

(2009) 08 KL CK 0038

In the High Court Of Kerala

Case No : W.A. No's. 1132 and 1152 of 2009

State of Kerala and Another

APPELLANT

Vs

K. Reghu Varma Ors.

RESPONDENT

Date of Decision : 06-08-2009

Acts Referred:

Consumer Protection Act, 1986 — Section 10(1A), 20
Consumer Protection Rules, 1987 — Rule 12A, 12A(5), 12A(6), 12A(6A), 12A(7)
Income Tax Appellate Tribunal Members (Recruitment and Conditions of Service)
Rules, 1963 — Rule 4, 4(3)
Kerala Consumer Protection Rules, 2005 — Rule 7, 7(3)
Kerala State and Subordinate Services Rules, 1958 — Rule 28

Citation : AIR 2010 Ker 28 : (2009) 3 ILR (Ker) 615

Hon'ble Judges : S.R. Bannurmath, C.J;Kurian Joseph, J

Bench : Division Bench

Advocate : Ranjit Thampan A.A.G and Sandesh Raja, Govt. Pleader, for in W.A. No. 1132/09 and K. Jayakumar and P.B. Krishnan, in 1152/09, for the Appellant; Ranjit Thampan A.A.G. and Sandesh Raja, Govt. Pleader, for in W.A. No. 1152/09 and K.P. Satheesan, for the Respondent

Final Decision : Allowed

Judgement

Kurian Joseph, J.—The issue raised in these writ appeals pertains to the method of selection and appointment of the President of the Consumer Disputes Redressal Forum, under the provisions of the Consumer Protection Act, 1986. The appointment is in respect of two districts, Kottayam and Wayanad. The question is whether the Government, which is the appointing authority, is bound to make appointments as per the selection made by the Selection Committee. The undisputed factual position is that the Selection Committee conducted interview and on the basis of merit, prepared a select list. The Government, ignoring the order of merit, appointed two Presidents, of course, from the panel prepared by the Selection Committee. The learned single Judge has taken the view that once the Selection Committee having assessed the merit of the qualified candidates and having recommended the candidates in the order of

merit, without assigning any reason, the Government could not have ignored the select list prepared on the basis of merit as assessed by the Selection Committee and hence the appeals by the State.

2. Under the Scheme of the Consumer Protection Act, 1986, the appointment is to be made by the Government on the recommendation of the Selection Committee. To quote the provision as prescribed u/s 10(1A) of the Act:

10(1A). Every appointment under Sub-section (1) shall be made by the State Government on the recommendation of the Selection Committee consisting of the following, namely:

- (i) The President of the State Commission - Chairman
- (ii) Secretary, Law Department of the State - Member
- (iii) Secretary in-charge of the department dealing with consumer affairs in the State - Member

Provided that where the President of the State Commission is, by reason of absence or otherwise, unable to act as Chairman of the Selection Committee, the State Government may refer the matter to the Chief Justice of the High Court for nominating a sitting Judge of that High Court to act as Chairman.

The procedure is prescribed under the Kerala Consumer Protection Rules 2005. The relevant Rule 7 reads as follows:

7. Appointment of whole-time members in the District Forum.- (1) Appropriate panel of candidates for consideration of appointment as whole-time member in the District Forum shall be called for by the Department in-charge of Consumer Affairs in Government from the concerned District Collectors and the District Collectors may, after due publicity, furnish a short listed panel of candidates, not exceeding five candidates per vacancy, with relevant documents and details to the Government after verification and scrutiny of the qualifications and other eligibility criteria prescribed in the Act and these Rules:

Provided that the Government Department dealing with the Consumer Affairs may, if necessary, advertise directly for the purpose.

(2) The panel of Sitting Judges/Retired District Judges and persons qualified to be appointed as District Judges shall be obtained from the High Court of Kerala for consideration of appointment to the post of President,

(3) The category-wise panel so obtained, after further scrutiny and short listing, with all relevant documents and details shall be placed before the Selection Committee at the appropriate time by the Convener of the Selection Committee and the Selection Committee shall finalise a panel of category-wise candidates, by adopting such methods as the Selection Committee may deem fit, and the list of qualified candidates so finalised, shall be sent for consideration of appointment by the Government. The Secretary to Government in-charge of the Department

dealing with Consumer Affairs in the State shall be the Convener of the Selection Committee.

3. Thus in the case of appointment of members of the District Forum there are seven stages:

(1) The District Collector invites applications for the preparation of a panel for appointment.

(2) The District Collector verifies each application as to whether the candidate possesses the required qualification and other eligibility criteria prescribed under the Rules.

(3) After such verification, he prepares a short listed panel of candidates, not exceeding five per vacancy.

(4) The short listed panel thus obtained from the District Collector is subjected to further scrutiny and short listing by the Government.

(5) Such a list subjected to further scrutiny and short listing is placed before the Selection Committee.

(6) The Selection Committee adopting its own methods as they deem fit, finalises the panel and that finalised panel of qualified hands, (select list) is forwarded to the Government.

(7) The State Government makes the appointment on the recommendation of the Selection Committee.

It is significant to note that the Secretary to the Government in-charge of the Department of Consumer Affairs is the Covener of the Selection Committee.

The same is the method for selection and appointment of the President also except for the difference that the initial scrutiny is by the High Court and not by the District Collector.

4. In view of an attempt made on the part of the learned Additional Advocate General appearing for the State to draw our attention to the difference between the appointment of members in the National Commission, we may refer to the appointment and its procedure also. u/s 20, the appointment of a member in the National Commission is made by the Central Government on the recommendation of a Selection Committee. The Consumer Protection Rules, 1987 provides for the procedure, under Rule 12-A. The applications are invited either by advertisement in newspapers or by vacancy circulars. Applications are scrutinized by the Central Government and a list of eligible candidates is placed before the Selection Committee. Sub-rules (5), (6), (6A), (7), (8) of Rule 12A, provide for the further procedure, which read as follows:

12A. (5) The Selection Committee shall consider all the applications of eligible applicants referred to it.

(6) The Selection Committee shall, subject to the provisions of Sub-rule (6A), assess the suitability of the candidates for the post of member:

Provided that the Selection Committee may, if it considers necessary, depending on the number of candidates, short list them on the basis of comparative merit and experience of such candidates for selection.

(6A) Selection Committee shall assess the suitability of the candidates and where short listing is done, from among the short-listed candidates, for the post of member in the following manner, namely:

(a) in the case of candidates having judicial background, by assessing them on the basis of the judgments and other judicial orders passed by such candidates;

(b) in the case of candidates having experience of working under the Central Government or any State Government or an undertaking under the Central Government or a State Government, by assessing such candidates on the basis of their Annual Confidential Reports and their experience relevant to the post applied for;

(c) in other cases, the suitability of the short listed candidates shall be assessed by the Selection Committee on the basis of personal interview conducted by it:

Provided that notwithstanding anything contained in this sub-rule, the Selection Committee may, for assessing the suitability of a class or category of candidates, if it considers necessary, call such class or category of candidates for interview for assessing their suitability for the post of member.

(7) The Selection Committee may, on the basis of its assessment made by it, recommend a panel of names of candidates for appointment as members from amongst the applicants referred to in Sub-rule (5) in order of merit for the consideration of the Central Government.

(8) The Central Government shall, before seeking approval of the Appointments Committee of the Cabinet, verify or cause to be verified the credentials and antecedents of the candidates selected by the Central Government from the panel recommended by the Selection Committee and satisfy the suitability of such candidates for appointment as members.

Thus under the Central Rules, for the appointment of the members of the National Commission, the Selection Committee has to assess the suitability of the candidates and in that process, depending on the number of candidates, the Committee is free to prepare a short list on the basis of comparative merit and experience. The Committee, on the basis of the assessment thus made by them, recommends a panel of candidates for appointment, in the order of merit for the consideration of the Central Government. Thereafter under Sub-rule (8) the Central Government makes the appointment after verifying the credentials and antecedents of the candidate from the panel recommended by the Selection Committee.

5. It will also be profitable to refer to the provisions and the procedure under the Kerala Rules for appointment of members to the State Commission. The same is contained under Rule 17, which reads as follows:

17. Appointment of whole-time members in the State Commission.:

(1) The President of the State Commission shall be appointed by the Government in consultation with the Chief Justice of the High Court of Kerala.

(2) Appropriate panel of candidates for consideration of appointment as judicial members to the State Commission shall be called for by the Department in charge of Consumer Affairs in Government from the High Court of Kerala.

(3) In the case of other members of the State Commission, appropriate panel of candidates for consideration of appointment shall be called for by the Department in-charge of Consumer Affairs in Government from the concerned District Collectors and the District Collectors may, after due publicity, furnish a short listed panel of candidates, not exceeding three candidates per vacancy, with relevant documents and details to the Government after due verification and scrutiny of the qualification and other eligibility criteria prescribed in the Act and these Rules:

Provided that the Government (Department dealing with the Consumer Affairs) may, if necessary, advertise directly for the purpose:

Provided further that the panel so obtained, after further scrutiny and short-listing, shall be placed before the Selection Committee at the appropriate time by the convener of the Selection Committee. The Secretary to Government in-charge of the Department dealing with Consumer Affairs in the State shall be the convener of the Selection Committee:

Provided also that the Selection Committee shall finalise a panel of candidates, by adopting such methods as the Selection Committee may deem fit, and the list of qualified candidates so finalised, shall be sent for consideration of appointment by the Government.

As in the case of President and Members of the District Forum, the Selection Committee is free to adopt such methods as the Committee deems fit for finalising the panel. The appointment is by the Government under Selection 16(1A), where the wording is identical : "Every appointment under Sub-section (1) shall be made by the State Government on the recommendation of a Selection Committee..."

6. The point to be considered is, in the Scheme of appointment; what is the scope of the expression "recommendation" u/s 10(1A) of the Act ? Once the Selection Committee recommends a candidate, can the appointing authority, without assigning any reason, ignore such recommendation made on the basis of merit ? The learned Additional Advocate General contends that the Central Rules framed in 1986 having prescribed the procedure wherein the Selection

Committee is bound to indicate the names in the order of merit and in the State Rules, the Government having not prescribed or followed such a procedure, the Government is free to appoint any candidate from the list. The only restriction is that the appointment should be from the panel. The learned Counsel appearing for the candidates already appointed would support the said contention. On the other hand, counsel appearing for the writ petitioners contend that the Selection Committee having indicated the comparative merit of the candidates, it is not open to the appointing authority to arbitrarily pick and choose the candidates.

7. The provision under the Act is very clear. The appointment is to be made by the State Government on the commendation of a Selection Committee. The appointing authority is the Government. As rightly held by this Court in *S. Chandramohan Nair Vs. State of Kerala and Others*, , the legislature has not divested the power of appointment from the Government while making provision of a Selection Committee. But the appointing authority does not have unfettered discretion in making the appointment. The appointment has to be made on the recommendation of the Selection Committee. We find from the records that what the Government directed the Selection Committee also was to "furnish the panel" for filling up the vacancies. Under Rule 28(b)(i) of the Kerala State and Subordinate Service Rules, 1958, appointments to posts in a selection category or grade in a service or class, other than Heads of Departments, shall be made from a select list prepared from among the members eligible for appointment to such category or grade on the basis of merit and ability, seniority being considered only when merit and ability are approximately equal. It has also to be seen that the select list thus prepared by the Department Promotion Committee is only in respect of the vacancies estimated for a year. That select list is placed before the Government only for its approval and the same is published under the Rules. Only under exceptional circumstances, in public interest, the Government is in a position to depart from the advice of the Departmental Promotion Committee. That is not the scheme or procedure Or power in the Selection Committee under the Consumer Protection Act and the Kerala Rules. Though the Act and the Rules have used the expression "Selection Committee", and though in common parlance the Selection Committee is expected to prepare a select list on assessment of merit of each candidate, under the Consumer Protection Act and its Rules in the State, the duty cast on the Selection Committee is only to recommend a panel. Under Rule 7(3), the Committee is given freedom to adopt any method as the Committee feels fit for finalising the panel. On finalising the panel, under the Rules the Selection Committee forwards "....the list of qualified candidates so finalised" to the Government for consideration for appointment. In other words, the duty cast on the Selection Committee under the Act and the Rules is, by whatever method they deem fit, to assess whether the candidates placed before them by the Government for finalising the panel are duly qualified, in the sense whether they are suitable and qualified to hold the position of either President or Member, and nothing more or nothing less. Under the Kerala State and Subordinate Service Rules, the select list is prepared based on merit and

ability and the incumbents are ranked on the basis of such assessment made by the Select Committee; whereas under the Scheme of the Consumer Protection Act and the State Rules the Selection Committee has no such power. The power conferred on them is only to finalise a panel of candidates after subjecting the candidates to whatever test they may deem fit for the purpose of assessing their merit, suitability etc. for holding the post. The Committee is not expected to or called upon to prepare a select list of candidates in the order of merit and suitability. Thus all the candidates included in the list of qualified candidates finalised by the Selection Committee are duly recommended by the Selection Committee. Once the Selection Committee recommends a list of qualified candidates, the appointing authority is free to appoint any candidate recommended by the Selection Committee. No doubt unless recommended by the Selection Committee, the appointing authority cannot make any appointment. In other words, the appointing authority, namely the Government, cannot appoint the candidate outside the list of qualified candidates furnished by the Selection Committee and only to that extent there is a fetter or restriction on the power and method of appointment of the President and Members of the various Forums under the Consumer Protection Act and its State Rules, on the Government.

8. Learned Counsel appearing for the writ petitioners strongly canvassed for the position that once the Selection Committee having adopted its own method of selection for assessing the comparative merit of the candidates included in the panel and the Selection Committee having indicated the comparative merit of the candidates included in the panel, the appointing authority has no discretion to appoint a candidate ignoring the order of merit indicated by the Selection Committee. Strong reliance is placed on the decision of the Supreme Court in *R.S. Mittal Vs. Union of India (UOI)*, . It was a case pertaining to appointment of members of the Income Tax Appellate Tribunal. Rule 4 of the Income Tax Appellate Tribunal Members (Recruitment and Conditions of Service) Rules, 1963 prescribed for the method of recruitment. It is necessary to extract the Rule - itself for understanding the factual position. The Rule reads as follows:

4. Method of Recruitment .- (1) There shall be a Selection Board consisting of:

(i) a nominee of the Minister of Law;

(ii) The Secretary to the Government of India, Ministry of Law (Department of Legal Affairs);

(iii) The President of the Tribunal; and

(iv) Such other persons, if any not exceeding two, as the Minister of Law may appoint.

(2) The nominee of the Minister of Law shall be the Chairman of the Selection Board.

(3) The Selection Board shall recommend persons for appointment as members

from amongst the persons on the list of candidates prepared by the Ministry of Law after inviting applications therefore by advertisement or on the recommendations of the appropriate authorities.

(4) The Central Government shall after taking into consideration the recommendations of the Selection Board make a list of persons selected for appointment as members.

It may be noted under Sub-rule (3) of Rule 4 the Selection Board recommends persons for appointment as Members from the list of candidates prepared by the Government. The appointing authority, namely the Central Government, considering the recommendation of the Selection Board, makes a list of persons selected for appointment as Members. In other words, the appointing authority itself prepares a select list of candidates from among the candidates recommended by the Selection Board. With reference to such a procedure for selection only it has been held by the Supreme Court that keeping in view the merit position of a candidate as appearing in the list prepared by the Government, ordinarily appointment should be made. The issue has been dealt with at paragraph 10 of the judgment which reads as follows:

10. The Tribunal dismissed the application by the impugned judgment on the following reasoning:

(a) The selection panel was merely a list of persons found suitable and does not clothe the applicants with any right of appointment. The recommendations of the Selection Board were directory and not mandatory and were not therefore enforceable by issue of a writ of mandamus by the Court.

(b) The letter of Ministry of Home Affairs dated 8-2-1982 which extends the life of panel till exhausted is not relevant in the present case. In the circumstances the life of the panel in this case cannot go beyond 18 months and as such expired in July, 1989.

It is no doubt correct that a person on the select panel has no vested right to be appointed to the post for which he has been selected. He has a right to be considered for appointment. But at the same time, the appointing authority cannot ignore the select panel or decline to make the appointment on its whims. When a person has been selected by the Selection Board and there is a vacancy which can be offered to him, keeping in view his merit position, then, ordinarily, there is no justification to ignore him for appointment. There has to be a justifiable reason to decline to appoint a person who is on the select panel. In the present case, there has been a mere inaction on the part of the Government. No reason whatsoever, not to talk of a justifiable reason, was given as to why the appointments were not offered to the candidates expeditiously and in accordance with law. The appointment should have been offered to Mr. Murgad within a reasonable time of availability of the vacancy and thereafter to the next candidate. The Central Government's approach in this case was wholly unjustified.

The select panel referred to in the decision is the select list of selected candidates prepared by the Government, the appointing authority, on the recommendation of the Selection Board. It has also to be noted that the decision is in the wake of the refusal on the part of the Central Government in not making any appointment, despite availability of vacancies. It is in that context, with reference to the peculiar procedure under the Rules as noted above, the Supreme Court made the observation that keeping in view the merit position, the appointment will normally have to be made. The factual situation in the instance case is different. No doubt the appointing authority, namely, the Government of Kerala is entitled to appoints candidate either as President or Member of the Forum only on the recommendation of the Selection Committee. But as already noted above, all the candidates included in the list of qualified candidates finalised by the Selection Committee are duly recommended. For making the appointment from among the list of candidates recommended, the appointing authority is not bound to follow the order indicated by the Selection Committee since the Selection Committee is not vested with such a power. That apart, being the subjective choice of the appointing authority, no reasons need be given also.

9. True, the expression "recommendation" is not defined in the Act. But the lexical meaning of the word is "to put forward with approval as being, suitable for a purpose or role; advise as a course of action; advise to do something". "Recommendation" means "a suggestion or proposal as to the best course of action". (Concise Oxford English Dictionary). The Supreme Court had occasion to interpret the expression "recommendation" in the context of the Kerala Building Rules in *V.M. Kurian Vs. State of Kerala and Others*, wherein it has been held that "....In Law Lexicon, the meaning of the word "recommendation" is "a statement expressing recommendation or a, message of this nature or suggests fit". It is true that word "recommendation" is not defined in the Rules. If we do not go by the meaning of the word "recommendation", as suggested by learned Counsel for the 5th respondent and found that there is no conclusive meaning of the word "recommendation" we are of the, view that in such a situation the meaning of the word has to be understood in the context of the provisions of the Rules and the object behind such Rules..." From the context of the provisions of the Act and Rules, it is absolutely clear that the Selection Committee can only finalise a panel and forward a list of qualified candidates for appointment and the appointing authority is free to appoint any candidate from the list without assigning any reason. The appointing authority is not bound to show any reason for making the appointment, in case the appointment is as per the Scheme under the Act and Rules. In that view of the matter it is not necessary to advert to the various other decisions referred to by the learned Counsel appearing for the writ petitioners, particularly since all those decisions pertain to a fact situation where the appointing authority attempted to make appointment outside the list recommended by the Selection Committee. In the instant case the writ petitioners have no case that the appointees are not recommended by the Selection Committee. Though the Selection Committee has indicated the order of

merit of the candidates recommended by them, the appointing authority is not bound to follow the order thus indicated by the Selection Committee, while making the appointments from the list of candidates recommended by them. Appointment from the list as we have already noted above, is a matter of subjective choice of the appointing authority, when the appointment is made from the list of candidates recommended by the Selection Committee.

Therefore, we set aside the judgment of the learned single Judge, allow the writ appeals and dismiss the writ petitions.