

CASE NO.:
Appeal (civil) 9527 of 2003

PETITIONER:
K.P.Sudhakaran & Anr.

RESPONDENT:
State of Kerala & Ors.

DATE OF JUDGMENT: 11/05/2006

BENCH:
B N Srikrishna & R V Raveendran

JUDGMENT:
J U D G M E N T
(With CA Nos.9528/2003, 9530/2003, 9531/2003 & 9532/2003)

RAVEENDRAN, J.

These appeals by special leave against the judgments dated 14.8.2002 of the High Court of Kerala in W.A. No.1178/1997, WA No.1170/1997 and WA No. 1135/1997 involve common questions of fact and law.

2. The appellants and the private respondents were recruited as Lower Division Clerks (LDCs) in the Registration Department, in different districts of the State of Kerala. In the cadre hierarchy, the promotion post for LDCs is that of Upper Division Clerk ('UDC' for short). The post of LDC is a district-wise post and the post of UDC is a State-wise post. In other words, the unit for recruitment of LDCs is the district, and the unit for recruitment of UDCs is the entire State. A State-wise seniority list of LDCs. is maintained for promotion to the post of UDCs.

3. The Appellants were recruited as LDCs in district X. The contesting private respondents were recruited as LDCs in other districts (say, district Y or district Z) and were transferred, on their own request to district X. (For convenience, we will refer to the appellants as 'Local LDCs' and the contesting private respondents as 'transferred LDCs'). The transferred LDCs., on own request transfers, were permitted to join as LDCs in district X by taking the rank below the junior-most local LDCs in the district.

4. On 7.11.1984, the State Government drew up a State-wise seniority list of LDCs with reference to their date of first appointment to the service as LDCs, for the purpose of effecting promotions to the next higher post (UDC). In Kerala, this is stated to be with effect from date of first effective advice made by PSC for their appointment to the service. The seniority of the transferred LDCs were shown in the said list, with reference to the dates of their first appointment as LDCs and not with reference to the dates of their joining in the district to which they were transferred on their own request. Having regard to the fact that they were recruited as LDCs, prior to the local LDCs, the transferred LDCs were placed above the local LDCs. If the seniority of the transferred LDCs had been fixed with reference to the date of transfer to the district to which they were transferred, they would have been placed at the bottom of the seniority list on the date of transfer and their

position/rank would have been below that of local LDCs.

5. After considering the representations received in respect of the said provisional seniority list dated 7.11.1984, the Inspector General of Registration, Kerala ('IG-Regn.' for short) by memorandum dated 6.4.1987 finalised the state-wise seniority list of LDCs as on 1.11.1983. On the basis of the said seniority list of LDCs, a provisional seniority list of UDCs. as on 22.2.1986 was also prepared, vide General Memorandum dated 9.12.1987. The said seniority list of LDCs as also the provisional seniority list of UDCs were challenged in O.P. No.4204/1990 before the High Court. The High Court by order dated 8.5.1990 disposed of the said petition, by directing the IG-Regn. to consider the representation given by the petitioner therein for re-fixation of his seniority.

6. Thereafter, the Inspector General of Registration issued a revised provisional seniority list of LDCs dated 13.11.1990. In the said seniority list, the positions of transferred LDCs were shown with reference to the date of their joining the new district, by excluding the service rendered till then in their old district. The transferred LDCs objected to the said change. The objections were rejected by IG-Regn. The provisional list dated 13.11.1990 and the order of IG-Regn. rejecting the objections, were challenged by the contesting private respondents and other similarly placed transferred LDCs in O.P. No.11194/1990 and connected cases.

7. A learned Single Judge of the High Court disposed of the said petitions by order dated 24.3.1997, holding as follows : (i) the transferred LDCs were not entitled to seniority with reference to the initial date of appointment as LDCs. and their seniority in the post of LDCs. has to be reckoned only from the date of their joining in the new district to which they were transferred on 'own request'; (ii) having regard to the fact that the recruitment of LDCs was district-wise and not State-wise, the transferred LDCs cannot contend that all LDCs in the State formed one unit for the purpose of seniority, nor claim any benefit in excess of what the rules conferred on them; and (iii) there was no merit in the challenge to the provisional seniority list dated 13.11.1990. However, as the IG-Regn. had not disposed of the objections filed by the transferred LDCs., by a reasoned order, the Single Judge directed the IG-Regn. to consider their objections as also other objections, if any, received in regard to the provisional seniority list dated 13.11.1990 and pass appropriate orders considering each of the objections and finalise the seniority list. He also directed that the promotions, if any, made on the basis of the seniority list dated 7.11.1984 and further promotions shall be reviewed based on the seniority list to be finalized. In compliance with the said direction, the IG-Regn. considered the objections again and by order dated 22.9.1997 rejected the objections of the transferred LDCs. He also issued a final seniority list of LDCs dated 22.9.1997 on that basis.

8. In the meanwhile, the order of the learned Single Judge was challenged by the transferred LDCs in W.A. No.1178/1997 and connected appeals. The State resisted the appeals by relying on the G.O. dated 2.1.1961 and Rule 27 of Kerala State and Subordinate Service Rules, 1958 ('Rules' for short) to contend that transferred LDCs. had to be treated as junior-most in the new district and the list dated 22.9.1967 was finalized by applying the said rule. The Division Bench which heard the appeals, held that having regard to GO dated 2.1.1961 and Rule 27, the seniority of the transferred LDCs will have to be

reckoned only from the date of their joining at the District to which they were transferred on their own request. It however felt that the seniority list finalized in 1984 and the position of the transferred LDCs should not be disturbed. It held that G.O. dated 2.1.1961 and the proviso to Rule 27(a) should be given effect prospectively. It, therefore, allowed the appeals filed by the transferred LDCs by order dated 14.8.2002 with the following observations :

"This is a case where inter-district transfers were effected before 1984 and they were all included in the final seniority list of L.D. Clerks giving seniority from the date of which they joined duty in the parent district. We are of the view at this distance of time there is no justification in disturbing the said situation. In such circumstances we hold that the direction given by first and second respondents to revise the final seniority list published vide office General Memorandum No. E4-34154/84 dated 7.11.1984 is illegal. Promotions on the basis of the said list be not disturbed and G.O. (Ms) 4/61/PD dated 2.1.1961 and the proviso to General Rule 27 of the Kerala State and Subordinate Services Rules would apply only prospectively without unsettling the rank and position of the petitioners. It is so declared and Ext. P7 order (order/seniority list dated 13.11.1990), would stand quashed. Rights of the parties will be regulated accordingly. Judgment of the learned single judge will stand set aside. All the writ appeals and original petitions are disposed of as above."

9. The said order of the Division Bench is challenged by the appellants who are the 'local' LDCs. They contend that having regard to the relevant rules and the Government Orders (GOs.), a Government servant who is transferred from one district to another on his own request, cannot claim seniority from his initial date of recruitment in the post but only from the date on which he is transferred on his own request to the new district. As a consequence, when a common State-wise seniority list of LDCs. is prepared for promotion to the post of UDC, the rank of transferred LDCs. should be shown with reference to the date of their transfer to the new district on their own request, and not when with reference to the date when they were initially appointed as LDCs. They contend that the Division Bench of the High Court having accepted the said legal position, had no power to direct that G.O. dated 2.1.1961 and proviso to Rule 27(a) of the Rules to be applied prospectively. They submit that the Division Bench having held that the transferred LDCs. should take rank below the junior-most local LDCs. as per Rules, committed an error in not giving effect to the said finding.

10. On the contentions urged, the following two points arise for consideration :

(i) Whether the seniority of transferred LDCs (transferred on own request to another unit (district) in the same department) should be reckoned from the date of their initial appointment to the post, or from the date on which they were transferred to the new district. Whether the lower post (LDC) being a district-wise post and the promotion post (UDC) being a state-wise post, would make any difference to the position.

(ii) Whether the Division Bench was justified in holding that the GO dated 2.1.1961 and proviso to Rule 27(a) of the Rules should only be applied

prospectively in the case of the transferred LDCs. (that is from the date of the judgment of the Division Bench), thereby giving benefit of the past service (from the date of initial appointment up to date of transfer), to transferred LDCs, contrary to the said rules and GO and denying to the local clerks the benefit of a higher position in the seniority list.

Re: Point No. 1 :

11. In service jurisprudence, the general rule is that if a Government servant holding a particular post is transferred to the same post in the same cadre, the transfer will not wipe out his length of service in the post till the date of transfer and the period of service in the post before his transfer has to be taken into consideration in computing the seniority in the transferred post. But where a Government servant is so transferred on his own request, the transferred employee will have to forego his seniority till the date of transfer, and will be placed at the bottom below the junior-most employee in the category in the new cadre or department. This is because a government servant getting transferred to another unit or department for his personal considerations, cannot be permitted to disturb the seniority of the employees in the department to which he is transferred, by claiming that his service in the department from which he has been transferred, should be taken into account. This is also because a person appointed to a particular post in a cadre, should know the strength of the cadre and prospects of promotion on the basis of the seniority list prepared for the cadre and any addition from outside would disturb such prospects. The matter is, however, governed by the relevant service Rules.

12. We may next refer to the relevant rules and GOs having a bearing on the subject. The service of State Government servants in State of Kerala are governed by the Kerala Public Services Act, 1968. Section 3 provides that all Rules made under the proviso to Article 309 regulating the recruitment and conditions of service of persons appointed to Government service and in force immediately before 17.9.1968, shall be deemed to have been made under the said Act and shall continue to be in force unless and until they are superseded by Rules made under the Act. The Kerala State and Subordinate Services Rules, 1958 ('Rules' for short) were made in exercise of power conferred under proviso to Article 309. The said statutory Rules governed seniority and transfer of Government servants. The said Rules as they originally stood, did not provide for 'own request transfers' and consequences thereof.

12.1) The State Government issued a GO dated 2.1.1961 in consultation with the Kerala Public Service Commission ('PSC' for short), laying down the conditions subject to which mutual or inter-departmental transfers of Government servants from one unit to another within the same department, or from one department to another within the same subordinate service, can be ordered by the appointing authorities concerned, on request. Two of the conditions which are relevant are extracted below :

"(1) A person transferred to a new unit will take rank below the juniormost in the category in the new unit or department. He will not be allowed to count his previous service towards seniority. Such transfers should not be

prejudicial to the legitimate interest of anyone in the department to which he is transferred. But he may be allowed to count his previous service towards increment, leave, pension, gratuity, etc. He will not be required to undergo fresh probation, if he has already completed probation.

x x x x x

(4) Persons transferred from one department to another or from one unit to another in the same department due to proved administrative reasons will retain all their rights in the old unit or department, as their case may be."

12.2) The State Government issued another G.O. dated 27.5.1971 providing for recruitment to the lower Ministerial cadres at district level, in consultation with the Public Service Commission. The said GO directed that the recruitment at district level through the district recruitment boards would be made subject to the following conditions :-

"(i) No transfers will be allowed from the District to another within a period of five years from the date of commencement of continuous service;

(ii) Such inter-district transfers will be allowed only after five years and subject to the conditions laid down in G.O. MS. No.4/PD dated 2-1-61.

x x x x x

(iv) This will not affect the existing procedure where State-wise promotions are involved."

12.3) Rule 27 of the Rules relating to seniority was amended by G.O. dated 13.1.1976 (Gazetted on 3.2.1976) inserting a proviso to clause (a), providing for the consequences of an 'on request' transfer. The note to the said proviso stated that the amendment shall be deemed to have come into force with effect from 28.12.1960. Relevant portions of Rule 27 as amended, are extracted below :

"27. Seniority.- (a) Seniority of a person in a service, class, category or grade shall, unless he has been reduced to a lower rank as punishment, be determined by the date of the order of his first appointment to such service, class, category or grade.

xxxxxxx

Provided that the seniority of persons on mutual or inter-unit or inter-departmental transfer from one unit to another within the same department or from one department to another, as the case may be, on requests from such persons shall be determined with reference to the dates of their joining duty in the new unit or department."

12.4) The executive instructions contained in the Government Orders dated 2.1.1961 and 27.5.1971 in so far as 'own request' transfers, ceased to apply, once a provision therefor was made the statutory service rules, by amendment. The proviso to Rule 27(a) of the Rules categorically provided that the seniority of an employee getting transferred at his own request to another unit within the same department or to another department will

be determined with reference to the date of his joining duty in the new department. This proviso is an exception to the general rule (contained in clause (a) of Rule 27) that seniority of a person shall be determined by the date of the order of his first appointment.

13. The following facts are not in dispute : (i) The contesting private respondents are transferee LDCs who were transferred from the district in which they were appointed to another district, in the same department on their own request. (ii) The appellants are the existing employees, that is local LDCs of the said department in the district to which the transferee LDCs were transferred. (iii) The transferred LDCs (contesting private respondents) were senior to the appellants with reference to their date of appointment as LDCs. But with reference to the date on which they were transferred to the new district, they will become juniors to the local LDCs (appellants). When the proviso to Rule 27(a) of the Service Rules is applied, as rightly held by the learned single Judge and the Division Bench, the seniority of the transferred LDCs has to be reckoned only from the date of their joining duty in the new unit (or district) and they are not entitled to count their service prior to the date of their transfer on their request.

14. The transferred LDCs. (contesting private respondents) contended that the GO dated 27.5.1971 stated that it will not affect the existing procedure where State-wise promotions are involved. They point out that though the posts of LDCs. are District-wise, as the promotion of LDCs to UDCs is State-wise, the provisions of G.O. dated 2.1.1961 will not apply, in view of clause (iv) of G.O. dated 27.5.1971. It is unnecessary to examine whether clause (iv) of G.O. dated 27.5.1971 excludes the applicability of G.O. dated 2.1.1961, as neither the G.O. dated 27.5.1971 nor the G.O. dated 2.1.1961 governed the effect of 'own request' transfers, after Rule 27(a) of the Service Rules was amended by introducing a proviso providing for the consequences of 'own request' transfers. Where Statutory Rules govern the field, prior executive instructions cease to apply.

15. The transferred LDCs. next submitted that the proviso to clause (a) of Rule 27 will not apply, having regard to the exclusion contained in clause (c) of Rule 27 which reads as under : --

[c] Notwithstanding anything contained in clauses (a) and (b) above, the seniority of a person appointed to a class, category or grade in a service on the advice of the Commission shall, unless he has been reduced to a lower rank as punishment, be determined by the date of first effective advice made for his appointment to such class, category or grade and when two or more persons are included in the same list of candidates advised, their relative seniority shall be fixed according to the order in which their names are arranged in the advice list."

A careful reading of clause [c] shows that it did in no way affect the contents of proviso to clause (a) of Rule 27 inserted by amendment by G.O. dated 13.1.1976. Clause (a) of Rule 27 provided that seniority of a person in a service, class, category or grade shall be determined by the date of the order of his first appointment to such service, class, category or grade. Clause (b) provides that the appointing authority shall, at the time of

passing an order appointing two or more persons simultaneously to a service, fix the order of preference among them, and seniority shall be determined in accordance with it. Clause [c] made it clear that notwithstanding anything contained in clauses (a) and (b), where a person is appointed to a class, category or grade in a service on the advice of the Commission, the seniority of such person shall be determined by the date of first effective advice made for his appointment to such class, category or grade and when two or more persons are included in the same list of candidates advised, their relative seniority shall be fixed according to the order in which their names are arranged in the advice list. The effect of clause [c] is to clarify the date with reference to which seniority should be reckoned when they are initially appointed on the advice of PSC. It only means that where the appointments are from the selection list published by the PSC, their seniority will be reckoned/determined by the first effective advice made for such appointment by the PSC and not by the actual date of his appointment by the appointing authority. Clause [c] has therefore no effect or application, over the proviso which regulates subsequent 'own request' transfers.

16. The transferred LDCs next submitted that the intention of making a provision that a person on an 'own request' transfer will be ranked as the juniormost in the new district or new unit, is to ensure that the seniority of the existing employees in the category in the new unit or district is not affected by a senior person coming from outside by transfer. It is contended that where the promotion post is State-wise, the seniority of the existing employees in the district to which the outside employee is transferred, will not be affected and, therefore, where the promotion is to a state-wise post, proviso to Rule 27(a) which requires those who are transferred on 'own request', to give up their seniority, will not apply. We cannot agree. The alleged intention behind a provision, cannot be used to defeat the express words of the provision. Once a statutory rule is made, without providing any exceptions, it is not possible to carve out exceptions to such rule, by judicial interpretation. Nor can an exemption from application of a clear and specific rule be claimed on the ground of hardship or similar reasons. The proviso to Rule 27(a) of the Rules is categorical and applies to all employees transferred on own request. It does not make distinction between employees whose promotion post is a State-wise post and those where the promotion posts are district-wise posts.

17. The learned counsel for the contesting private respondents lastly submitted that by now the appellants and the contesting private respondents have all been promoted from the posts of LDC to UDC and several of them have also been promoted as Sub-Registrars and the matter should not be unsettled after such a long time. We find that the matter has been continuously under litigation ever since 1990 and the delay in disposal cannot defeat the rights of appellants.

Re : Point No. 2 :

18. The Division Bench having held that the transferred LDCs would take rank below the juniormost in the category in the district to which they were transferred, could not have held that the seniority list prepared on 7.11.1984 (wrongly giving transferred LDCs seniority from the date of initial appointment

as LDCs) should not be disturbed and proviso to Rule 27(a) should be given effect prospectively. The High Court has no power to direct that a Rule which has been in force for several years, will be operated only prospectively, that too in a proceeding where the validity of the Rule was not in challenge.

Conclusion

19. In view of the above, we find that the revised seniority lists dated 13.11.1990 and 22.9.1997 under which seniority of transferred LDCs. (inter-district transferees) is counted only from the date of their joining the new district, excluding the previous service, are proper and do not call for interference.

20. These appeals are accordingly allowed. The judgment of the Division Bench of the High Court, to the extent it directs that G.O. dated 2.1.1961 and proviso to Rule 27(a) of the Rules will apply prospectively, and that the promotions made with reference to the seniority list dated 7.11.1984 should not be disturbed, is set aside. The writ petitions filed by the transferred LDCs. are dismissed. As a result of giving effect to the seniority list dated 13.11.1990 and 22.9.1997, if the positions of the transferred LDCs. are altered to their disadvantage, we direct that no consequential recovery shall be made from them, on the ground of excess payment.