

Sasi Vs. State of Kerala

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Court : Kerala

Decided On : Jun-04-2004

Reported in : 2004(2)KLT778

Judge : Kurian Joseph, J.

Acts : Kerala Animal Husbandry Service Rules - Rule 3; Kerala State and Subordinate Services Rules, 1959 - Rule 37

Appeal No. : W.P.(C) No. 15349 of 2004

Appellant : Sasi

Respondent : State of Kerala

Advocate for Def. : Mohan C. Menon, Government Pleader,; A.N. Rajan Babu and;

Advocate for Pet/Ap. : K.P. Dandapani, Adv.

Disposition : Petition dismissed

Judgement :

Kurian Joseph, J.

1. Special rules generally provide for promotion as method of appointment as Head of the Service. In spite of the availability of a qualified, competent and

eligible incumbent, is the Government empowered and justified in appointing an Officer from All India Service

2. Petitioner is aggrieved since he was not considered for appointment to the post of Director of Animal Husbandry, instead the second respondent who is an IAS Officer, has been appointed. Petitioner joined service as a Veterinary Surgeon on 11.12.1989. On further promotions, he was appointed as Additional Director on 25.7.1996. The post of Director fell vacant on 30.9.2002 on the retirement of the then incumbent. Being the seniormost Additional Director, petitioner was given the additional charge as per Ext.P3 and the petitioner has been continuing as such. While so, as per Ext.R4 order dated 21.5.2004, the second respondent was appointed as Director by creating an ex-cadre post for a period of one year.

3. Shri.K.P. Dandapani, learned counsel appearing for the petitioner submits that the appointment to the post of Director under the Kerala Animal Husbandry Service Rules is by promotion. Petitioner is qualified and eligible for being considered for promotion to the post of Director. Extensive arguments have been addressed regarding the merit and competence of the petitioner. Shri. Mohan C. Menon, learned Senior Government Pleader submits that the Government is vested with powers under Rule 37 of the Kerala State and Subordinate Services Rules to resort to the appointment of an officer in All India Service, notwithstanding anything contained in the Special Rules or General Rules. It is further submitted that though under Rule 28A of the General Rules, direct recruitment is to be resorted to, in the absence of suitable persons for appointment by promotion or by transfer, it is now settled law that Rule 28A has to yield to Rule 37 in the case of appointment of an Officer of All India Service to any State Service. Shri. Rajan Babu, learned counsel appearing for the second respondent has supported the arguments of the learned Senior Government Pleader.

4. It is the contention of Shri.Dandapani that unlike various other Special Rules in State Service, promotion is the only mode prescribed for the purpose of appointment to the post of Director of Animal Husbandry. Appointment even by transfer and direct recruitment is prescribed only in the General Rules and hence ordinarily in the matter of appointment to the post of Director, promotion should

have been the first and the best method. Only if there is no Additional Director who is competent to be promoted as Director, who is competent to be promoted as Director, the question of appointment either by direct recruitment or by transfer or even from All India Service arises. Referring to the pleadings, it is stated that there has never been any adverse observation by the Government at any point of time that the petitioner is not competent, and that only because the petitioner was found competent, he was given the additional charge of Director when the retirement vacancy arose on 30.9.2002. Reference is also invited to the grading given to the petitioner in the Confidential Report ever since 1992.

5. In order to appreciate the rival contentions it is necessary to refer to the statutory provisions governing the field. The Kerala Animal Husbandry Service Rules in the matter of appointment provide as follows:

'3. Appointment -- Appointment to the various categories shall be made as follows:-----Category Method of Appointment(1) (2)Category I By promotion from Addl. Director of(1) Director of Animal Husbandry/Director,Animal Husbandry Veterinary Biological Institute'.

6. Rule 28A of the KS & SSR reads as follows:

'28A. Notwithstanding anything contained in these Rules or in the Special Rules, in the case of appointment to the post of Heads of Departments, direct recruitment shall be resorted to in the absence of suitable persons for appointment by promotion or by transfer. Appointment by promotion or by transfer shall be made on the basis of merit and ability, seniority being considered only when merit and ability are approximately equal. Merit and ability shall be assessed by the authority competent in the Government to make such appointment:

Provided that the lists for consideration for appointment by promotion or by transfer to the posts shall not ordinarily consist of members of service who do not have at least one year of service before the date of their superannuation after appointment to such a post'.

7. Rule 37 of the KS & SSR reads as follows:

'37. Appointment of All India Service Officers to State posts

Notwithstanding anything contained in these Rules or in the Special Rules, an officiating or permanent officer of an All India Service may be appointed to any State Service, or class or category thereof. Such Officer shall not, by reason of such appointment, cease to be a member of an All India Service'.

8. Though Rule 37 is widely worded, in the decision of this Court in *Narayanan v. State of Kerala*, 1993 (1) KLT 461, it has been held that adherence to the appointment under the Special Rules should be the rule and resort to Rule 37 is only an exception. It has also been held that, that exception can be resorted to only if there are no suitable hands as envisaged in the Special Rules available in the Service and it is not feasible to go for direct recruitment. It will be profitable to extract from paragraph 18 of the Judgment where the question has been considered:

'Rule 37 is an all pervading rule applying to all categories of service and posts in Government. Members of the All India Service are appointed to cadre posts reserved for them. But it may happen that having regard to the requirements of a particular service at a particular time or having regard to certain peculiar situations arising, it is felt necessary or expedient to have the service of a talented Officer belonging to an All India Service to man a particular post which may or may not be the post of Head of Department. Such situations can be postulated when a competent Officer who is otherwise suitable for the post of Head of Department is away on deputation, or on leave, likely to return in a short time, and the next in line in the department may not be sufficiently experienced or competent to fill up the post. Direct recruitment may not be possible at this stage when the duration of the vacancy is not that sufficient to resort to direct recruitment, or when it will be unjust and improper to scotch the promotional opportunities of those in the service by bringing in a direct recruit who may be in service for a long time. Such situations can be legion where resort to direct recruitment will work hardship to those in service. But, at the same time, the service of a competent officer may be required. Rule 37 provides for such contingencies by enabling appointment of members of an All India Services to any service, class or category. While Rule 28A is an

enabling provision, Rule 37 is one which is necessary in public interest to enable Government to have well equipped or experienced Officers of the All India Service to occupy a particular post at a particular time.....'

9. Though it is held that the application of Rule 37 is restricted to certain situations, obviously those situations are not exhaustive. They are only illustrative. In any case, it has been held that the invocation of Rule 37 is permitted in public interest. It is in that perspective also, the question of suitability of the person to be appointed as the Head of service, is to be understood.

10. In this context, it will be profitable to refer to some of the statements in the counter affidavit filled on behalf of the first respondent. It is stated in the counter affidavit that... 'the performance of the petitioner as Director in charge of the Animal Husbandry Department had not been quite satisfactory..... There had been complaints about his performance and also corruption.....'. There is an allegation that the petitioner had not taken, effective steps for the implementation of certain projects. There is also pointed reference to the failure on the part of the petitioner in the matter of purchase of medicines and filling up of vacancies. It is also stated in paragraph 6 of the counter affidavit that 'the other Additional Directors of Animal Husbandry..... are facing enquiry. Hence they cannot be considered for the post of Head of Department'.

11. When the petitioner filed a detailed reply affidavit controverting the various allegations raised against him, a rejoinder affidavit is filed by the first respondent. It is stated in paragraphs 5 and 6 as follows:

'... the petitioner was given additional charge only because of the fact that Government felt that due to the past track records, the petitioner was not suitable for a permanent substantive appointment. Besides, it is submitted that even as per Ext.P11 Confidential Report, a perusal of column A and B will show that his grading has been deteriorated and Serial No. 11 and 12 regarding 2002 and 2003 are conspicuously absent. Besides, the then Secretary of the Department, who is also a graduate in veterinary science has evaluated the petitioner as incompetent which is evident from the files produced before this Hon'ble Court. The averment that there are no allegations against the conduct of the petitioner as a public

servant is also incorrect, Communications like D.O. letter No. 31697/AHE-3/03/AD dated 7.1.2004, letter No. 34628/AHE-3/03/AD dated 9.1.2004, D.O.letterNo. 31697/AHE-3/03/AD dated 21.4.2004 and letter No. 14342/ AHE-3/04/AD dated 28.5.2004 are sufficient ample testimonies proving contra.

6. Regarding the averments in para-5, it is submitted that the relevant files will disclose that the performance of the-petitioner was not satisfactory. There are about 23 allegations against him before the Vigilance pending enquiry, for which Ext.R1 is only one among them'.

12. Further at paragraphs 11 and 12 it is stated thus:

'11. The Director, Vigilance and Anti corruption Bureau in his letter dt.2.6.2004 has informed the Chief Secretary and Agricultural Production Commissioner that as ordered in the Government letter No. 474/B2/2002/Vig dt. 3.3.2003 the enquiry is in the initial stage. The enquiry officer has reported that a further period of four months is required for the completion of the vigilance enquiry, since there are more than 23 allegations to be enquired into. Besides, as per Govt. Letter No. 7303/B2/02/Vigdt. 2.8.2002 the Vigilance Enquiry is also at the initial stage and the enquiry officer has reported that a further period of 3 months is required for the completion of enquiry against The petitioner.

12. On a totality of the circumstances mentioned above, it is submitted that the Government have felt that the petitioner is not suitable for the appointment as the Director of Animal Husbandry Department and since the other officers in the post of Addl. Director (Higher Scale) are also not suitable it was felt in public interest to post an IAS Officer in the ex-cadre post for a period of one year, invoking Rule 37'.

13. Shri. Dandapani vehemently contended that in the nature of complaints like Ext.R1 of which even the author is not traceable, it will be highly unjust to crucify the petitioner. It is a complaint procured only for the purpose of denying the legitimate claim of the petitioner for promotion to the post of Director, it is submitted. It is seen that the undated complaint does not even state who is the author of the complaint. The allegations are very vague. On the implementation of the projects also, the petitioner has his own explanation. But, even if there is some

force in all these contentions, if the appointing authority on the evaluation of the overall performance of the petitioner has made an assessment regarding the suitability for appointment to the post of a Head of a Service on relevant factors, like the petitioner facing an enquiry in respect of certain allegations raised as early as in 2002, the conduct of the petitioner as Additional Director with additional charge of Director, as Director of Veterinary Biological Institute, the assessment made by the Government Secretary as referred to in the rejoinder affidavit, desirability in public interest in such circumstances of availing the service of an Officer of A1 I India Service etc., it cannot be said that the Government has not applied its mind in the matter of first adhering to the rule of promotion in the State Service and finding whether the aspirant is suitable. Merely because a qualified, competent and eligible person is available in the State Service, the Government is not bound to promote and appoint him as Head of Service as per the Special Rules if he is not suitable for the post. Suitability in service parlance is not the mere qualification, competence and eligibility; it necessarily partakes an element of desirability in larger public interest. That is the purport of the non obstante clause under Rule 37 of the Kerala State and Subordinate Services Rules.

14. Further, it has also to be noted that the ex-cadre post is created only for the one year. The Government has stated in the affidavit that the time required for completing the vigilance enquiry is only around four months. Therefore, it is not as if the doors are shut once for all. After the said period of one year, the Government will have to consider the suitability of the petitioner and other Addl. Directors for appointment to the post of Director. Needless to say, only if it is found that they are not suitable in spite of being competent and eligible, there arises a question of resort being made to either Rule 28A or Rule 37 of the KS & SSR.

In the above circumstances, the interim order dated 21.5.2004 is vacated and the Writ Petition is dismissed.