

**Shajil Vs. State of Kerala**

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**Court :** Kerala

**Decided On :** Jan-07-2004

**Reported in :** 2004(1)KLT553

**Judge :** M. Ramachandran, J.

**Acts :** State and Subordinate Services Rules, 1959 - Rule 28

**Appeal No. :** W.P. (C) No. 34713 of 2003

**Appellant :** Shajil

**Respondent :** State of Kerala

**Advocate for Def. :** P. Nandakumar, Government Pleader,; C.P. Sudhakara Prasad and;

**Advocate for Pet/Ap. :** K.R.B. Kaimal and; B. Unnikrishna Kaimal, Advs.

**Disposition :** Petition allowed

**Judgement :**

**M. Ramachandran, J.**

1. The point that has come up for consideration, is as to whether the select list of Lecturers in Instrument Technology, Government Polytechnics, prepared for promotion to the category of Head of Section, is in conformity with law. The

petitioner and the fourth respondent are at present working as Lecturers in Instrument Technology. They had been appointed on the same day. By virtue of his higher rank and advice by the Public Service Commission, the fourth respondent had always been considered as senior to the petitioner. It appears that the petitioner had been taking effort for a promotion. The learned counsel for the petitioner refers to Ext. P2 judgment in O.P. No. 34044 of 2000, when he had challenged the steps for filling up of the vacancy by direct recruitment. The Original Petition filed as above had been disposed of by this Court by observing that at the time when the vacancy arose in 1995 there were no qualified hands for promotion available and therefore steps for direct recruitment could be validly proceeded with. However, the claim of the petitioner for promotion to any vacancies that might arise after he became qualified had been left open.

2. Evidently, when the vacancy had arisen thereafter, the petitioner had again filed O.P. No. 15199 of 2003. This was on a complaint that he had been placed below the fourth respondent in the list published by the Departmental Promotion Committee (for short DPC) dated 21.4.2003. The Court had not adverted to the merits of the case, but had directed the authorities concerned to examine the objections which had been pleaded by him. Ext. P7 is the consequential order passed by the State.

3. The Government, by order dated 28.10.2003, had held that since the DPC had taken due notice of all aspects, including the settled seniority of officers in the feeder category, a change in the select list was not warranted. The petitioner's claim was therefore rejected. Ext. P7 is therefore subjected to challenge. Also under challenge is the basic proceedings, viz., Ext.P1 notification dated 21.4.2003, to the extent that in the select list of Head of Section in Instrument Technology for 2002, the fourth respondent has been conferred a position of rank No. 1, whereas the petitioner is given only the second position. We may examine the rival contentions in brief.

4. A vacancy of Head of Section in instrument Technology in the Polytechnics under the Directorate of Technical Education had arisen on 1.1.1998. The minimum qualification for a candidate for being considered/promoted for the post

as laid down by the Kerala Technical Education Service Rules was completion of eight years experience, including three years teaching experience as Lecturer. The petitioner contended that the fourth respondent had attained qualification only by 25.11.2000, since he got three years teaching experience only by that date. As for the petitioner, he attained the minimum eligibility on 16.12.1999. Petitioner argues that though the vacancy arose on 1.1.1998, as on that date since no qualified hand was there for promotion, the rules required that the person who secures first the minimum required qualification, including experience was to be preferred. The date on which the claim was considered, or the date on which the posts are filled up, according to him, had no relevance. That the fourth respondent was senior to the petitioner or that the vacancy remained unfilled from 16.12.1999 onwards therefore could not have militated against the petitioner for a higher ranking in the select list prepared by the D.P.C.

5. The petitioner had worked as Lecturer in IPT & GPT, Shornur from 14.6.1990 to 13.12.1990 and 5.7.1991 to 31.5.1997 as Executive Trainee/Assistant Plant Manager/ Senior Plant Manager in Hindustan Latex Limited, Trivandrum. His experience was 6 years 4 months and 17 days. This was the experience prior to his appointment as Lecturer in Government Polytechnic. As far as his colleague, viz., the fourth respondent is concerned, he had served as Service Engineer in Usha Drager (P) Ltd., Faridabad from 1.1.1992 to 11.8.1995 and 4.9.1997 to 30.5.1997, totalling four years six months and eight days. The petitioner had joined duty on 5.6.1997 and the fourth respondent had joined duty on 2.6.1997. The Kerala Technical Education Service Rules provided that for promotion as Heads of Sections in Polytechnics, the qualifications were: (i) Degree in appropriate branch of Engineering with not less than 60% marks; and (ii) Eight years experience in Engineering profession of which at least 3 years should be teaching experience as Lecturer not below the Diploma Level in recognised/ approved institutions. It was thus taking notice of the past service rendered before joining the Polytechnic also, that, the petitioner claims completion of eight years experience. He became qualified by 16.12.1999. However, the fourth respondent could secure the teaching experience only by 25.11.2000.

6. Sri. K.R.B. Kaimal, counsel appearing for the petitioner, submits that the rejection of the contention of the petitioner was illegal, since such contingency has been specifically taken notice of by the general rules, and to the advantage of the petitioner. He had referred to the provisions in the Kerala State arid Subordinate Services Rules and particularly to Rule 28(b)(iA) which is to the following effect:-

28(b)(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.

(Not:- 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).

7. Counsel submits that the Note to the above rule squarely applies to the facts of the case. According to him, the select list was prepared without noticing the above and in spite of an opportunity being given, the Government had overlooked the rules while passing Ext. P7. The counsel submits that the select list prepared should be set aside to the extent he had been put to any disadvantageous position. Only after promoting the petitioner, the case of the fourth respondent could be considered at all.

8. A counter affidavit has been filed by the fourth respondent. He refers to Ext.R4(a) order of appointment. Being rank No. 1 he was entitled to be reckoned as superior claimant and for all purposes. He also referred to the circumstances that the fourth respondent had completed the probation earlier than the petitioner. Sri. Elvin Peter, on behalf of the fourth respondent, submits that seniority should govern promotions, especially when both of them did not possess the minimum experience as on the date of occurrence of the vacancy.

9. The D.P.C. apparently had taken a stand that when the posts are filled up, far later than the date on which the vacancy had occurred, experience possessed by the candidates at the time of selection alone need be taken notice of. Supporting

the view recorded in Ext. P7, the learned Government Pleader submits that, since the fourth respondent was senior to the petitioner in all respects, there was nothing irregular for them to confer on him the higher place in the rank list leading to appointment as Head of the Section.

10. The learned counsel for the fourth respondent had also invited my attention to a decision reported in ILR 1986 (2) Kerala 670 (C.R. Jose and Ors. v. The Board of Revenue). The counsel submits that after distinguishing the earlier decisions, reported in 1981 KLT 458 (Varghese and Ors, v. State of Kerala) and 1982 KLT 539 (Padmanabhan v. State of Kerala), it had been observed that qualification at the time of occurrence of the vacancy is the relevant requirement for promotional post based on seniority alone. The submission is that when the D.P.C. assesses the merit and ability, the date of occurrence of the vacancy becomes unimportant, and the only consideration is as to whether on the crucial date, when the post is filled up, the claimant is qualified. If this is the yardstick, according to him, Exts. P1 and P7 cannot be found fault with.

11. On going through the decisions, it is found that the issue which came up for consideration there, was altogether different. The Court had occasion to consider a case where appointments were made after special rules were issued and the Court held that the date of occurrence of vacancy became irrelevant. Sri. Elvin Peter submits that when the Division Bench had dealt with the matter, Rule 28(b)(iA) was already in the statute book, and it should be presumed that the Bench was aware of the existence of the Rules, though there was no reference made to the said Rule.

12. It is difficult to accept the said contention. Firstly, the issue that is placed before me by the present set of facts was totally different from one that was considered by the Division Bench. There was no impact brought by change in governing rules. Secondly, when rules are unambiguous, observations of the Court especially without noticing such rules can be of little assistance. And thirdly, the note to the statutory Rule requires as much obedience as to be given to the Rule. The draftsman of the Rule had incorporated the amendments brought in respectively on 2.6.1977 and 20.10.1981. Though there is a proviso to the rule, as

that does not concern us, I am not going to the impact thereof.

13. The learned counsel had thereafter referred to a decision reported in 1997 (3) SCC 118 (Vijay Singh Deora and Ors. v. State of Rajasthan and Anr.). Here also the accent is on seniority, but so long as the Rules have not been subjected to challenge in these proceedings, I will have to rely on the rule, which per se operates to the disadvantage of the cause of the fourth respondent.

14. The fourth respondent had thereupon submitted that an appeal as postulated by the Rules against the select list of D.P.C. had not been appropriately filed. Therefore, when the petitioner suffered Ext. P7 order, he is estopped from challenging it in writ proceedings.

15. However, the argument is too technical. Though an appeal against Ext. P1 would have been there to the appellate authority, Ext. P7 had come to be passed on the directions passed by this Court. When it is found that there has been no due advertence to the rules governing the issue, and when the matter is considered by this Court on merits, it may not be prudent to shirk jurisdiction.

16. The petitioner has made out a case for interference. Ext.P1 will consequently stand set aside to the extent the fourth respondent has been conferred with a higher rank than the petitioner. It is declared that the petitioner is entitled to the first rank in the list of Head of Section in Instrument Technology Branch for the year 2002 and consequently earlier appointment. Ext. P7 is also set aside as it had omitted to take notice of the rules. A decision after due discussion was expected from the Government, and on merits.

The Writ Petition will stand allowed.

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