

(1971) 01 KL CK 0016

High Court Of Kerala

Case No: W.A. No. 254 of 1971

R. Godavarma and
others

APPELLANT

Vs

K.P. Aboobacker and
others

RESPONDENT

Date of Decision: Jan. 5, 1971

Acts Referred:

- Constitution of India, 1950 - Article 16

Citation: (1973) KLJ 541

Hon'ble Judges: P. Govindan Nair, J; G. Viswanatha Iyer, J

Bench: Division Bench

Judgement

P. Govindan Nair, J.

These appeals are by the third respondent in O.P. No. 1220 of 1969 and by the first and second respondents therein the State of Kerala and the Director of Dairy Development, Trivandrum against the judgment of Isaac J. allowing the original petition and setting aside the order Ex. P2 impugned in that original petition. By Ex. P2 order the inter se seniority of the petitioner and respondents 3 and 4 in O.P. No. 1220 of 1969 was settled. We will be referring to the parties as they were arrayed in O.P. No. 1220 of 1969. The order Ex. P2 it was contended was discriminatory and against R. 27 of the Kerala State and Subordinate Services Rules (hereinafter referred to as the Rules) 1958. Isaac J. accepted the contention that the order was against R. 27 of the Rules and also accepted a further contention that the order was liable to be set aside in view of the principle laid down by this Court in its Full Bench decision in [M.P. Raghavan Nair Vs. State Insurance Officer and Others](#), . This Court held in that decision that if a promotion granted unconditionally had not been challenged by persons who could have challenged such promotions those who had not so challenged the promotions cannot later on seek to in effectuate such a promotion. The principle so laid down was sought to be applied in this case on the

basis of the contentions that the petitioner in O.P. No. 1220 of 1969 had been promoted as an Assistant Director as early as 22-6-1963 and that respondents 3 and 4 therein were promoted only on 6-7-1965 and 26-7-1965 and that respondents 3 and 4 not having challenged the promotion given to the petitioner on 22-6-63, they were not entitled to in effectuate that promotion by altering the seniority of the petitioner and respondents 3 and 4 in the cadre of Dairy Extension Officers to which posts all the three were appointed. We do not think this contention is well founded. We have verified the nature of the promotions that have been granted to the petitioner. The order of promotion had specifically stated that it was a provisional one. It has become customary in this State to use the expression "provisional" though such an expression as such is not envisaged by the rules. This expression "provisionally" is mainly used in regard to appointments under R. 9 (or R. 31) of the Kerala State and Subordinate Services Rules. We have therefore to understand the promotion that had been granted as one falling under R. 31 of the Rules. Though the word "temporary" is not used the order of promotion can only be understood as one passed under R. 31. The appointee therefore did not become a probationer and will not be entitled by reason only of such promotion to any preferential claim to future promotion to such higher category (see R. 31(2)(d)). In cases of appointments which can be treated as appointments falling under R. 31 we do not think the principle of the decision in [M.P. Raghavan Nair Vs. State Insurance Officer and Others](#), can be applied. The only other question arising for consideration is whether the order Ex. P2 violates R. 27 of the Rules. It is true that the petitioner had been appointed as an Extension Officer in the Dairy Development as early as 7-1-1963 and the respondents 3 and 4 were appointed only on 8-5-1963 and 20-12-1963 respectively. We notice on perusal of the file that the petitioner's appointment was stated to be specifically under R. 9(a)(i) of the Rules. The order of appointment of respondent 3 had been made available to us. The order of appointment of the 3rd respondent does not show that the appointment was a provisional one. The order of the 4th respondent is not made available. Ex. P2 order however states that the petitioner as well as respondents 3 and 4 were appointed provisionally. All the three were working in the Animal Husbandry Department before they were transferred and appointed in the Dairy Development Department on the dates mentioned above. In the Animal Husbandry Department the 3rd respondent was the senior most. The 4th respondent was the next senior and the petitioner was the junior most. By the order Ex. P2 it was directed that the appointments of the three persons in the Dairy Development Department as Extension Officers will be regularised with effect from 20-12-1963 the date on which the 4th respondent was transferred to the Dairy Development Department and that the three will have the respective ranks which they held while they were in the Animal Husbandry Department. The principle that has been applied by Ex. P2 order is challenged on the ground that by the appointment of the petitioner to the Dairy Development Department on 7-1-1963 he was entitled to reckon that date for the purpose of his seniority by virtue of R. 27 of the Rules. This is the contention that has been accepted by the learned judge. As far

as the petitioner is concerned it is clear from R. 9 that by virtue of his appointment as Extension Officer in the Dairy Development Department he had not become a probationer (see R. 9(a)(iv) and R. 27 has specifically stated that in cases where any portion of the service of the person appointed does not count towards probation under the rules, that person's seniority shall be determined by the date of commencement of his service which counts towards probation. We have not been told and it has not been established that there has been what we may term "regular appointment" as Extension Officer in the Dairy Development Department and that the petitioner had commenced his probation in the service. This being so R. 27 on which reliance has been placed will have no application.

2. The order Ex. P2 has stated that all the three were appointed as Extension Officers in the Dairy Development Department "provisionally". In the original petition that has been filed there has been no categorical denial of this statement in Ex. P2. We have therefore to take it that the appointments of all the three persons as Extension Officers in the Dairy Development Department were on a provisional basis. Even if this is not so, before the petitioner can claim that he is entitled under R. 27 to service from the date of his appointment he must establish that he had become a probationer. The petitioner was specifically appointed under R. 9(a)(i) and had not therefore become a probationer. He cannot claim seniority on the basis of his service from the date of his appointment.

3. What we have said above is sufficient to dispose of this appeal. But it was contended by counsel for the petitioner in O.P. No. 1220 of 1969 that this is a clear case of discrimination. For this purpose he relied on a judgment rendered by one of us in O.P. No. 348 of 1968 and reference was made to the principle adopted by the Government then in determining the inter se seniority of the petitioner in that O.P. vis-à-vis the 3rd respondent therein one Philipose Thomas. The petitioner in O.P. No. 348 of 1968 was working as an Assistant Registrar in the Dairy Wing of the Cooperative Department when he was provisionally appointed as Assistant Director of Dairy Development Department on 21-10-1962. The 3rd respondent was working in the Animal Husbandry Department as Manager when he was provisionally appointed as Dairy Manager in the Dairy Development Department on 1-1-1962. In settling the inter se seniority of the two the Government took into consideration the respective dates on which the two persons were appointed provisionally in the Dairy Development Department. This Court said that there was nothing wrong in such procedure being adopted. The point we have dealt with in this judgment has not been considered in the judgment but there is the following sentence therein which clearly supports the contention of counsel for the petitioner that this Court upheld the view of the Government that the past services of the two persons concerned in that O.P. cannot be taken into account for regularising their appointment in the Dairy Development Department. One of us who disposed of the case said "No doubt he was working as an Assistant Registrar and before that as an Inspector in the Cooperative Department but those are posts belonging to the Cooperative Service

and his service in that category cannot be taken into account for regularising his appointment in the Dairy Development service". It is not clear on the basis of what principle it has been so stated in the judgment. It may be recalled that the two persons concerned therein the petitioner and the 3rd respondent came from different departments; the petitioner from the Cooperative Department and the 3rd respondent from the Animal Husbandry Department. There was no question of any existing inter se seniority between the two before they came to the common service under the Dairy Development Department. Perhaps this was the reason why the above statement was made. Perhaps the real question arising for consideration had not been borne in mind. As far as we are able to see there is no principle laid down by the rules in regard to this matter of counting or not counting prior service when a person is transferred from one department to another either at the request of such a person or due to administrative exigencies. There is however a Government Order G.O. MS. No. 4 Public (Services B) Department dated Trivandrum, 2nd January, 1961 which clearly says that if a person is transferred from one department to another, due to administrative reasons he does not lose his service. This G.O. was not brought to the notice of the Judge who disposed of O.P. No. 348 of 1968 and the correct procedure to adopt even in cases where persons are transferred from two different departments to a 3rd one for administrative reasons would be to take their respective prior service into consideration. If that is the principle to be applied, the principle adopted by the Government in taking the date of appointment to the third service as the criterion was not correct. In the light of the above, the judgment in O.P. No. 348 of 1968 does not seem to be correct. It has affirmed the application of a wrong principle. The principle applied therein being wrong cannot be relied on for the purpose of showing that there has been discrimination. Now the State Government having applied the correct principle by Ex. P2 order it is upto them to apply it uniformly and rectify mistakes if any committed by them by omitting to apply that principle or by applying a different principle. If the appointment is one under R. 9(a)(i) by virtue merely of such appointment, the appointee does not get any right to the post to which he is appointed. He does not get a preferential claim to reappoint to that post. He does not become a probationer by virtue of such an appointment. Nor is he entitled to count the period of service which he rendered pursuant to such an appointment for the purpose of reckoning his seniority under R. 27 of the Rules. This being so it is open to the State Government to regularise the appointment and this can be done with reference to such date as the Government feels, is the appropriate date for so regularising the appointment. In these cases the appointments of the three have been regularised with effect from 20-12-63. When all the three had been appointed on a particular date it is open to the State Government to determine who among them is senior. This is clear from R. 27(b) and in so determining the inter se seniority of the persons appointed on a specific date, if the Government considered, their past services in the department from which they had been transferred as relevant factors in determining the

question of their inter se seniority in the new posts to which they had been appointed, it cannot be said to be wrong or unfair or for that matter against the rules applicable or against Art. 16 of the Constitution, it goes without saying therefore that this Court cannot interfere with such procedure. The order Ex. P2 must therefore stand. We allow this appeal; set aside the judgment under appeal and dismiss the original petition. There will be no order as to costs.