

Achuthan V. and ors. Vs. State of Kerala and ors.

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Court : Kerala

Decided On : Apr-04-2008

Reported in : 2008(2)KLJ200

Judge : V. Giri, J.

Acts : Kerala State and Subordinate Rules, 1958 - Rule 27B; [Constitution of India](#) - Article 32

Appeal No. : W.P. (C) Nos. 24264, 30815 and 32218 of 2007 and 1530 of 2008

Appellant : Achuthan V. and ors.

Respondent : State of Kerala and ors.

Advocate for Def. : P. Nandakumar, Sr. GP

Advocate for Pet/Ap. : T.A. Unnikrishnan,; Babu Joseph Kuruvathazha,; C. Unnikr

Judgement :

V. Giri, J.

1. Common issues arise for consideration in these writ petitions. Therefore, they have been heard together and are being disposed of by this common judgment. Since the pleadings are complete in W.P. (C) No. 24264/07 and notice has been taken out by publication as well, I will refer to the said writ petition, as the leading case.

The petitioners commenced service as Head Constables, having been appointed pursuant to a Special Recruitment. They were advised on 23-6-1980 and after completion of training they joined duty. They were included in the select list for promotion to the post of Assistant Sub Inspector of Police, after being considered by the Departmental Promotion Board. They were promoted on a regular basis. They were promoted as Sub Inspectors by Ext.P5 series orders and their probation was declared as per Ext.P6 series orders.

2. While so, Ext.P7 range-wise seniority list as on 1-1-2003 was published on 9-11-2004. The same was finalised under Ext.P8. According to the petitioners, after Ext.P8 final range-wise seniority list, the Annual Confidential Reports were called for as per Ext.P21 for considering them for the post of Circle Inspectors.

3. While so Ext. P9 State-wide provisional seniority list of Sub Inspectors was published for the period from 1-1-1998 to 31-12-2002. There were some objections against Ext. P10. But, by and large, the petitioners were not aggrieved by Ext.P10. By Ext.P11, the Inspector General of Police revoked Ext. P8 State-wide seniority list without notice to the petitioners. Taking note of Ext. P 11, Ext. P12 State-wide provisional seniority list of Sub Inspectors were published. This was including persons, who were promoted/appointed as Sub Inspectors as on 31-12-2002. The petitioners did not find a place in Exts.P11 and P12. Therefore, as against Ext. P12, they filed Exts.P13 and P14 representations. The objections were not accepted and Ext.P12 was finalised under Ext.

P 15 final State-wide seniority list of Sub Inspectors as on 31-12-2002. Ext. P 15 was Challenged before this Court. But the petitioners were directed to prefer applications under Rule 27B of the Kerala State and Subordinate Rules, 1958 (for short 'the Rules') before the Government, which the petitioners did as per Ext.P16(a). The same has been rejected under Ext. P22 order passed by the Government. The petitioners essentially challenge Ext. P 22 order. They also challenge Ext.P11 provisional range-wise seniority list, Ext. P12 State-wide provisional seniority list and Ext.P 15 final seniority list as well. Exts. P 18 and P19 are the provisional range-wise seniority list for the period subsequent to 31-12-2002 and they have also been challenged in these writ petitions. Though the petitioners find a place in Exts.P18 and P19, according to them, they should have been included in the final State-wide seniority list, Ext.P12, which was later finalised under Ext.P15.

4. The whole dispute, as such, has arisen under the circumstances, which can, briefly, be summarised as follows: The method of appointment to the post of Sub Inspectors contemplate appointment by promotion from among Assistant Sub Inspectors and by direct recruitment. There is a quota of 50:50 set apart for promotion and direct recruitment. Apparently, direct recruitment was not resorted to, for a fairly long period from 1996-2000. In the meanwhile, vacancies in the post of Sub Inspectors were filled up by promoting the eligible Assistant Sub Inspectors. In doing so, the department had effected promotions of Assistant Sub Inspectors even against the quota, that should have been set apart for direct recruitment (This is the sand taken by the Government, but the petitioners do not completely accept the same). A rank list of direct recruits was published in the year 2002 and candidates were advised by the Public Service Commission. Since there were sufficient number of vacancies, the availability of the PSC hands did not affect any departmental hands including the petitioners. But after the direct recruits had joined duty, it was necessary for the department to first publish a range-wise seniority list and then State-wide seniority list. But in the course of preparation of final seniority list of Assistant Sub Inspectors, the department had to go by the date of advice in the case of direct recruits and the date of commencement of service of the departmental hands pursuant to orders of promotion in accordance with Rules, insofar as the promotees are concerned. According to the department, commencement of service by a promotee, for the purpose of reckoning his seniority can only be on promotion being effected, against a substantive vacancy in the quota that is available for promotees. As a corollary thereof, according to the department, if promotions have been effected against vacancies, which otherwise should be set apart for direct recruits, then such promotions must be treated as provisional and can be regularised only with reference to the date on which the vacancies had actually arisen in the 50% quota set apart for promotees. Since seniority is to be reckoned under Rule 27(a) of the Rules for direct recruits and it became necessary to fix the seniority, in the course of the same, it was found that several among the promotees of 2000-02 were to be placed below the direct recruits who were advised by enforcement of the rank list which was published in January, 2003. The provisional range-wise seniority list, Ext.P7, which was finalised under Ext.P8, was published in January, 2003. The provisional range-wise seniority list, Ext.P7, which was finalised under Ext.P8, was published without providing for assignment of seniority for direct recruits and it is, therefore, that pursuant to the instructions given by the Director General of Police for publishing a State-wide seniority list strictly adhering to the quota of 1 : 1, and therefore Ext. P12 seniority list came to be published. As noted above, this was ultimately finalised under Ext.P 15. The correctness of the same has been confirmed in Ext.P22 passed by the Government.

5. The petitioners' contentions are two fold. Firstly they were promoted not by way-of provisional promotion, but by way of regular promotion and their probation has also been declared as evidence by Ext.P6 series. Therefore, they are entitled to insist that their seniority in the post of Sub Inspector be reckoned with reference to the commencement of service as Sub Inspector pursuant to Ext.P5 series.

It is then contended that direct recruits are entitled to reckon their seniority only with reference to the date of their advice and since admittedly all of them were advised only in 2003, they should have been placed below the petitioners. They also rely on the 3rd proviso to Rule 27(a) of Part II of the Rules to contend for the position that where the method of appointment contemplates promotion as well as direct recruitment and

also prescribes a ratio in that regard, and where the direct recruits are not available, the promotees are entitled to be regularised in service with reference to the date of occurrence of the vacancies which, otherwise would have been filled up by direct recruits as such. Without prejudice to the above, they also contend that there are absolutely no materials on record, to show that there were inadequate vacancies in the 50% quota available for promotees during 2000-01 when the petitioners were promoted so as to treat those vacancies as exclusively set apart for direct recruits. According to them, there were enough vacancies in the quota set apart for promotees and therefore, their promotions under Ext.P5 series must be treated as regular and against substantive vacancies in accordance with the rules. Apparently, this position was correctly understood by the Department in the first instance, inasmuch as that petitioners' probation was duly declared.

6. A counter affidavit has been filed on behalf of the Director General of Police. The stand taken by the respondents is that no doubt the petitioners were promoted in the year 2000 under Ext.P5 series. But, such promotions were only provisional. Petitioners are entitled to be regularised in the post of Assistant Sub Inspector only with reference to the date of occurrence of the vacancies in the 50% quota, and therefore, the provisional promotions effected were in excess of 50% quota. Therefore, they cannot be regularised in service with reference to the date of commencement of provisional service as such. The declaration of probation, as such, cannot result in the quota rule being violated in the matter of regularisation of services of the petitioners. Direct recruits are entitled to reckon their seniority with reference to the first effective advice under Rule 27(c) of the Rules. This alone has been followed while drawing up Ext.P15. The third proviso to Rule 27(a) has been misunderstood by the petitioners.

7. I heard Mr. Venugopalan Nair, Mr. T.A. Unnikrishnan and Mr. Babu Joseph Kuruvathazha, learned Counsel for the petitioners and the learned Senior Government Pleader Sri. Nandakumar on behalf of the respondents.

8. The first question to be decided is whether the promotion granted to the petitioners and consequent declaration of their probation in the category of Assistant Sub Inspector would result in the petitioners' seniority being reckoned with reference to the date of such promotion. Admittedly, the method of appointment to the post of Sub Inspector in the General Executive Branch contemplates promotion as well as direct recruitment. Ratio of 1:1 is prescribed as regards promotion and direct recruitment. Once, therefore, a quota is prescribed, recruitment will have to be made adhering to the same. In the present case, there was no direct recruitment during 1996-2000 to the vacancies in the post and consequently the vacancies were filled up partly by provisional promotion of eligible Assistant Sub Inspectors of Police.

9. If in effecting such promotions, the number of persons so promoted and appointed to the category of Sub Inspectors of Police are in excess of the 50% quota that is available to promotees as per the method of appointment, can it be said that the persons, were actually entitled to reckon their seniority with reference to the date on which they commenced their service in the promoted category? In my view, it cannot be so. Once method of appointment prescribes a quota, the quota will have to be strictly adhered to. Where promotions are effected to a category in excess of the quota, the services rendered by the promotee, who is so accommodated in excess of the quota, will be treated as officiating in the promoted post. But, his promotion cannot be considered as 'in accordance with the Rules'. He will continue in the promoted post till a direct recruitment is made. Of course, by the time, if further vacancies arise and sufficient number of vacancies are available, even in the quota meant for promotees, then those already provisionally promoted could be accommodated in the vacancies so made available to the promotees as such. If there are inadequate vacancies to accommodate a specific number of persons in the quota set apart for promotees, then a reversion will follow. The promotees will be entitled to commence their probation only from the date on which the vacancies in the quota set apart for promotees are made available to accommodate them. This is the principle that has been laid down by the Construction Bench of the Supreme Court in the case of Direct Recruit Class II Engineering Officers' Association v. State of Maharashtra and Ors. : [1990]2SCR900 and subsequently followed in several judgments of this Court. The principle was directly considered by this Court in O.R No. 5215/97 which was affirmed by the Bench in W.A. No. 678/05 as also by the Bench in O.R No.

8395/98. The following principles as summarised by the Supreme Court in the case of Direct Recruit Class II Engineering Officers' Association v. State of Maharashtra and Ors. : [1990]2SCR900 is apposite and therefore extracted:

47. To sum up, we hold that:

(A) once an incumbent is appointed to a post according to rule, seniority has to be counted from the date of his appointment and not according to the date of his confirmation. The corollary of the above rule is that where the initial appointment is only ad hoc and not according to rules and made as a stop-gap arrangement, the officiation in such post cannot be taken into account for considering the seniority.

(B) If the initial appointment is not made by following the procedure laid down by the rules by the appointee continues in the post uninterruptedly till the regulatisation of his service in accordance with the rules, the period of officiating service will be counted.

(C) When appointments are made from more than one source, it is permissible to fix the ratio for recruitment from the different sources, and if rules are framed in this regard they must ordinarily be followed strictly.

(D) If it becomes impossible to adhere to the existing quota rule, it should be substituted by any appropriate rule to meet the needs of the situation. In case, however, the quota rule is not followed continuously for a number of years because it was impossible to do so the interference is irresistible that the quota rule had broken down.

(E) Where the quota rule has broken down and the appointments are made from one source in excess of the quota, but are made after following the procedure prescribed by the rules for the appointment, the appointees should not be pushed down below the appointees from the other source inducted in the service at a later date.

(F) Where the rules permit the authorities to relax the provisions relating to the quota, ordinarily a presumption should be raised that there was such relaxation when there is a deviation from the quota rule.

(G) The quota for recruitment from the different sources may be prescribed by executive instructions, if the rules are silent on the subject.

(H) If the quota rule is prescribed by any executive instruction, and is not followed continuously for a number of years, the interference is that the executive instruction has ceased to remain operative.

(I) The posts held by the permanent Deputy Engineers as well as the 'officiating Deputy Engineers' under the State of Maharashtra belonged to the single cadre of Deputy Engineers.

(J) The decision dealing with important questions concerning a particular service given after careful consideration should be respected rather than scrutinised for finding out any possible error. It is not in the interest of Service to unsettle a settled position.

With respect to Writ Petition Nos. 1327 of 1982, we further hold:

(K) That a dispute raised by an application under Article 32 of the Constitution must be held to be barred by principles of res judicata including the rule of constructive res judicata if the same has been earlier decided by a competent court by a judgment which became final.

10. If this be so, then the petitioners cannot be heard to say, as a matter of law, that even if there were no adequate number of vacancies made available to the promotees, who were aspiring for promotions to the post of Sub Inspector and therefore, their promotions were in excess of the 50% quota that was available, it should nevertheless be treated as a regular promotion bringing in its wake an entitlement to count their seniority with reference to the date of commencement of the service in the promoted category.

11. Learned Counsel for the petitioners submits that the petitioners were not only regularly promoted as Sub Inspectors under Ext.P5 series, but their probation had also been declared. It is true that the petitioners' probation has been declared under Ext.P6 series. But Ext.P5 series orders will show that their promotions were only provisional. The question is whether mere declaration of probation as such will be sufficient to bypass the quota rule and nevertheless give the petitioners a right to reckon their seniority from the date of commencement of the provisional service. This aspect also is no longer res integra as per the judgment of the Supreme Court in C.K. Antony v. B. Muraleedharan and Ors. : (1999)ILLJ572SC .

6. A direct recruit to the cadre of ACF can count seniority only with effect from the date of his appointment as a Probationary Assistant Conservator. A person who has been appointed to a service or post temporarily or provisionally as a stop gap arrangement, can never be considered as one who has been appointed to that post or service. If there is no substantive vacancy in the permanent cadre available, no direct recruitment can be resorted to. The direct recruits should get substantive vacancy in the permanent cadre while recruits by transfer can be adjusted against a permanent who gets a temporary appointment or promotion, as the case may be, shall not be regarded as a probation in that category and on account of that temporary appointment or promotion, he cannot have any preferential claim to that post. Any commencement of probation for the purpose of counting seniority must precede by an appointment in accordance with the rules. In case a temporary appointee is allowed to start his probation from a date anterior to the date of his subsequent appointment in accordance with the rules, that should be without prejudice to the seniority of others in the service, in this case, without prejudice to the seniority of direct recruits.

12. Therefore, the crucial question is whether the promotion was effected against a vacancy which was within the quota that was available to the promotees as such. A promotion, which will entail a benefit in excess of the quota rule, will have to be treated as a provisional promotion. Therefore, a promotion against a vacancy, which is in excess of the 50% quota, that was available to the promotees, will nevertheless have to be treated as provisional, whatever be its nomenclature and declaration of probation by itself will not result in regularisation of such promotion. The declaration of probation as such should not be to the detriment of the persons who have been directly recruited to the same category. In other words, the mere fact that probation is declared will not result in seniority being reckoned with reference to the commencement of the provisional service, if promotion was effected to a vacancy in excess of the 50% quota.

13. Yet another argument, which was seriously made by Sri. Venugopalan Nair, learned Counsel for the petitioners in W.P.(C) No. 24264/07, revolves around the 3rd proviso to Rule 27(a) of Part II of the KSSR. The proviso, being relevant, is hereby extracted. It reads as follows:

Provided also that the seniority of persons advised for appointment to a category of post in a Department, where the methods of appointment to that post are by promotions, by transfer and by direct recruitment in a fixed ratio or percentage, shall be determined as illustrated below:

Where the first vacancy in a category is for appointment by promotion or transfer and the second vacancy is for appointment by direct recruitment and when the first two vacancies arise in that category a departmental hand shall be appointed regularly by promotion or transfer, as the case may be, in the first vacancy and in the absence of a direct recruit reporting for duty in the second vacancy, a departmental hand shall be appointed temporarily by promotion or transfer, as the case may be, in that vacancy. In case a direct recruit does not report for duty till a third vacancy arises in the Department, the appointment of person temporarily by promotion or transfer in the second vacancy shall be regularised from the date of occurrence of the third vacancy. Similarly, if two more vacancies arise in that cadre (totally five) the departmental hands are entitled for three vacancies and hence the promotion or transfer of the third man shall be regularised from date of occurrence of the fifth vacancy. The direct recruit shall be entitled for rank and seniority from the date of his first effective advice.

14. Sri. Venugopalan Nair contends that the situation contemplated by the proviso is obviously available in the

present case. There is a ratio of 1:1 between appointment by promotion and appointment by direct recruitment. The first vacancy in the category is for appointment by promotion and therefore the second vacancy is for appointment by direct recruitment. He submits that the present case is where there were admittedly more than 2 vacancies and therefore, when a person is appointed temporarily by promotion in the vacancy that otherwise should have been available for a direct recruit, then the appointment of the person, who is promoted temporarily in the second-vacancy, that is set apart for a direct recruit, shall be from the date of occurrence of the third vacancy. Regularization must, therefore, take place in the manner provided in the proviso to Rule 27(a). The argument is, therefore, even if the contentions of the respondent that the promotions were effected in excess of the 50% quota is accepted such among them who were accommodated against the vacancies which otherwise were set apart for direct recruits should nevertheless be regularised in service with reference to the date of occurrence of the 3rd, 5th, 7th and 9th vacancies and so on. It is submitted that the third proviso carves out an exception to the normal rule of seniority being reckoned with reference to the date of commencement of service in a vacancy set apart for the promotee and this situation came about in the absence of direct recruits on the date of occurrence of the vacancy.

15. I am afraid, I am unable to accept this submission. The 3rd proviso to Rule 27(a), obviously deals with the mode of fixation of seniority, where the method of appointment to a post is by promotion, transfer and direct recruitment and there is a ratio or a percentage prescribed in relation to each method of appointment. In my view, the rule runs itself in the following sequence. There are vacancies available in a particular category where the method of appointment is, by direct recruitment and also by promotion. There are several vacancies available and obviously such vacancies will have to be apportioned between promotions and direct recruits. A direct recruit is available in the sense that there is an enforceable rank list and an eligible person is advised by the PSC. But the person, who was advised, does not join duty and therefore, a vacancy arises in the quota that is set apart for direct recruits. In such a case, the departmental hand could be appointed temporarily by promotion and the departmental hand commences his service in the promoted cadre. Where the direct recruit does not turn up for duty till the 3rd vacancy arises in the department (3rd vacancy should normally go to the promotee), then the departmental hand, who has been accommodated in the vacancy, which otherwise should have gone for a direct recruit, will be entitled to claim regularisation in service in the promoted post, with effect from the date on which the '3rd vacancy', (which otherwise is also available to the promotee) arises. The logical sequence provided in the proviso essentially contemplates a situation where direct recruits are available for recruitment, but nevertheless, in spite of advice, such persons would not join duty, and there are sufficient number of hands available among the promotees and in the exigencies of administration, such vacancies could be filled up by promotees. But in doing so, the quota rule obviously should not be violated and therefore, a person, who is temporarily promoted against a vacancy, which is otherwise available only for a direct recruit, will be entitled to claim regularisation in service with reference to the date of occurrence of the vacancy that is next available to a promotee. But this situation would come into vogue only in case where direct recruits fall to join duty against vacancies which are set apart for direct recruits and not in case where there is no rank list in force as happened in the present case during the period from 1996 to 2000. This is the only logical approach to be adopted by the court while construing the rule 'in the absence of a direct recruit reporting for duty'. The operation of the proviso in the manner suggested above, obviously would come about only if a direct recruit does not report for duty in spite of advice. In my view, the proviso only affirms the quota rule and does not carve out an exception therefrom.

16. A reading of Ext.P22 order will show that the position in law by and large understood. correctly by the Government when it passed Ext. P22.1 am afraid, I am unable to accept the contention of the learned Counsel for the petitioners, which suggests the contra.

17. The next question to be considered is whether there were sufficient number of vacancies available in the quota set apart for promotees during 2000-01 and 2002 even otherwise to accommodate the petitioners, who were found eligible for promotion as Sub Inspectors. No doubt, promotions in excess of the 50% quota will have to be treated only as provisional as has already been held above. But, I am unable to clearly discern any

materials to show the actual vacancy position during 2000-01 and 2002, when the petitioners were provisionally promoted under Ext.P5 series. There seems to be an assumption by the respondents that the petitioners were provisionally promoted in excess of the quota and consequently they are liable to be placed only below the direct recruits who were advised in 2003. As I mentioned above, there is no material to come to a conclusion as to whether there were sufficient number of vacancies in the post of Sub Inspector in the General Executive Branch and whether maintaining an adherence to the quota rule, there were still adequate number of vacancies to absorb the petitioners as Sub Inspectors. If therefore there were sufficient number of vacancies even in the 50% quota available for promotees, then obviously they are entitled to reckon their seniority from the date of commencement of their service in the promoted post. This aspect does not seem to have been specifically engaged the attention of the Government while it passed Ext.P22.1 am unable to find from Ext.P22 the number of vacancies that were available in the post of Sub Inspector in 2002 when Ext.P5 series orders of promotions were passed, and whether vacancies available for promotees were inadequate to absorb the petitioners. To that extent alone, a reconsideration by the Government is necessary.

18. In the result, while upholding the general principles laid down in Ext.P22 as such, I direct the 2nd respondent to specifically consider the following aspects and pass appropriate orders:

(a) What were the total number of vacancies in the post of Sub Inspectors (General Executive Branch) available in January 2000 and upto December, 2002.

(b) What were the number of vacancies that were available in the 50% quota that had to be set apart for promotees.

(c) Whether there were adequate number of vacancies in the quota set apart for promotees to absorb the petitioners in service as Sub Inspectors of Police on a regular basis.

(d) Depending upon the answers to the issued mentioned above, the Director General of Police may issue suitable directions for re-assignment of seniority of the concerned persons in the post of Sub Inspector of Police and such orders shall be passed notwithstanding Ext.P22.

(e) If the petitioners' claims are accepted, consequential orders may be passed.

(f) Such orders shall be passed within a period of three months from the date of receipt of a copy of this judgment

(g) A representative of the petitioners shall also be heard before orders are passed by the Director General of Police.

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19. The directions issued as above, will be applicable to these cases also.

Writ petitions are disposed of as above.

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