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Krishnakumar Vs. State of Kerala

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Court : Kerala

Decided On : Feb-13-2006

Reported in : 2006(2)KLT75

Judge : K.K. Denesan, J.

Acts : Kerala Health Service (Indian Systems of Medicine) Rules - Rules 3; K.S and S.S. Rules - Rule 28

Appeal No. : W.R.C. No. 29134 of 2003

Appellant : Krishnakumar

Respondent : State of Kerala

Advocate for Def. : S. Easwaran, Adv. and; M.A. Thomaskutty, Government Pleader

Advocate for Pet/Ap. : N. Sugathan and; R. Seema, Advs.

Judgement :

K.K. Denesan, J.

1. Petitioners were appointed as Medical Officers (Specialist) in the Kerala Health Subordinate Service (Indian Systems of Medicine). Their appointment to the above post was from the open market. In the year 1991 they were promoted to the post

of Senior Medical Officer (Specialist) which is category No. vii in the Kerala Health Service (Indian Systems of Medicine), hereinafter referred to as the 'Special Rules'.

2. Rule 3 of the aforesaid Special Rules lays down the method of appointment. Category No. v Chief Medical Officer (Ayurveda) has to be filled up by transfer appointment of those belonging to category vi or Category No. vii. Rule 3(b) of the Special Rules reads as follows:

Whenever there are more than one feeder category with different scales of pay, persons in the lower categories shall be considered for promotion/transfer only in the absence of suitable candidates in the higher categories.

Along with the above provision in the special rules, it will be useful to read Note (vi) of Rule 28(b)(i)(7) of K.S & S.S.R:

When there are more than one feeder category carrying different scales of pay, they shall be shown in separate lists and persons in a lower scale of pay shall be appointed only after appointing all persons on a higher scale of pay, unless the Special Rules prescribe a ratio or any special order of preference for each feeder category.

Respondents 4 to 20 were appointed based on the inclusion of their names in Ext.P3 Government notification dated 24.9.2001. As per this notification select list of officers fit for promotion to various categories in the Indian Systems of Medicine Department for the year 2001 prepared by the Departmental Promotion Committee and approved by the Government was published. Serial Nos. 1 to 15 are respondents 4 to 20 herein.

3. Petitioners challenge Ext.P3 notification to the extent it includes respondents 4 to 20, Petitioners had availed the statutory remedy of filing a review petition before the second respondent requesting to include them in Ext.P3 select list in the appropriate place taking due note of the provisions contained in Rule 3(b) of the Special Rules. Contention of the petitioners before the first respondent was that the post of Senior Medical Officer (Specialist) carries a higher time scale of pay

when compared to Senior Medical Officer (Ayurveda) and the above rule along with Note (vii) of Rule 28(b)(i)(7) of K.S & S.S.R ought to have been considered. Petitioners further contended that they had the preferential right to be included in the select list for appointment to the post of Chief Medical Officers (Ayurveda) in the year 2001 and only in their absence respondents 4 to 20 could have been included in the select list. This contention was negatived by the first respondent stating that seniorty cannot be given a go by while including persons belonging to category Nos. vi and vii and no interference was called for with Ext.P3 select list. Feeling aggrieved, petitioners have filed this writ petition.

4. They have sought for a writ of certiorari quashing Exts.P8 and P9 as also orders appointing respondents 4 to 20 as Chief Medical Officers (Ayurveda) as per Exts.P7 and P8. A writ of mandamus is prayed for directing respondents 1 to 3 to prepare a revised select list for promotion to the category of Chief Medical Officer (Ayurveda) following Rule 3(b) of the Special Rules and Note (vi) of Rule 28(b)(i)(7) of K.S & S.S.R.

5. Though not very pertinent for a consideration of the reliefs prayed for in this writ petition, it will be useful to mention here that upon publication of Ext.P10 select list for the year 2005, the petitioners find their names included therein. Interim order has been passed by this Court to give effect to that select list against vacancies arose during the year 2005. Respondents 1 to 3 have moved this Court for vacating the interim order. At the same time the petitioners have filed a Contempt of Court case against respondents 1 to 3 for not implementing the interim order passed by this Court as stated above. Having regard to all those developments, I feel that instead of going deeper into the contentions taken by the parties in relation to the sustainability of the interim order and its continuance or the complaint of the petitioners in the Contempt of Court Case and the defence set up by the respondents therein, it would be more appropriate to dispose of the writ petition itself. I therefore proceed to examine the merits of the contentions taken by the parties with regard to the challenge made to Exts.P3, P7, P8 & P9 and the other reliefs prayed for by the petitioners.

6. I have heard Adv. N. Sugathan for the petitioners, Adv. S. Easwarn for respondents 6, 9, 10, 11 & 16. Some of the party respondents are not represented by counsel. I have also heard Mr. M.A. Thomaskutty, Govt. Pleader for respondents 1 to 3.

7. As already noticed, the petitioners contention is based on Rule 3(b) of the Special Rules. Vacancies in the post of Chief Medical Officer has to be filled up by transfer appointment of the members belonging to category Nos. vi and vii. Category (vi) is Senior Medical Officer (Avurveda) and Category (vii) is Senior Medical Officer (Specialist). Post of Senior Medical Officer (Specialist) carries a time scale higher than that of Senior Medical Officer (Ayurveda). Rule 3(b) applies not only in the matter of promotions but also transfer appointments. Appointment by transfer shall be in accordance with the provisions of Rule 28(b)(i)(7) of K.S. & S.S.R. Ext.P3 select list was approved, notified and published by the Government. If Rule 3(b) of the Special Rules was taken into consideration, respondents 1 to 3 ought not to have prepared a select list based on the inter se seniority of those belonging to categories (vi) & (vii), contends counsel for the petitioners.

8. The question is whether the above contention is justified having regard to the language used in Rule 3(b). Counsel for the party respondents submits that the post of Chief Medical Officer is not a promotion post and therefore Rule 3(b) will not apply to the facts of this case. Learned Counsel invites my attention to the decision of the Division Bench in W.A.72/88. In paragraph 2 of the above judgment the Division Bench held that there is no basis for the assumption that the rule requires that the post of Chief Medical Officer be filled up by promotion. The method of appointment to category No. v was extracted by the learned Judges of the Division Bench which decided W.A.72/88. It was highlighted that the expression used was 'appointment' and not promotion. During the course of discussion, the Division Bench said that the posts of Senior Medical Officer (Ayurveda) and Senior Medical Officer (Specialist) cannot be regarded as feeder categories for promotion to the post of the Chief Medical Officer (Ayurveda). Learned Counsel for the party respondents placed emphasis on the above statement in the judgment of the Division Bench in W.A.72/88. Learned Counsel further submits that in W.A.436/88 the finding contained in W.A.72/88 was referred

to and that that judgment was not disturbed by the Supreme Court despite the filing of SLP 10178/88.

9. Senior Government Pleader submits that new special rules have come into existence with effect from 5.4.2005 and further, the preference that can be claimed by feeder category members based on higher time scale of pay in terms of Note (vi) of Rule 28(b)(i)(7) of K.S & S.S.R has been taken away by amendment. I may immediately notice the fact that the new 'rules and the amendment to the General Rules are of no consequence, for, the same has got only prospective effect and the provisions thereof cannot be imported to the fact situation here and will not be helpful in deciding the issue that has come up for consideration here.

10. It is not disputed that post of Senior Medical Officer (specialist) carries a higher time scale of pay. In fact, sufficient materials have been pleaded and produced by the petitioners in that behalf. As per the Rules under consideration, a post carrying higher pay scale is a higher post and the post carrying lower pay scale is a lower post. Rule 3(b) speaks about not only promotion but also appointment by transfer. The word 'appointment' gets qualified depending upon facts and circumstances and the rule position. Appointment by direct recruitment, appointment by promotion, appointment by transfer, appointment by deputation etc. come within the fold of the generic term 'appointment'. Appointment by transfer is one of the species. The issue before the Division Bench was whether the post of Chief Medical Officer (category v) was a promotion post. In that context Division Bench held that category Nos. vi and vii are not feeder categories for promotion to the post of Chief Medical Officer. No contention was raised before the Division Bench that category No. v has to be filled up by transfer appointment. It was also not contended before the Division Bench that Rule 3(b) speaks not only about promotion but also about transfer appointment. On the other hand, the very argument advanced before me is with reference to the method of appointment to category No. v which, as can be seen from the provisions of the special rules, is appointment by transfer. It cannot be said that the concept of feeder category comes into play only in cases where the higher post is to be filled up by promotion. I find it difficult to accept the argument that the term feeder category has relevance only if the method of appointment from lower category to higher category is

promotion. Feeder category means a category which is used to feed the higher category. Such feeding can be done to fill up a higher post which is the promotion post as also a higher post which is to be filled up by transfer appointment of members belonging to certain lower categories. When transfer appointment is to be effected either from categories within the same service or from categories belonging to a different service, those categories from which alone transfer appointment can be made, feed the higher post. That means category Nos. vi and-vii are feeder categories in relation to category No. v. I therefore find that Rule 3(b) has relevance and comes into operation with all its force in the instant case.

11. Ext.P3 select list has been prepared in derogation of the special rules. Rule 3(b) in the context of the method of appointment prescribed by the special rules for the post of Chief Medical Officer (Ayurveda) mandates, until the amendment came into force, that members of the qualifying service belonging to category No. vii are the first to be considered for filling up vacancies. Of course, as rightly pointed out by the Senior Govt.Pleader the scope and application of Rule 3(b) as well as Note (vi) of Rule 28(b)(i)(7) of K.S & S.S.R vis-a-vis the transfer appointment to the post of Chief Medical Officer has undergone changes with effect from the commencement of the amended rules.

12. I hold that the petitioners ought to have been considered by the Departmental Promotion Committee against vacancies arose in the year 2001 in the post of Chief Medical Officer (Category No. v) and only in their absence respondents 4 to 20 could have been considered.

13. In this view of the matter I set aside Ext. P3 notification and the select list for the year 2001. There shall be an order directing the second respondent to convene a DPC for the purpose of considering the case of the petitioners for inclusion in the select list of 2001 for transfer appointment to the post of Chief Medical Officer (Ayurveda). If it is found that sufficiently qualified persons in category No. vii were not available, the DPC shall consider the case of respondents 4 to 20 also for the very same year. A select list shall be prepared in accordance with law and the same shall be published with the approval of the Government. This exercise shall commence immediately and be completed within

a maximum period of two months on production of a copy of the judgment.

14. Ext.P3 order has been challenged by two petitioners whereas as per Exts.P7 and P8 about 14 persons have been promoted. It may not therefore be proper or fair to straight away set aside the promotion of all those persons including the respondents herein. However, it is necessary that promotions made as per Exts.P7 and P8 are reviewed by the respondents 1 and 2, immediately after the publication of the select list as directed above. Appropriate orders shall be passed transfer appointing persons who would be found eligible to be included in the select list for the year 2001 prepared in accordance with Rule 3(b) of the Special Rules. The review of orders appointing respondents 4 to 20 shall be done within one month of the publication of the select list. Petitioners, if found eligible to be included in the select list shall be appointed from the date on which Ext.P7 was issued. They shall be entitled to all consequential benefits in accordance with law. In the meantime the petitioners shall be provisionally promoted as Chief Medical Officer (Ayurveda) against the next arising vacancies.

Writ Petition is disposed of with the above observations.

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