is in the said backdrop that the respondents, without raising any objection based on the availability of unqualified hands in the feeder category, submitted before the Court that the delay in constitution of the appraisal committee is the reason for non-consideration for promotion. Therefore the Corporation had given up before this Court, the objection stated in Ext.P6. Viewed in that manner, the failure of the petitioner to challenge Ext.P6 is of no significance.

20. There is yet another aspect of the above. The respondents have no case that the IMG training(to acquire qualification) for respondents 4 to 10 were going on at the time of passing of Ext.P9 judgment. As per the judgment, promotion was directed to be effected within two months. The period of IMG training is three

months. Therefore, respondents 4 to 10 would not have been qualified for promotion within the time stipulated in the judgment. The Corporation was not aggrieved by the judgment; no appeal was filed against the same. Viewed in that manner it can be said that the Corporation had conceded to effect promotion of the petitioner in preference to the others without waiting for the others to acquire qualification as was mentioned in Ext.P6. Therefore a further challenge Ext.P6 was unnecessary. At any rate, I do not think that the failure to get Ext.P6 communication set aside will stand in the way of the petitioner from urging her claim of seniority in the light of the law noted earlier.

21. The petitioner alleges arbitrariness at the hands of the Corporation in having not promoted the petitioner and waited till the others in the feeder category attained qualification. At paragraph 14 of the writ petition it is stated, "So it can be seen that the official respondents had waited till the respondents 4 to 10 herein acquiring mandatory qualification for promotion and given them undue advantage and placed them above the petitioner. In fact the IMG training as prescribed in the Rules was for a period of three months but in the case of respondents 4 to 10 it was reduced to one month". The allegation is not denied in the counter affidavit. The facts reveal that, there existed vacancy in the promotion post, that the Corporation intended to fill up the promotion post, that the petitioner was qualified and was eligible for promotion, but still, promotion was not effected solely to enable the others in the feeder category to secure the requisite qualification. The action of the Corporation is arbitrary.

22. On the above discussions, the claim of the petitioner for preference of seniority over respondents 4 to 10 is liable to be upheld.

In the result, this writ petition is allowed. It is declared that the petitioner is entitled to preference in seniority over respondents 4 to 10 in the cadre of Assistant Manager/Accountant. Seniority shall stand reckoned from the date of expiry of the two months period stipulated in Ext.P9 judgment in W.P.(c) No.19952/2014. Ext.P10 will stand modified accordingly.