

Vasanthi Vs. State of Kerala

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Court : Kerala

Decided On : Sep-09-2005

Reported in : 2006(1)KLT288

Judge : K.K. Denesan, J.

Acts : Kerala Last Grade Service Rules - Rules 1 and 5

Appeal No. : W.P. Nos. 36569 and 39049 etc. of 2005

Appellant : Vasanthi

Respondent : State of Kerala

Advocate for Def. : P. Nandakumar, Government Pleader

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

Judgement :

K.K. Denesan, J.

1. The issue involved in these Writ Petitions is the same. Therefore they are disposed of by this common judgment.

2. Petitioners were appointed as Hospital Attendants Gr.II, a post coming under Category No. 4 of Rule 1 of the Kerala Last Grade Service Rules, for short the 'Rules'. The method of appointment to the post of Hospital Attendant Gr.II as laid

down in Rule 5 of the Rules, is as follows:--

(i) 50% of the post in the departments of Health Services, Indian Systems of Medicine (including Ayurveda Colleges), Homoeo, Employees' State Insurance and Medical Colleges shall be filled up by Promotion of Part time contingent employees in these departments concerned on the basis of seniority by the respective appointing authorities.

(ii) The remaining 50% of the posts in the departments specified under item (i) shall be filled up by the respective appointing authorities by promotion from the candidates advised by the District Collectors from the common seniority list of Part time contingent employees prepared on Revenue District wise basis as mentioned in Note I.

(iii) In the absence of suitable hands under items (i) & (ii) above, by direct recruitment through employment exchange.

Petitioners were appointed through Employment Exchanges. That being the position their appointments fall under item (iii) above. According to the petitioners their appointments are regular in nature and as long as the posts continue they have got the right to work as regular employees till they attain the age of superannuation, subject to other provisions governing service conditions. However, apprehending premature termination of their services they have approached this Court seeking for directions to the respondents not to terminate their services. Directions have also been sought to permit them to continue in accordance with law.

3. The rule relating to method of appointment extracted above shows that direct recruitment through Employment Exchange can be resorted to only in the absence of suitable hands under items (i) and (ii). According to the petitioners eligible and willing candidates belonging to items (i) and (ii) were not available for appointment as Hospital Attendants Gr.II and it was taking that aspect also into consideration the Employment Exchange was directed to sponsor qualified candidates for appointment to the post of Hospital Attendants Gr.II; and orders appointing the petitioners were made by the competent authorities. Petitioners rely on the

judgment in W.A.96/2000 passed by the Division Bench of this Court. Respondents had contended before the Division Bench that Hospital Attendants who were parties in W.A.96/2000 were appointed under Rule 9(a)(i) of K.S & S.S.R and their services were liable to be terminated to give place to regular recruits. Division Bench did not accept this argument and held that Rule 9(a)(i) of K.S & S.S.R cannot be made applicable to appointments made to categories of posts coming within the purview of Kerala Last Grade Service.

4. Govt.Pleader points out that the judgment of the Division Bench in W.A.96/2000 are on the basis of the facts, circumstances and materials available in that case, and, therefore, the above judgment cannot be considered as laying down a principle of law that whenever appointments are made to the post of Hospital Attendants Gr.II from candidates sponsored by the Employment Exchanges those appointed are to be treated as regular recruits. Therefore, appointments, made contrary to the method laid down in items (i) and (ii) of Rule 5 for Category 4, are liable to be terminated. Another contention raised on behalf of the respondents is that direct appointment through the Employment Exchanges envisaged by the Rules fall under two categories, (i) appointments made on a requisition made by the appointing authority to the Employment Exchange for filling up posts on temporary basis and (ii) on requisition made for filling up vacancies on a regular basis. Relying on Ext.R1(a) Government order dated 18.1.1988 and the annexure attached thereto it is submitted that full time vacancies falling outside the purview of the Public Service Commission shall be filled up through Employment Exchanges by circulating the requisition on statewise basis whereas vacancies which are purely provisional (as certified by the employer) or vacancies arising due to leave taken by regular hands or daily rated employment or other specific duration employment not exceeding three months, can be filled up by giving the requisition districtwise circulation only. According to the Govt.Pleader some of the appointments made by the respondents in these cases were not intended to be filled up on a regular basis and, therefore, it will not be in accordance with law to allow the beneficiaries of such appointments to continue on regular basis.

5. Counsel for the petitioners submitted that the distinction pressed into service based on two different procedure, for sponsoring the candidates, to be followed by the Employment Exchange was not a point considered by the Division Bench and such a contention cannot be advanced to prejudice the rights of the petitioners to continue in employment based on the dictum laid down by the Division Bench.

6. Having examined the facts of these cases with reference to the relevant statutory provisions, the judgment in W.A.96/2000 and Ext.R1(a) Circular produced along with the counter affidavit of the respondents, I think the most important question to be considered is whether the petitioners herein were appointed infringing the rights of feeder category members who come within the purview of items (i) and (ii). If the rights of such feeder category members have been infringed, judgment of the Division Bench cannot stand in the way of this Court holding that such appointments are bad in law because as rightly contended by the Government Pleader, W.A.96/2000 was decided on the basis of the facts available in the Writ Appeal before the Division Bench as also the materials produced in the Writ Petitions which were disposed of along with the Writ Appeal mentioned above. Therefore, if the facts and materials available before me would lead to the conclusion that appointments have been made in violation of items (i) and (ii) of the method of appointment under Rule 5 of the Rules, beneficiaries of those appointments cannot claim the right to get their services regularised or to continue in that post indefinitely as though they are regular recruits.

7. In the counter affidavit the respondent has averred that there were eligible and willing hands to be appointed against vacancies of Hospital Attendants and therefore, the appointments of these petitioners were irregular and cannot be made regular. As directed by this Court, Govt.Pleader got the necessary particulars from the District Medical Officers of all the districts in this State numbering 14, and a statement showing the districtwise, details of Hospital Attendants Gr.II in the Health Services Department has been placed for the consideration of this Court. The particulars furnished in that statement are reproduced below:

STATEMENT SHOWING THE DISTRICT WISE DETAILS OF HOSPITAL

ATTENDANT GR.II IN THE HEALTH SERVICES DEPARTMENT

District Sanctioned post Existing Existing Eligible
of HA Gr.II strength vacancy candidate
for pro-
motion

Thiruvananthapuram- 864 41 Total-823 20 (will be
thapram 38 (Open promoted
vacancies) soon on
785 (occupied completion
by daily waged of procedural
& based on formalities)
Court Order)

Kollam 264 19 Total- 245 Nil
105-(daily
waged)
140-(based
on Court order)

Pathanamthitta 153 13 Total -140 24

70 (Daily Waged)

29 (based on

Court order)

41 (Open

vacancies)

Alappuzha 384 193 191 Nil

Idukki 138 75 63 10

Kottayam 395 286 109 35

Ernakulam 407 264 143 Nil

Thrissur 465 380 85 Nil

Wayanad 90 88 2 Nil

Palakkad 301 210 91 Nil

Malappuram 301 143 158 56

Kozhikode 523 322 201 75

Kannur 352 232 120 30

Kasaragod 141 89 52 38

8. From the above statement it appears that Hospital Attendants like the petitioners were appointed against open vacancies and that sufficient number of eligible and willing employees belonging to the part time services were not available for promotion to the post of Hospital Attendants. This being the factual position I have no hesitation to hold that the appointments of these petitioners

were made in accordance with Rule 5 of the Kerala Last Grade Service Rules. Method of appointment under item (iii) has been resorted to only on finding that feeder category members coming under items (i) and (ii) were not available for promotion/appointment. The statement also shows that appointments of the petitioners and others as Hospital Attendants were made against sanctioned posts.

9. Therefore, the only issue that arises for consideration is whether the Employment Exchanges had sponsored the candidates by following the procedure prescribed in the annexure attached to Ext.R1(a). It is contended by the counsel for the petitioners that the above question need not be considered while disposing these Writ Petitions. Firstly, materials are not available before this Court to come to any conclusion as to whether the Employment Exchanges had sponsored the candidates following the procedure for temporary vacancies or regular vacancies. Secondly, the above question is pending consideration before the Supreme Court at the instance of the respondents.

10. It is pertinent to note that the above point is not seen considered or decided in the judgment in W.A.96/2000. State of Kerala has challenged the judgment of the Division Bench in the aforesaid cases. One of the points raised in the S.L.P. is whether the procedure referred to in Ext.R1(a) is mandatory for appointing Hospital Attendants on a regular basis. Supreme Court has passed interim orders in the S.L.P. Taking note of the above fact, a learned Judge of this Court, (Kurian Joseph, J.) has taken the view that Hospital Attendants in service as on the date of the interim order of the Apex Court in the S.L.P shall be allowed to continue service but subject to the outcome of the cases before the Supreme Court on the subject. I am inclined to take the same view taken by the learned Judge. It follows that the services of the petitioners are not liable to be terminated until and unless the Hon'ble Supreme Court takes a different view of the matter in the Special Leave Petition pending consideration before the Supreme Court. Ordered accordingly.

11. Some of the petitioners have got a grievance that though they are working as Full Time Hospital Attendants Gr.II and are discharging their duties as such, they

are not paid emoluments in the pay scale attached to the post of Hospital Attendants Gr.II. They are paid emoluments on a daily wage basis and that too only for a maximum of 26 days in a month. In view of the fact that the petitioners were appointed under the method of direct recruitment prescribed under item (iii) of Rule 5 and no infringement of the statutory provision has been established in the matter of appointment of the petitioners, there shall be a direction that all Hospital Attendants appointed by competent authorities viz., the concerned District Medical Officers, through Employment Exchanges, shall be paid pay and allowances in the scale applicable to the post of Hospital Gr.II.

12. It is true that the Division Bench has taken the view that Hospital Attendants appointed in the post can continue as regular appointees. But that decision was taken as is evident from the discussions in the Division Bench judgment that the Court had no material before it to come to the conclusion that such appointments were made violating the method under items (i) and (ii) of Rule 5. In other words if there were materials before the Division Bench to find that rights of the feeder category members, who belong to the part time services stood violated and eligible and willing persons were denied due promotions while resorting to the method of direct recruitment, such appointments would have been found illegal. In this batch of cases also, a verdict is given in favour of the petitioners because facts and materials do not disclose any violation of the method prescribed by the Rules.

13. It is the duty of the appointing authorities to see that vacancies in the post of Hospital Attendants Gr.II are filled up by following the method of appointment prescribed by the Rules. The District Medical Officers shall ensure that part time employees working in the respective districts in the Health Services Department are not willing to get promotion to the post of Hospital Attendants Gr.II in the 50% quota allotted to them. As regards the 50% vacancies coming under item (ii), the District Medical Officer shall inform the District Collector concerned about the number of vacancies to be filled up by eligible and willing part time employees in all the other departments in that district. This intimation shall be given promptly and sufficiently early. As soon as the intimation is received by the District Collector urgent steps shall be taken to collect information regarding the availability of

candidates for promotion as Hospital Attendants in the 50% quota falling under item (ii) of Rule 5. Only after the appointing authority viz., the District Medical Officer is satisfied that eligible and willing persons are not available under items (i) and (ii), regular appointment of Employment Exchange candidates under the procedure prescribed for direct recruitment under item (iii) can be resorted to. In cases where unavoidable delay occasions in filling up the vacancies of Hospital Attendants after collecting the required details, the District Medical Officer will be free to fill up such vacancies on a temporary basis from the list of candidates supplied by the Employment Exchanges as provided in Annexure R1(a) Circular. Needless to state that in the absence of eligible and willing persons under items (i) and (ii), candidates from the Employment Exchanges can be appointed by the District Medical Officer as Hospital Attendants on a regular basis against regular vacancies.

Writ Petitions are disposed of with the above observations and directions.

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