

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT:-

THE HONOURABLE THE CHIEF JUSTICE MR.ASHOK BHUSHAN

&

THE HONOURABLE MR.JUSTICE K.VINOD CHANDRAN

TUESDAY, THE 29TH DAY OF SEPTEMBER 2015/7TH ASWINA, 1937

W.A.No.2737 of 2009

AGAINST THE JUDGMENT IN W.P.(C).NO.34903/2007 DATED 04.11.2009
OF HIGH COURT OF KERALA.

APPELLANT(S)/ RESPONDENTS 12 TO 33 IN W.P.(C):-

1. MURALEEDHARAN.V, S/O.VASUDEVAN.K,
FAMILY QUARTER NO.F/9, S.A.P, PEROORKADA.P.O.
2. VIJAYAKUMARAN NAIR.P, S/O.PADMANABHA PILLAI.R,
VIJAYA NIVAS, CHERIYAKONNI.P.O, BHAGAVATHIPURAM.
3. SURESH KUMAR.S, S/O.SIVAN NAIR.K,
MANCHAVILAKOM VEEDU, POOVAR, POOVAR.P.O.
4. KRISHNANKUTTY.A, S/O.AYYAKUTTY.P,
FAMILY QUARTER NO.F-10, S.A.P. CAMPUS, PEROORKADA.PO,
THIRUVANANTHAPURAM.
5. PRADEEP KUMAR.B, S/O.BHARGAVAN.J,
PRA.75, 'ANUPAM', KAMALESWARAM,
MANCAUD.P.O, THIRUVANANTHAPURAM.
6. MOHANAN.S, S/O.SEPANIYAVE.J,
FAMILY QUARTER NO.G-13/A, PEROORKADA.P.O.,
THIRUVANANTHAPURAM-5.
7. GLADSTON, S/O.ABIASAR,FAMILY QUARTER G.2/B,
SAP CAMP, PEROORKADA.P.O.,THIRUVANANTHAPURAM.
8. GOPAKUMAR, S/O.KRISHNAN NAIR.P,
KRISHNA MANDHIR, T.C.3/1454, PATTOM.P.O.,
THIRUVANANTHAPURAM-4.
9. VARADHARAJAN PILAI,S/O.RAGHAVAN PILLAI.K.,
FAMILY QUARTER NO.G-10/B, SAP CAMP, PEROORKADA.P.O.,
THIRUVANANTHAPURAM.

10. SURESH KUMAR.G, S/O.GOPINATHAN NAIR.K,
'SWARAM', T.C.10/189-1, SWATHY NAGAR,
2ND LANE, PEROORKADA.P.O.
11. ANIL KUMAR, S/O.VIKRAMAN.V, SREE BHAVAN,
CHAKRAPANIPURAM, PUTHUKULANGARA.P.O, OZHAMALAKKAL.
12. VIJAYAKUMARAN NAIR, S/O.PADMANABHA PILLAI.P,
PADMA VILASOM, VETTAMUKKU,
THIRUMALA.PO, THIRUVANANTHAPURAM-06.
13. MURUGAN.S.S, S/O.SADHASIVAN.C,
KUTTIKATTA MINISADHANAM, ELANGAMVILA LANE, T.K.P.ROAD,
MUTTADA.P.O.
14. ANIL KUMAR, S/O.RAGHAVAN PILLAI.R,
LEELA BHAVAN, CHATHANKONAM, KALLARA.P.O.,
THIRUVANANTHAPURAM.
15. SURESH BABU.A, S/O.APPUKKUTTAN PILLAI.M,
FAMILY QUARTER NO.B-15, SAP CAMP, PEROORKADA.P.O.,
THIRUVANANTHAPURAM.
16. ROLAND THOMAS, S/O.THOMAS,
T.C.3/893(1), ROSE VILLA, MUTTADA.P.O, L.M.S.NAGAR-695 025.
17. PADMAKUMAR.T.V, S/O.THRIVIKRAMAN NAIR,
T.V.NILAYAM, ONAMKODE, THANNIMOODU.P.O,
THIRUVANANTHAPURAM.
18. AJI.P, S/O.PAPPAN.S,
T.C.36/1357, PANAYIL VEEDU, EYYAMVILAKONAM, THIRUMALA.P.O.,
THIRUVANANTHAPURAM-06.
19. JAYACHANDRAN.K, S/O.KUNJUKRISHNA PILLAI.P,
SUKUMARA BHAVAN, MANTANKIL.PO,
THIRUVANANTHAPURAM-695 571.
20. LEVAKUMAR, S/O.SAHADEVAN.N,
'THIRUVATHIRA', THURVIKKAL.PO, THIRUVANANTHAPURAM-31.
21. KOSHY.P.T, S/O.THOMAS.P.T,
VAZHAYIDATHU ZION, T.C.14/79, NEAR KIMS HOSPITAL,
AKKVILAM AVENUE, ANAYARA.P.O, THIRUVANANTHAPURAM.
22. SURESH KUMAR, S/O.ANANDARAMAN.G,
UKKAZHACHI, VILAKOM, T.C.48/544
ARA-123, MANARCAUD.PO, THIRUVANANTHAPURAM-9.

BY ADVS.SRI.M.JACOB MURICKAN
SRI.DINESH MATHEW J.MURICKEN
SRI.P.V.BALAKRISHNAN.

RESPONDENT(S)/ PETITIONERS/RESPONDENTS 1 TO 11 IN W.P.C.:-

1. RAJEEVAN.A,
ARMED POLICE ASST.SUB INSPECTOR, 4TH BATTALION,
MANGATTUPARAMBA, KANNUR.
 2. GANGADHARAN.P, ARMED POLICE ASST.SUB INSPECTOR,
4TH BATTALION, MANGATTUPARAMBA, KANNUR.
 3. K.MADHU, ARMED POLICE ASST.SUB INSPECTOR,
KERALA POLICE ACADEMY, THRISSUR.
 4. SHAIJU ANTONY, ARMED POLICE ASST. SUB INSPECTOR,
KERALA POLICE ACADEMY, THRISSUR.
 5. STATE OF KERALA, REP. BY ITS HOME SECRETARY,
HOME DEPARTMENT, SECRETARIAT, THIRUVANANTHAPURAM.
 6. THE DIRECTOR GENERAL OF POLICE, THIRUVANANTHAPURAM.
 7. THE INSPECTOR GENERAL OF POLICE,
ARMED POLICE BATTALION, THIRUVANANTHAPURAM.
 8. THE COMMANDANT, SPECIAL ARMED POLICE,
THIRUVANANTHAPURAM.
 9. THE COMMANDANT, M.S.P, MALAPPURAM.
 10. THE COMMANDANT, KERALA ARMED POLICE,
1ST BATTALION, RAMAVARMAPURAM, THRISSUR.
 11. THE COMMANDANT, KERALA ARMED POLICE,
2ND BATTALION, MUTTIKULANGARA, PALAKKAD.
 12. THE COMMANDANT, KERALA ARMED POLICE,
3RD BATTALION, ADOOR, PATHANAMTHITTA.
 13. THE COMMANDANT, KERALA ARMED POLICE,
4TH BATTALION, MANGATTU PARAMBU, KANNUR.
 14. THE COMMANDANT, KERALA ARMED POLICE,
5TH BATTALION, MANIYAR, PATHANAMTHITTA.
 15. THE COMMANDANT, STATE RAPID ACTION FORCE,
PANDIKKAD, MALAPPURAM.
- R1 TO 4 BY ADVS. SRI.ELVIN PETER P.J.
SMT.POOJA SURENDRAN
R5 TO R15 BY SPECIAL GOVERNMENT PLEADER SMT.GIRIJA GOPAL.

THIS WRIT APPEAL HAVING BEEN FINALLY HEARD ON 18.09.2015
ALONG WITH WA.NOS.2744/2009, WA.2760/2009, WA.2/2010 & WA. 26/2010,
THE COURT ON 29-09-2015 DELIVERED THE FOLLOWING:-

APPENDIX

APPELLANT'S ANNEXURES:-

ANNEXURE A1 TRUE COPY OF THE ORDER ISSUED BY THE
COMMANDANT, KAP 4TH BATTALION,
MANGATTUPARAMBA, DATED 28.02.1994.

vku/-

[true copy]

Ashok Bhushan, C.J. & K.Vinod Chandran, J.

W.A.Nos.2737 of 2009, 2744 of 2009, 2760 of 2009,
2 of 2010 and 26 of 2010

Dated this, the 29th day of September, 2015

JUDGMENT

Vinod Chandran,J:

The dispute raised in the above appeals pertains to the seniority in the cadre of Havildars of the Kerala Police.

2. The admitted facts are that, earlier appointments as Police Constables, through the Public Service Commission [for brevity “PSC”], were made only to the Armed Police Battalions within the State. Subsequently on options being made for transfer, the Police Constables who have expressed their options are transferred to the District Armed Reserve; the launch pad to the local police. Vacancies in the local police are filled up from the District Armed Reserve and the Police Constables from the Battalions are accommodated in the resultant vacancies in the District Armed Reserve. The State had also brought out the Kerala Police Subordinate Services (Armed Police Battalions) Special Rules [for brevity “Special Rules”], which prescribed the method of appointment

to the post of Havildar.

3. The petitioners in W.P.(C).No.34903 of 2007 are the respondents 1 to 4 in W.A.No.2737 of 2009. The petitioners in W.P.(C).No.8077 of 2009 are the respondents 1 to 3 in W.A.No.2744 of 2009. The respondents in the respective writ petitions are the appellants in the said appeals. The Government too has filed two appeals, W.A.Nos.2 of 2010 and 26 of 2010, from the common judgment of the learned Single Judge. W.A.No.2760 of 2009 is filed by third-parties with leave obtained from this Court. The parties are referred to as seen from the writ petitions and any reference to the party respondents would include the third-parties who filed appeal with leave.

4. The relevant dates pertaining to the appointment, declaration of probation and promotion of each of the parties need not be referred to. Suffice it to say that, the petitioners were persons who were appointed to the post of Police Constables in the Armed Reserve Battalions and were promoted to the post of Havildars, provisionally, before their probation was declared. The respondents, all of whom were appointed earlier to the petitioners, again as Police Constables in the Armed Reserve Battalions, were promoted to the post of Havildars after their probations were

declared in the post of Police Constable. The date of regularisation in the post of Havildars were granted from the date of their respective promotions, i.e., with respect to the petitioners from the date of their provisional promotion and with respect to the respondents from the date of their regular promotion. This resulted in the seniors in the cadre of Police Constables, being pushed down in the seniority list of Havildars; common to all the Battalions of the State.

5. The question raised in the appeals is, as to whether the petitioners were entitled to be promoted regularly to the post of Havildars before they completed their probation in the cadre of Police Constables. If not, their promotion to the post of Havildars could be regularised only after their probation in the cadre of Police Constable is declared and then their seniority would have to be assigned only from that date. The learned Single Judge, on the basis of the Special Rules, specifically Rule 3(a)(3); held that Note-2 to the said rule enabled such promotions even before the probation is declared and since the Special Rules would have to prevail over the General Rules, the promotion of the petitioners ought to be regularised from the date of their provisional promotion itself.

6. The petitioners and the respondents were admittedly appointed, first regularly to the Battalions through the PSC in the early 1990s. The seniority in the cadre of Police Constable was drawn up with respect to each Battalion and even as per the Special Rules, the promotions to the post of Havildars have to be made from the Police Constables in that Battalion; however with a provision for promotions by way of transfer from among the Havildars in other Armed Police Battalions or by promotion of Police Constables in other Armed Police Battalions; but, however, the two later streams being available only for the first three years from the date of appointment of the first direct recruit Police Constable as per Note-1 to Rule 3(a)(3).

7. In the post of Havildars, there was to be a common seniority list in all the Armed Police Battalions. Such a list was drawn up by Exhibits P2 and P2(a) on 23.06.2004, produced in W.P.(C).No.34903 of 2007, which finalised the seniority of Havildars of the Armed Police Battalions as on 01.01.1998. Exhibit P2 order shows that earlier a seniority list was published by order dated 04.01.2002, which was revised. After publishing a revised provisional seniority list, the present one at Exhibit P2(a) was finalised. Some of the persons who figured in the list; but however,

who did not file any objections, challenged it before this Court by way of a writ petition of 2006 [W.P.(C)No.28498 of 2006], which was disposed of by Exhibit P3 judgment dated 17.11.2006, finding that Exhibit P3 filed therein is a statutory representation under Rule 27B of Part II of Kerala State & Subordinate Services Rules [for brevity "KS & SSR"]. Though the Court's finding was that in the normal course the petitioners should have filed individual appeals before the Government, all the same directed the 1st respondent to hear one of the petitioners as also those who are likely to be affected and pass final orders within a period of three months.

8. The Government by Exhibit P4 revised the list, on the ground that Note-2 under Rule 3(a)(3) though permitted promotions of Havildars even before their probation is declared, the same was subject to Rule 3(b) and Rule 8; since Note-1 of Rule 3(a)(3) restricted appointment by transfer or promotion from other Armed Police Battalions to three years. The promotions granted to the probationers were found to be temporary promotions and the same was liable for regularisation only after the declaration of probation in the lower post; was the finding. The Government noticed Rule 27(a) of the KS & SSR, which

mandated seniority of a person in a service, class or category or grade to be determined by the date of the order of his first appointment and Rule 28(a), which prohibits any member of a service or class of service from being eligible to be promoted from the category in which he was appointed to the service, unless he has satisfactorily completed his probation in that category. Exhibit P4 revision was challenged by the petitioners for reason of it being issued without hearing any of the parties and for reason of the same being contrary to the Special Rules.

9. Learned Senior Counsel appearing for the appellants in W.A.No.2760 of 2009, with reference to the specific dates of appointments of the appellants therein, points out that those persons were appointed long before the petitioners and were continuing in the respective Battalions as Police Constables when the petitioners who were probationers were promoted to the post of Havildars even before their period of probation was over. Relying on Rule 28 of the KS & SSR, it is contended that since nothing in the Special Rules is repugnant to the General Rules, the learned Single Judge was wrong in setting aside the revision of seniority as per Exhibit P4. The interpretation placed on Note-2 to Rule 3(a)(3), according to the learned Senior Counsel, is wrong

insofar as, the learned Single Judge having found that it permitted regular promotion of Police Constables who have not completed their probation.

10. The learned counsel appearing for the parties in the other two appeals would contend that, a conjoint reading of Notes 1 and 2 would indicate that Note-1 restricted the promotions under sub-clauses (2) and (3) of Rule 3(a)(3) for a period of three years and Note-2 provided for promotions from even probationers only in the three years as provided for in the Note. The learned Special Government Pleader would also argue in the same vein and reliance is placed on ***V.B.Prasad v. Manager, P.M.D.U.P.School*** [AIR 2007 SC 2053] to canvass the principle that the Note appended to a statutory provision or subordinate legislation must be read in the context of the substantive provision and not in derogation thereof.

11. The learned counsel for the petitioners in the writ petitions, however, would contend that the revision is bad on the short ground that none of the affected parties were heard. It is also contended that going by the specific provisions of Rule 3(a)(3) and the Notes appended, after three years of the initial appointment of a Police Constable in a newly constituted

Battalion, the promotion to the post of Havildars could be only from that Battalion. Note-2 was brought in, in the year 1985, since there was a dearth of Police Constables who appeared for the qualifying test for promotion to the post of Havildars. This was by reason of the fact that every constable would aspire to move to the District Police Reserve, which opens the doors to the local police.

12. A Police Constable could opt to the District Police Reserve only after completion of seven years in the Battalions. On promotion as Havildars, there was a prescription that they have to continue as such in the Battalions for another three years. The said lock-in period existed in the 1980s and was reduced subsequently and completely withdrawn in 2005 [vide page 4, para 4 of the counter affidavit of the State]. In the case of Havildars, such a transfer implied reversion to the category of Police Constable. It was in such circumstance that Note-2 was brought in, where even probationers willing to take the qualifying test of Havildars, were allowed to be promoted to the post of Havildars. Further, it is submitted that what was essentially assailed, by the challenge directed to the final seniority list, is the promotion of the petitioners; which was effected long back on

28.02.1994 as seen from Annexure-AI in W.A.No.2744 of 2009.

13. The relevant provisions to be noticed are Rule 3(a)
(3) and Rule 3(b) of the Special Rules, Rule 8 and Rule 28(a) of
the KS & SSR, which are extracted hereunder:

Special Rules

R.3(a) Appointment.- Appointments to the several
categories shall be made as follows:

Category	Method of Appointment	

(1)	(2)	

	xxx	xxx
(3) Havildar (1)	By promotion of Police Constables in the respective Battalions	
	or	
	(2)	By appointment from among the Havildars in other Armed Police Battalions.
	or	
	(3)	By promotion of Police Constables in other Armed Police Battalions who have been included in the Select List of Police Constables fit for promotion as Havildars.

Note 1:- The methods (2) and (3) are
intended for filling up the vacancies which
arose or will arise consequent on the
formation of new Battalions and shall be

resorted to only for a period of three years from the date of the appointment of the first direct recruit Police Constable of the Battalion.

Note 2:- When approved probationers in the Category of Police Constable are not available for promotion in the respective Battalion and when candidates are not available for appointment or promotion from other Battalions as provided under (2) and (3) above. Police Constables who are probationers in the respective Battalions may also be promoted subject to Rule 3(b) and Rule (8).

xxx

xxx

xxx

“R.3(b) Appointment by promotion to categories (1) to (3) shall be made from Select List of eligibles prepared on the basis of seniority subject to suitability as assessed by the Departmental Promotion Board.

xxx

xxx

xxx”.

“R.8. Qualifications.- No person shall be eligible for appointment to any of the categories mentioned in column (1) of Appendix by the method specified in column (2) against it unless he possesses the qualifications specified in the corresponding entry in column (3) thereof”.

KS & SSR

“R.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 he has satisfactorily completed his probation in that category”.

14. Note-2 of Rule 3 of the Special Rules was added by G.O.(MS).No.142/85/Home dated 01.07.1985, the Explanatory Note of which reads as under:

The Police Constables and Havildars in the Battalions who opt for transfer to District Armed Reserve should have completed 7 years of service even though in the case of Havildars it implies reversion to the category of Police Constables after completing 3 years of service as Havildar. As a result of this majority of the Police Constables are not keen to take the promotion test and to become Havildars and continue for another three years. A good number of vacancies of Havildars is left vacant in the Battalions. Necessary provision has to be made in the Kerala Police Subordinate Services (Armed Police Battalions) Special Rules to provide for the promotion/appointment of Police Constables who are undergoing probation being promoted or appointed as Havildars in the absence of approved probationers in the category of Police Constables, provided that the probationer Police Constables are otherwise qualified and are fit for promotion/transfer as Havildars. The Notification is intended to achieve the above objective”.

15. The Government also relied on Exhibit P1 and specifically Rule 4, which is with respect to General Rules of eligibility for inclusion in the “Select List”, wherein officers considered for inclusion in the select list are only, those who have

successfully completed their probation in the category of posts held by them. The petitioners contend that, Exhibit P1 is irrelevant insofar as the decision of the Hon'ble Supreme Court in ***K.Dayanandalal and Others v. State of Kerala [(1996) 9 SCC 728]***. We would not dwell on this now, since the efficacy of Exhibit P1 would arise only if there is found a repugnancy in the Special Rules as against the General Rules.

16. As has been noticed initially, the entire dispute revolves around whether probationers could be promoted to the post of Havildars before their probation is declared and in that event, whether their regularisation in the post of Havildars could relate back to that date insofar as fixation of seniority is concerned. Rule 3(a)(3) specifically provides for three modes of appointment to the post of Havildars in the respective Battalions:

- (1) By promotion of Police Constables in the respective Battalions;
- (2) By transfer of Havildars from other Battalions; and
- (3) By promotion from other Armed Police Battalions who are included in the list of Police Constables fit for promotion as Havildars.

As per Note-1, the appointment by transfer and promotion from other Battalions [clauses (2) and (3)] have been restricted for a

period of three years from the date of appointment of the first recruit Police Constable. Hence, after the said three years, there could be no appointment of Havildars in a particular Battalion; by transfer or by promotion from other Battalions.

17. In the year 1985, Note-2 was added as extracted above. The Explanatory Note, as has been extracted above, specifically indicated that the Note was added only in the event of there being a dearth of Police Constables in the Battalions willing to take promotion as Havildars. It was in this context that the Note specifically provided that if there are no approved probationers in a Battalion and none are available for appointment under clauses (2) and (3), then Police Constables who are probationers in the respective Battalions may also be promoted; but, subject, however to Rule 3(b) and Rule 8. Rule 3(b) specifically provides that such promotions can be only from the Select List and after a regular mode of promotion with the approval of the Departmental Promotion Board [for brevity "DPB"].

18. We are unable to countenance the argument that on a conjoint reading of Notes 1 and 2, both would apply only to the initial three years from the date of appointment of the first direct recruit and not later. While Note-1 restricted appointments,

by transfer and by promotion from other Battalions, to three years, what was intended by Note-2 is that in the said initial three years and later, when there were no approved probationers in the category of Police Constables, available for promotion in the respective Battalions; promotions could be made from the Police Constables who are probationers in the respective Battalions; subject, however, to Rule 3(b) and Rule 8.

19. Note-2 was added, in the year 1985 and the restriction in Note-1 was within the knowledge of the Government. Hence, if the promotion as per Note-2 was to be confined to the three years, as is the case with clauses (2) and (3) of Rule 3; then suffice it to have merely noticed the circumstance of absence of persons eligible under clauses (2) and (3). Note-2 however indicated absence of even persons under clause (1). Hence, the intention in adding Note-2 was to enable such promotions even after the initial three year period. The Explanatory Note specifically indicated the problem which Note-2 intended to overcome. The diffidence of the Police Constables in the Battalions, to opt for promotion as Havildars, was not confined to three years and was an on-going factor; due to the overwhelming desire to move on to the local police. Note-2 intended to solve the perennial problem in

the Battalions; existing and newly formed.

20. However, there can be no repugnancy found as against Rule 28(a), since such promotions under Note-2 are made subject to Rule 3(b) of the Special Rules. Rule 3(b) as was noticed deemed such promotions to be regular only if the incumbents were in the Select list and were approved by the DPB. Obviously no probationer could be placed in the Select list; nor is there a case that the petitioners who were promoted by Annexure-I referred to earlier were so approved by the DPB. Note-2, hence, is a reiteration of the principles of Rules 12, 18(c), 28(a) and 31 of KS & SSR, which reads as under:

“R.12. Qualifications for promotion.- (a) Where general educational qualifications, special qualification or special tests are prescribed by the Special Rules of a service for any category, grade or post therein, or in a class thereof, which are not prescribed for a category or grade in such service or class carrying a lower rate of pay and **no member in the category or grade carrying the lower rate of pay is eligible for promotion to such category, grade or post a member in such lower category or grade may be promoted to the category or grade carrying the higher rate of pay temporarily until a member of the former category or grade qualified under this rule is available for promotion.** A member temporarily

promoted under this rule shall not by reason only of such promotion, be regarded as a probationer in the category or grade to which he has been promoted, or be entitled to any preferential claim to future promotion.

(b) A probationer in a category carrying a lower rate of pay who is promoted temporarily under sub-rule (a) to a category carrying a higher rate of pay in the same service shall be entitled to count towards his probation in the former category the period of duty performed by him in the latter category during which he would have held a post in the former category but for such temporary promotion”.

“R.18(c) Service in a higher category counting for promotion.- A probationer in any category or a service or class of service shall be eligible to count for probation, his service, if any, performed otherwise than in a substantive capacity on regular appointment to a higher category of the same service or class of service, as the case may be.

Nothing contained in this sub-rule shall be construed as authorising the promotion of a probationer in a category to a higher category in contravention of rule 28”.

“R28.(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 he 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 therefor, 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.

xxx

xxx

xxx

(ii) Where the Special Rules for a service provide for appointment 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.

xxx

xxx

xxx”.

“Rule 31. Temporary promotion.- (a)(i) Where it is necessary in the public interest owing to an emergency which has arisen to fill immediately a vacancy in a post borne on the cadre of a higher category in a service or class by promotion from a lower category and there would be undue delay in making such promotion in accordance with the rules, the Appointing Authority may promote a person otherwise than in accordance with the rules, temporarily.

xxx

xxx

xxx”.

Hence, on the promotion of a probationer, the balance period of probation in the lower post would be satisfied by his continuing in the higher post by sub-rule (b) of Rule 12.

21. It is also to be noticed that the promotions made as per Annexure-I were purely on provisional basis for reason only of they having not completed the probation period in the cadre of Police Constable. Hence, the promotion was subject to their completion of probation and regularisation in the promoted post could be made only after the declaration of probation in the cadre of Police Constable. We are unable to agree with the decision of

the learned Single Judge, insofar as finding the Special rules to be repugnant to the General Rules. Though there could be no dispute to the proposition that the Special Rules prevail over the General Rules, a reading of the Special Rules does not, according to us, indicate any repugnancy with the General Rules. Both postulate that no regular promotion could be made before probation is declared in the lower post.

22. However, we are considerably persuaded by the fact that the promotions of the petitioners were made as early as in 1994, to the post of Havildars which post has a common seniority list among the Battalion-Havildars and the seniority list itself was finalised as on 01.01.1998 by Exhibit P2. It cannot but be noticed that the finalisation of the seniority list itself, was a long drawn out procedure, wherein the provisional seniority list was published and a final seniority list was published as early as on 04.01.2002. The respondents, before the publication of the said final seniority list, if at all filed objections, did not pursue it. Despite that, there was a revision necessitated in the final seniority list of Havildars, the reason for which is not clear from the records available with us. Exhibit P2, however, specifically speaks of a revision and a provisional seniority list having been published and

communicated to the Battalions for objection. 166 representations were received, which were considered and the final seniority list as per Exhibit P2(a) was published on 23.06.2004. Though the petitioners in the earlier writ petitions and the respondents herein contend that they had objected to the seniority list, none seems to have pursued it diligently. Nor is any such objection produced.

23. No appeal, as provided under rule 27B of KS & SSR, was filed by any of the respondents. The respondents thought it fit to challenge Exhibits P2 and P2(a) seniority list dated 23.06.2004 by a writ petition filed in November, 2006, after two years. The learned Single Judge who considered the writ petition, at the stage of admission itself, disposed of the same, finding the representation filed by the petitioners therein to be akin to a statutory application under Rule 27B of Part II of KS & SSR. We have called for the records of the case and found that the representation is dated 18.02.2005 and is addressed to the Chief Minister, Rule 27B of KS & SSR reads as under:

“27B. In case of disputes regarding seniority matters connected with it by reason of any order of Government or any order of an authority subordinate to Government, representation for reconsideration of such order shall be submitted to Government by the

aggrieved person within a period of six months from the date of receipt of the order, or the date of publication of the order in the Kerala Gazette, whichever is later”.

24. KS & SSR specifically provides for an appeal to be filed within the time stipulated therein, i.e., six months. Exhibit P3 has been wrongly found to be a statutory representation under Rule 27B. In any event, the direction was only to consider the revision sought of the seniority list. The Government could have definitely rejected the same finding that the same is beyond time. No consideration on merits was made by this Court. The Government thought it fit to revise the seniority list by Exhibit P4 which is challenged herein.

25. It is trite that this Court under Article 226 cannot go against the statutory prescriptions and confer a right on the litigant which is not available under the statute. Exhibit P4 is also said to be one without notice to the affected parties. But for the laconic statement in Exhibit P4 that “representatives of the affected parties argued that it is improper to re-open a finalized seniority list” (*sic*), nothing is stated as to any notice having been issued or

the judgment at Exhibit P3 or the representation of the petitioners in Exhibit P3, having been communicated to the Battalions. The counter affidavit also does not indicate any such notices having been issued.

26. The allegation of lack of notice is answered so in the counter affidavit of the State:

“8. As per the directions in the Judgment, the Government of Kerala [1st respondent] heard the representative of the petitioner as well as some of the affected parties who were impleaded as Respondents 12 to 14 in the Writ Petition as representative capacity, on 18.8.2007. The Government [1st respondent] found that the grievances of the Petitioners therein are genuine and hence ordered to rectify the erroneous regularization in the category of Havildar w.e.f. the date of provisional promotion of the probationer in the Police Constable Post, and also ordered to refix the rank and Seniority in the cadre of Havildar, as per GO (Rt) No.2557/07/Home dt. 28.9.07 [Ext.P4]. While passing Ext.P4 order, Government have not taken any decision for or against any one, but only directed to rectify the errors in the seniority list in accordance with the relevant rules. Hence the contentions of the petitioners are unsustainable”.

The writ petition was disposed of at the admission stage. Though the direction was to hear one of the petitioners therein, it was

clearly directed that any one affected should be heard. The proposal for revision hence ought to have been communicated to the Battalions.

27. The promotions were made long back and on the basis of the seniority list; further promotions too were effected. Exhibit P3 judgment of the learned Single Judge of this Court was not intended to revive stale claims. The representation made to the Chief Minister, cannot be deemed to be one under Rule 27B of KS & SSR, since the same is grossly out of time. Government ought to have found so, when considering the representation in compliance of Exhibit P3 judgment.

28. The petitioners who were given a seniority and were conferred with benefits arising out of such seniority by way of subsequent promotions cannot be unsettled at a long distance of time from the date of the seniority list. The promotions itself were made as early as in 1994. The Government also cannot take a different stand at this point of time, since the petitioners were all regularised in the promoted post of Havildars from the date of their promotion; despite they having not completed their probation in the lower post of Police Constable. The petitioners are entitled to the benefits of "sit back" theory.

29. The Hon'ble Supreme Court in ***Shiba Shankar Mohapatra v. State of Orissa*** [2010 (12) SCC 471], after discussing a catena of decisions on the point, held so in para 30:

“30. Thus, in view of the above, the settled legal proposition that emerges is that once the seniority had been fixed and it remains in existence for a reasonable period, any challenge to the same should not be entertained. In *K.R.Mudgal*, this Court has laid down, in crystal clear words that a seniority list which remains in existence for 3 to 4 years unchallenged, should not be disturbed. Thus, 3-4 years is a reasonable period for challenging the seniority and in case someone agitates the issue of seniority beyond this period, he has to explain the delay and laches in approaching the adjudicatory forum, by furnishing satisfactory explanation”.

In the present case, the promotions were of 1994. The seniority as on 01.01.1998 was first finalised on 04.01.2002 and then again revised and finalised on 28.09.2004 as per Exhibit P4. The remedy available under Rule 27B was not availed by those who were aggrieved and after two years filed a writ petition.

30. In such circumstances, though we differ with the learned Single Judge on the question of law, we do not find any reason to interfere with the operative portion of the judgment. We

hold that there is no repugnancy in the Special Rules and the KS & SSR; on the finding that none could be regularly promoted before their probation is declared; going by the Special Rules and the KS & SSR. However, we refuse to uphold the revision of seniority [Exhibit P4] made for reason of it being grossly delayed by default on the part of the affected parties. We, hence, dismiss the above Writ Appeals for the reasons aforesaid reversing the findings of the learned Single Judge, but upholding the operative portion for different reasons. Parties are left to suffer their respective costs.

Sd/-

Ashok Bhushan
Chief Justice

Sd/-

K.Vinod Chandran
Judge.

Vku/

[true copy]