

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT:

THE HON'BLE THE CHIEF JUSTICE MR. ASHOK BHUSHAN
&
THE HONOURABLE MR.JUSTICE A.M.SHAFIQUE

MONDAY, THE 1ST DAY OF JUNE 2015/11TH JYAISHTA, 1937

WA.No. 1 of 2010 ()

(AGAINST THE ORDER/JUDGMENT IN WP(C).NO. 22913/2007 DATED 16-10-2009)

APPELLANT(S)/PETITIONERS 2 TO 4 :

1. SHAMIL KRISHNAN.C.K.,
SENIOR GRADE ASSISTANT, EXAMINATION BRANCH,
KANNUR UNIVERSITY, KANNUR UNIVERSITY CAMPUS.P.O.,
MANGATTUPARAMBA, KANNUR.
2. NIRON DAS.C.K., ASSISTANT,
SCHOOL OF DISTANCE EDUCATION,
KANNUR UNIVERSITY CAMPUS.P.O.,
MANGATTUPARAMBA, KANNUR.
3. THARA.T.K., SENIOR GRADE ASSISTANT,
EXAMINATION BRANCH, KANNUR UNIVERSITY,
KANNUR UNIVERSITY CAMPUS.P.O.,
MANGATTUPARAMBA, KANNUR.

BY ADV. SRI.M.P.ASHOK KUMAR

RESPONDENT(S)/1ST PETITIONER/RESPONDENTS :

1. DINESHAN CHENARATH, SENIOR GRADE ASSISTANT,
EXAMINATION BRANCH, KANNUR UNIVERSITY,
KANNUR UNIVERSITY CAMPUS.P.O., MANGATTUPARAMBA, KANNUR.
2. THE KANNUR UNIVERSITY, REPRESENTED BY ITS REGISTRAR,
KANNUR UNIVERSITY CAMPUS.P.O., MANGATTUPARAMBA, KANNUR.
3. THE VICE CHANCELLOR, KANNUR UNIVERSITY,
KANNUR UNIVERSITY CAMPUS.P.O., MANGATTUPARAMBA, KANNUR.
4. STATE OF KERALA, REP. BY THE SECRETARY TO GOVERNMENT,
HIGHER EDUCATION DEPARTMENT, GOVERNMENT SECRETARIAT,
THIRUVANANTHAPURAM.
5. ANIL CHANDRAN, SENIOR GRADE ASSISTANT,
KANNUR UNIVERSITY, KANNUR UNIVERSITY CAMPUS.P.O.,
MANGATTUPARAMBA, KANNUR.

6. **SWAPNA SUKUMARAN,
SENIOR GRADE ASSISTANT, KANNUR UNIVERSITY,
KANNUR UNIVERSITY CAMPUS.P.O., MANGATTUPARAMBA,
KANNUR.**
7. **SAJITH.M.K.,
SENIOR GRADE ASSISTANT, KANNUR UNIVERSITY,
KANNUR UNIVERSITY CAMPUS.P.O., MANGATTUPARAMBA,
KANNUR.**
8. **DISEEJA.S.D.,
SENIOR GRADE ASSISTANT, KANNUR UNIVERSITY,
KANNUR UNIVERSITY CAMPUS.P.O., MANGATTUPARAMBA, KANNUR.**

**R2 & R3 BY ADV. SRI.M.SASEENDRAN,SC,KANNUR UNIVERSITY
R4 BY SR GOVERNMENT PLEADER SRI.P.I.DAVIS
R5 TO R7 BY ADV. SRI.V.A.MUHAMMED
SRI.M. CHANDRA BOSE**

**THIS WRIT APPEAL HAVING BEEN FINALLY HEARD ON 01-06-2015, THE COURT
ON THE SAME DAY DELIVERED THE FOLLOWING:**

**ASHOK BHUSHAN, CJ
&
A.M. SHAFFIQUE, J.**

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W.A. No. 1 of 2010

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Dated this, the 1st day of June, 2015

J U D G M E N T

Ashok Bhushan, CJ

Heard Sri.M.P.Ashok Kumar, learned counsel for the appellants and the learned standing counsel appearing for the University.

2. This writ appeal has been filed against the judgment dated 16th of October 2009 passed in W.P (C) No. 22913/2007. Petitioners are appellants since the writ petition filed by them has been dismissed.

3. Brief facts giving rise to this appeal are the petitioners were appointed as Assistant Grade II in the University who joined on 01/6/2005, 11/3/2004, 12/5/2005 and 15/3/2004 respectively. This appeal has been filed by petitioners 2 to 4 alone. The first petitioner has not filed the appeal. In the University, the next higher post for promotion was Senior Grade Assistant. Petitioners were on probation for a period of one year. The party respondents

in the appeal, who were also working as Assistant Grade II, were promoted as Senior Grade Assistant on 17th March, 2005. The dates of promotion of respondents is only given upto to Anil Chandran and Swapna Sukumaran. Private respondents 4 and 5 were promoted on 17/3/2005 as Senior Grade Assistant. A seniority list was published by the University, Ext.P3, wherein, promotion of private respondents were shown as Senior Grade Assistant. Other lists were issued as per Exts.P4 and P5. Petitioners have come up in the writ petition praying for the following reliefs;

- “(i) Issue a writ in the nature of certiorari or any other direction or orders quashing Exhibit P3, P4 and P5 seniority list;*
- (ii) Issue a writ of mandamus, or any other writ, order or direction, directing the respondents to grant promotion to the petitioners as selection grade assistants in accordance with law and to revise and publish seniority list of senior grade and selection grade assistants in accordance with proviso to Rule 28(a) of KS & SSR, retaining their seniority in the cadre as above their juniors and to get their ranks reassigned in the said seniority lists in accordance with law and to grant the petitioners all consequential reliefs.”*

4. Learned Single Judge dismissed the writ petition holding that as the petitioners have not passed Account Test, which was one of the essential qualification for promotion to Senior Grade Assistant, no error was committed in granting promotion to the juniors earlier. It is useful to refer to the observation made by the learned single Judge in para 2, which is to the following effect;

"2. As already seen, pass in Account Test was one of the essential qualifications for promotion and though juniors to the petitioners, the respondents had passed the test prior to their promotion. If that be so, they satisfied the prescribed qualification. Therefore, the promotion given to them cannot be said to be illegal."

5. Aggrieved by the judgment of the learned single Judge, the appellants have come up in this writ appeal. Learned counsel for the appellants submits that the petitioners were appointed on probation, which was for a period of one year within a continuous period of two years as per the Kannur University First Statutes, 1998 Chapter IV, Part II, Clause 10, which, being relevant, is quoted as below;

“10. Probation (1) Every persons appointed to Class I, II and III posts shall, from the date on which he joins duty, be on probation for a period of one year within a continuous period of two years:

Provided that it shall be competent for the Vice-Chancellor to extend the period of probation for a period not exceeding one year for good and sufficient reasons.”

6. Learned counsel submits that all the petitioners have passed Account Test within the period of two years. Hence, they were entitled for consideration of promotion by virtue of the provisions of Rule 28(a) of Kerala State and Subordinate Services Rules, 1958 (for short the 1958 Rules). He submits that non consideration of petitioners during the period when they were under probation is erroneous since they had right to be considered for promotion during that period and superseding the petitioners for promotion is contrary to the provision of Rule 28(a) of the 1958 Rules. He has placed reliance on the judgment of this Court reported in **Devadasan v. K.S.E.B.** (2001 (1) KLT 278) as well as the Division Bench judgment of this Court in WA No.880/1998 (**T.G.Janardhana Babu v. State of Kerala & Ors.**) decided on 5th January, 2000. Learned counsel for the

University refuted the submission of the learned counsel for the appellants and contends that the petitioners being not qualified for promotion, having not passed the Account Test at the relevant time when juniors were promoted, cannot complain violation of Rule 28(a). It is submitted that the benefit of Rule 28(a) shall be applicable only if probation has not been cleared by an applicant whereas as under the Ordinance of the University, one of the essential qualification for promotion as Senior Grade Assistant was passing of the Account Test.

7. We have considered the submission of the learned counsel for the parties. Admittedly, the petitioners were on probation when juniors to them were promoted. The whole submission of the learned counsel for the appellants hinges on Rule 28(a) of the 1958 Rules. It is useful to extract Rule 28(a), which is to the following;

“28. (a) Promotion (i) Except in the case of appointment to the posts of Heads of Departments] no member of a service or class of a service shall be eligible for promotion from the category in which he was appointed to the service unless she has satisfactorily completed his probation in that category:

Provided that a probationer in a class, category or grade shall not be superseded for promotion to a higher class, category or grade by his junior, if the vacancy in the higher class, category or grade arises within the period specified in the Special Rules for completion of probation in the class, category or grade in which he is probationer and if he has passed the test or tests prescribed for successful completion of probation and is otherwise eligible and suitable for such promotion; but his promotion shall be subject to the condition that he satisfactorily completes the probation in the class, category or grade from which he was promoted within the period prescribed therefore, and for this purpose the period of service put in by him in the higher class, category or grade shall be reckoned towards probation in the class, category or grade from which he was promoted and also in the class, category or grade to which he was promoted:

Provided further that if a probationer promoted in pursuance of the above proviso fails to complete his probation in the class, category or grade from which he was promoted within the period prescribed therefore, his probation in the higher class, category or grade shall be terminated and he shall be reverted to the class, category or grade from which he was promoted, and any subsequent promotion of such person to the

higher class, category or grade shall not also entitle such person to claim seniority in the higher class, category or grade by reason only of his previous promotion in pursuance of the preceding proviso and he shall commence probation afresh in that class, category or grade from the date of such subsequent promotion.

(ii) where the Special Rules for a service provide for by promotion to any class or category from a specified class or category of such service, no member shall be eligible for such appointment unless he is a full member or an approved probationer in the class or category so specified.

Provided that if he is the holder of a post in any service for which no probation has been prescribed, he shall not be eligible for promotion unless he has put in satisfactory service in that post for a period of one year on duty within a continuous period of two years.

(iii) Notwithstanding anything contained in these Rules or in the Special Rules/Executive Orders, the period of probation for persons appointed by direct recruitment or recruitment by transfer through Public Service Commission shall be two years on duty within a continuous period of three years and for persons appointed in a post or category from another post or category in the same service or appointed by transfer from one service to another within the same Department or

in another Department (where direct recruitment is not resorted to) shall be one year on duty within a continuous period of two years."

8. Emphasis is made by the learned counsel for the appellants on proviso to Rule 28(a). He submits that the proviso mandates that the probationer shall not be superseded for promotion to a higher category or grade by his junior, if the vacancy in the higher class, category or grade arises within the period specified in the Special Rules for completion of probation in the class, category or grade and if he has passed the test or tests prescribed for successful completion of probation and is otherwise eligible and suitable for such promotion. Learned counsel for the appellants has submitted that the said provision has been added by notification dated 16/1/1978 to emulate the grievances of seniors who are not able to complete the probation to their juniors. Explanatory note to the said notification, i.e., SRO No.90/78, referred to by the learned counsel for the appellants, has been extracted by the Division Bench in the judgment in **T.G.Janardhana Babu** (supra).

9. Statute 12 of Chapter IV of Kannur University First Statutes, 1998, deals with promotion, which is extracted for ready

reference;

“12. Promotion-(1) No member of the University service shall be eligible for promotion from the category in which he was appointed to the service unless he has satisfactorily completed his probation in that category aforesaid passed the prescribed test.

(2)If the person is the holder of a post for which no probation has been prescribed, he shall not be eligible for promotion unless he has put in satisfactory service in that post for a period of one year on duty within a continuous period of two years.”

10. Statute 12 (1) indicates that two conditions are necessary for promotion. One is that he has to satisfactorily complete his probation in that category and passed the prescribed test. Under the Ordinances of the University, it is made clear that passing of the Account Test is not part of the test, which is necessary for declaration of probation. Declaration of probation is a different requirement than passing of Account Test. Statute 12 (1) joins both the requirement by conjunction “and”. Thus, passing of both the declaration of probation as well as passing of the prescribed test is mandatory. The Proviso to Rule

28(a) of 1958 Rules on which much reliance has been placed also requires that the probationer shall not be superseded for promotion provided that he has passed the test or tests prescribed for successful completion of probation and is otherwise eligible and suitable for such promotion. Thus, the passing of test for successful completion of probation is to be along with otherwise eligibility. One of the eligibility clause for promotion is passing of the Account Test as per Ordinance of the University has been noted by the learned Single Judge. Here, the submission of learned counsel for the appellants is that since the period of two years which was required for completion of probation was not over, he should not have been superseded during this period. The judgment of the learned single Judge in **Devadasan's case** (supra) has interpreted Rule 28(a) proviso. It is useful to quote the following observation from the judgment;

"In order to avail of this benefit, the vacancy in the higher category shall occur "within the period specified in the Special Rules for completion of probation in the class, category or grade" of Assistant Engineer. The period specified in the Special Rules for completion of probation is admittedly a continuous period of two years. In the case of the petitioner it is from 8.3.94,

when he was so promoted. The period expired on 8.3.96. If a promotion chance occurred only within that period, then alone the petitioner can aspire for application of the proviso to seek promotion notwithstanding non-completion of the period of probation. Petitioner should have completed the probation within a continuous period of two years from 8.3.1994. If any of his juniors had completed it earlier than him, and if that junior was being promoted, necessarily, the petitioner would have preference for promotion to him, notwithstanding his non-completion of probation in terms of the said proviso. Here, admittedly, the vacancies in the higher category of Assistant Executive Engineer to which his juniors had been promoted had arisen after 29.2.2000, ie., beyond the period specified in the Special Rules for completion of probation. So far as the petitioner is concerned, that period ended on 8.3.96, as he was promoted as Assistant Engineer on 8.3.94. But he could not complete his probation within that period. He cannot blame others for it. Those are not the vacancies occurred, as provided for in the said proviso, "within the period specified in the Special Rules for completion of probation". To get the benefit, the vacancy ought to have occurred within the period of probation provided for in the Special Rules, and not within the period actually taken by one to complete the probation."

11. There cannot be any dispute to the ratio of the above

judgment. However, in the said case, the question of eligibility of the probationer was not an issue. The period provided for probation is the period under which the probationer is protected from supersession, but the said case was on its own facts and distinguishable. Now coming to the Division Bench judgment in ***T.G.Janardhana Babu's case*** (supra), the Division Bench had again occasion to consider Rule 28(a). Following was laid down by the Division Bench;

"The only thing that needs to be adjudicated is what is the period to which reference has been made in the proviso. The relevant expression used in the provision is: "If he has passed the test or tests prescribed for successful completion of probation...."within the period specified in the Special Rules for completion of probation". It is to be noted that the first proviso was inserted by G.O.(P) No.29/78/GAD dated 16.1.1978 published in SRO No.90/78 in K.G.No.5 dated 31.1.1978. Under the Special Rules, the period of probation is two years."

12. The Division Bench also has referred to SRO No.90/78 and following observations were made;

"S.R.O.No.90/78 as referred to above was issued in exercise of powers conferred by sub-section (1) of Section 2 of the Kerala Public Services Act,

1968 (hereinafter referred to as 'KPS Act') read with Section 3 thereof. The purpose of insertion/amendment has been detailed in the Explanatory Note, which is not part of the Notification but is intended to indicate its general purport and reads as follows:

"There is at present no provision in the Kerala State and Subordinate Service Rules, 1958 to protect seniors against being superseded by juniors who complete probation earlier, when, owing to reasons beyond their control such as illness, delay in transit or delay to get relief from any service, the seniors are able to join duty only later than the juniors. It is now proposed to incorporate suitable provisions in the Rules with a view to affording protection to such seniors. This Notification is intended to achieve the above object."

When the object for which the proviso was inserted is taken into consideration, the inevitable conclusion was that the period prescribed for completion of probation has to be reckoned to be three continuous years as provided in Rule 10 of the Special Rules. That being the position, the proviso to Rule 28(a)(i) was clearly applicable to the appellant's case. The benefits which he is entitled to are to be worked out on that basis."

13. The aforesaid judgment also dealt with the period of probation as envisaged in proviso to Rule 28(a). The other eligibility, i.e., passing of the Account Test was not an issue in the aforesaid Division Bench judgment nor it was held that the proviso to Rule 28(a) is attracted even if other eligibilities are not completed. Coming to the facts of the present case, when the eligibility of passing the Account Test was not there with the appellants, they were not entitled for the benefit of the proviso to Rule 28(a). We do not find any error in the ultimate decision taken by the learned Single Judge dismissing the writ petition.

For the aforesaid reasons, we do not find any merit in the appeal. Appeal is dismissed.

Sd/-

ASHOK BHUSHAN, CHIEF JUSTICE

Sd/-

A.M. SHAFFIQUE, JUDGE

Rp

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PS to Judge