

PETITIONER:
K. DAYANANDALAL & ORS.

Vs.

RESPONDENT:
STATE OF KERALA & ORS.

DATE OF JUDGMENT: 07/08/1996

BENCH:
AGRAWAL, S.C. (J)
BENCH:
AGRAWAL, S.C. (J)
HANSARIA B.L. (J)

CITATION:
JT 1996 (7) 532 1996 SCALE (5)630

ACT:

HEADNOTE:

JUDGMENT:
(WITH CIVIL APPEALS NOS. 7278/1995,
7279-80/1995, 10589-90/1995 & 7281/1995)
J U D G M E N T

S.C. AGRAWAL, J.

These appeals by special leave raise common questions relating to promotion of Constables as Head Constables in the police force of the State of Kerala.

The aforesaid promotion is made from a select list of Constables who have qualified in the promotion test. These select lists are prepared district wise. In the Kerala State and Subordinate Service Rules, 1958 (hereinafter referred to as 'the State and Subordinate Service Rules') the following provisions are made with regard to promotion :

"Rule 28(bb). Promotion which depends upon the passing of any examination. : Promotion in a service or class which depends upon the passing of any examination (General of Departmental) shall ordinarily be made with reference to the conditions existing at the time of occurrence of the vacancies and not with reference to those at the time when the question of promotion is taken up."

"Rule 28(b)(10). The claims of person who qualifies himself for post, after the select list in respect of that post has been prepared but before the date of occurrence of the vacancy in the higher post shall not be overlooked."

In 1960 the Kerala State Legislature enacted the Kerala Police Act, 1960 (hereinafter referred to as 'the Act') to consolidate and amend the law relating to police force in

the State of Kerala. Section 69 of the Act empowers the State Government to make rules consistent with the act in respect of matters referred to in clauses (a) to (d) of sub-section (1). Under clause (b) such rules may be made to regulate the recruitment and conditions of service of police officers other than the members of the Indian Police Service. Such rules are however, required to be notified in the Gazette. On May 17, 1963, the Home (a) Department of the Government of Kerala Issued an order G.O. (Ms) No. 252/Home-containing rules for making appointments by promotion and by transfer to posts in the Police Department. In Rule 10 of the said Rules provisions were made for promotion to posts of Head constables and of corresponding rank. In clause (1) of Rule 10, it was provided that promotion tests shall be held on a district basis for assessing the fitness of eligible Constables as Head Constables and that Constables who qualify in the test shall be included in the Select List for promotion as Head Constables. Clause (ii) of Rule 10 made the following provision :-

"(ii) The ranking in the 'Select' list of Constables who qualify at the promotion tests shall be in those who qualify at the test on the same date will be ranked according to length of continuous service as constables."

It appears that promotion tests were held for the purpose of promotion of Constables to the rank of Head Constables in various districts in 1978 and select lists of Constables who had qualified in that test were prepared. Many Constables, though senior, failed to qualify in the promotion test and their names were not included in the select list, while the names of their juniors who had qualified in the test were included. Another promotion test was held in 1981. The names of senior Constables who had failed to qualify in the test held in 1978, but who had qualified in the test held in 1981, were included in the select list that was prepared in 1981. In accordance with clause (ii) of Rule 10 as contained in G.O. order dated May 17, 1963, Constables in preference to their seniors whose names were not included in the select list prepared in 1978, although they were promoted as Head Constables in preference to their seniors whose names were not included in the select list of 1978 but were included in the select list of 1981. Some of the senior constables who were thus superseded by their juniors in the matter of promotion to the post Head Constables in district Ernakulam filed a writ petition (O.P. No. 5298 of 1982 regarding promotion of Constables as Head Constables) was assailed. On behalf of the petitioners in the said writ petition reliance was placed on the provisions contained in Rules 28(b)(i)(10) and 28(bb) of the State and Subordinate Service Rules. It was submitted that since they were senior as constables and had also qualified in the promotion test in 1981 before the passing of the order dated July 9, 1982, they were entitled to be promoted in preference to their juniors since the vacancies had occurred after the preparation of the select list of 1981. On behalf of the State as well as contesting respondents in the said writ petition, it was urged that Rule 28(b)(10) and 28(bb) of the State and Subordinate Service Rules had no application in the matter of promotion of Constables as Head constables and that the said promotion was governed by clause (ii) of Rule 10 of the Rules issued under order dated May 17, 1963. The said writ petition was allowed by the learned single Judge by Judgment dated December 5, 1984,

The contention that the State that Subordinate Service Rules were not applicable in the matter of promotion Constables as Head Constables was rejected and it was observed that it was not shown that the order dated May 17, 1963 was made under Article 309 of the Constitution of India and that though the matter was adjourned a number of times, the Government pleader was not able to produce the original files relevant to the order dated May 17, 1963, it was further observed that the order dated May 17, 1963 did not specifically state that it was an order passed in exercise of power vested in the Government under Article 309 of the Constitution of India and no material was placed before the court to substantiate the plea that the order dated May 17, 1963 was passed in exercise of that Jurisdiction. The learned single Judge held that Rule 10(ii) of the Rules issued under order dated May 17, 1963 could not override the provisions contained in Rule 28(b)(10) read with rule 28(bb) of the State and Subordinate Service Rules and that on date of the occurrence of the vacancies in July, 1982 promotion to the post of Head Constables could be made only in accordance with Rule 28(BB) and 28(b)(10). The single Judge, therefore, quashed the order dated July 9, 1982 regarding promotion of the respondents in the writ petition as Head Constables and directed that the matter of promotion of Head Constables must be considered in accordance with Rule 28(b)(10) read with Rule 28(bb) of the State and Subordinate Service Rules.

Writ Appeal No. 591 of 1984 filed against the said judgment of the learned single Judge was dismissed by the Division Bench of the High Court by Judgment dated April 9, 1987. The contention that the order dated May 17, 1963 should be construed as a statutory rule made under Section 69 of the Act was rejected for the reason that there was no evidence to show that the said order had been notified in the Gazette. The learned Judges observed that they had given opportunity to the counsel for the appellant and to the Government Pleader to produce a copy of the Gazette where the order dated May 17, 1963 was published but they were not able to trace out any Gazette and the Government Pleader was not able to state whether it was published in any Gazette at all. It was, therefore, held that the order dated May 17, 1963 could not be treated as rule under Section 69 of the Act. The learned Judges have stated that the Government Pleader did not urge that the order dated May 17, 1963 contains rules made under the proviso to Article 309 of the Constitution. Proceeding on the basis that the order dated May 17, 1963 was an executive order only, the learned Judges held that the provisions contained in it cannot have any validity since they are in conflict with the principles contained in Rule 28(bb) of the State and Subordinate Service rules inasmuch as the order dated May 17, 1963 requires that the ranking in the select list of Constables shall be in accordance with the date of passing the test although the statutory rule does not provide for the supersession of a senior who is found to be eligible and suitable on the date of vacancy, by a junior who became eligible or acquired the necessary test qualification earlier. It was, therefore, held that fore vacancies which arose in July 1982 the case of the writ petitioners would not have been overlooked and not preferential treatment should have been given to their juniors on the only ground that they became test qualified earlier. The Government was directed to consider whether on the facts and in the light of Rule 28(bb) the petitioners in the writ petition were qualified and eligible to be promoted in 1982 when the

vacancies arose. The High Court, however, observed that the declaration give and the decision rendered regarding the effects of the order dated May 17, 1963 would not affect any promotions made to the post of Head Constables prior to July 20, when the said writ petition was filed.

Another writ petition (O.P. No. 3982) was filed by two Constables in district Ernakulam who had been superseded in the matter of promotion as Head Constables by their Juniors. The said writ petition was allowed by another learned single Judge of the High Court by judgment dated January 10, 1985 on the basis of the judgment of the learned single Judge in O.P. No. 5298 of 1982.

After the decision of the learned single Judge in O.P. No. 3923 of 1982, the State Government issued a circular dated November 24, 1986 to review the promotions made after August 9, 1981 in accordance with the decision in O.P. No. 3923 of 1982. Thereafter, fresh select lists were prepared and promotions were made on the basis of the said select lists whereby those who were promoted as Head Constables earlier were sought to be reverted. Feeling aggrieved by the orders of reversion, some of the affected Head Constables approached the High Court by filing writ petitions which have been dismissed by the High Court. These appeals arise out of those writ petitions. They relate to the districts of Palghat, Connanore and Malappuram.

Shri P.S. Poti, the learned senior counsel appearing in support of the appeals, has, in the first place, urged that the State, and subordinate Service Rules are not applicable to the members of the police force in Kerala. The learned counsel has pointed out that initially in the Kerala civil Services (Classification, control and Appeal), Kerala Police Service was included in Schedule I and Kerala Police Subordinate Service was included in Schedule II, and the said rules were applicable to the Kerala Police Service and the Kerala Police Subordinate Service. Subsequently, by notification dated May 26, 1958, the 1957 Rules were amended and Kerala Police Service was deleted from Schedule I and the Kerala Police subordinate Service was deleted from Schedule II. The submission was that since the members of the Kerala Police Subordinate Service were also not governed by the State and Subordinate Service Rules which were made on December 17, 1958, After the aforementioned notification dated May 26, 1958, We do not find any merit in this contention. Merely because the Kerala Police Subordinate Service had been excluded from the ambit of the 1957 Rules by notification dated May 26, 1958, it cannot be said that the State Subordinate Service Rule, which are independent Rules made vide notification dated December 17, 1958, are not applicable to the members of the Kerala Police subordinate Service. The question of Applicability of the State and Subordinate Service has to be determined on the basis of the provisions contained in the State and Subordinate Service Rules, and not on the basis of the 1957 Rules. We find that the provision with regard to the applicability of the State and Subordinate Service Rules is contained in rule 1 of the General Rules contained in Part II of the State and Subordinate Service Rules which reads as under :-

"Rule 1, Scope of General Rules.---

The rules in this part shall apply to all State and Subordinate services and the holders of all posts, whether temporary or permanent in any such service, appointed thereto before, or after the date on which these rules come

into force as provided in sub-rule (b) of Rule 1 in part I except to the extend other wise expressly provided (a) by or under any law for the time being in force, or (b) in respect of any member of such service by a contract or agreement subsisting between such member and the State Government."

The language of the said Rule is wide and comprehensive enough to include all State and Subordinate services and all post whether temporary or permanent except to the extent otherwise expressly provided by or under any law for the time being in force or in respect of any member such service by contract or agreement. Shri Poti has not been able to show any law or statutory rule whereby the members of the Kerala Police Subordinate Service have been excluded from the ambit of the state and Subordinate Service Rules. we are, Therefore, of the view that member of the Kerala Police Subordinate Service are Governed by the State and Subordinate Service Rules.

Shri Poti has next submitted that even if the State and Subordinate Service Rules were held to be applicable to the members of the Kerala Police subordinate Service, the said Rules have no application in the matter of promotion of Constables as Head Constables in view of the rules issued under order dated May 17, 1963. The submission is that the said rules made under section 69 of the Act. This contention of Shri Poti cannot be accepted for the reason that Section 69 of the Act requires that the rules should be notified in the Gazette and it has not been shown that the order dated May 17, 1963 was published in the Gazette. Shri Poti has invited our attention to certain circular making amendments in the rule issued under order dated May 17, 1963. which were published in 'Kerala Police Gazette'. The submission is that the publication of these circulars in the Kerala Police Gazette indicates that the rules issued under order dated May 17, 1963 were in the nature of statutory rules made under Section 69 of the Act. We are unable to accept this contention. The Kerala Police Gazette is a publication of the Office of Inspector General of Police issued for departmental use only. It contains various circulars and standing orders issued by the State Government as well as the circulars and standing orders issued by the State Government as well as the circulars issued by the Inspector General of police and other useful information for the member of the police force. The said Kerala Police Gazette cannot be equated with the State Gazette published under the authority of the State Government. The requirement in Section 69 of the Act regarding the rules being notified in the Gazette postulates publication in the Kerala Police Gazette (which too is not established) would not be substitute for the requirement of Section 69 regarding publication in the State Gazette. In our opinion, therefore, the rules issued under order dated May 17, 1963 cannot be held to be rules made under Section 69 of the Act and the order dated May 17, 1963 must be treated as an executive order only. Since the provisions contained in Rule 10(ii) of the Rules contained in the said order are in conflict with the provisions mentioned in Rules 28 (b)(10) and 28(bb) of the State of Subordinate Service Rules, the said provisions in Rule 10(ii) could not be applied and promotion of Constables as Head Constables could be made only in accordance with Rules 28(b)(10) and 28(bb) of the State and Subordinate Service Rules. We, therefore, do not find any

infirmity in the impugned judgment of the High Court and the appeals are liable to be dismissed.

In the judgment of the Division Bench of the High Court dated April 9, 1987 in Writ Appeal No 591 of 1984 it has been indicated that the declaration given and the decision rendered therein regarding the effect of the order dated May 17, 1963 would not affect any promotions made to the post of Head Constables prior to July 20, 1982, when the writ petition was filed. The date of the filing of the writ petition, i.e., July 20, 1982, was chosen as the cut off date and promotions made prior to that date on the basis of Rule 10(ii) of the Rules issued under order dated May 17, 1963 have not been disturbed. Having regard to the fact that promotions were being made in accordance with the direction contained in Rule 10(ii) of the rules issued under order dated May 17, 1963 and the legal position with regard to the validity of the said direction was not clear till the decision of the learned single Judge in O.P. No. 5298 of 1982. we are of the opinion that promotions of Constables as Head Constables made prior to the date of the decision of the learned single Judge in O.P. No. 5298 of 1982, i.e., December 5, 1984, on the basis of the direction contained in Rule 10(ii) of the Rules issued under order dated May 17, 1963 should remain undisturbed. It is, therefore, directed that the promotions of Constables as Head Constable made prior to December 5, 1984 on the basis of Rule 10(ii) of the rules issued under order dated May , 1963 shall not be affected. But, at the same time, it is made clear that this protection that has been given in respect of such promotions would not operate to the prejudice of the Constables who were otherwise entitled to be so promoted under Rules, 28(b)(10) and 28(bb) of the State and Subordinate Service Rules. Such Constables should be given promotion due to them in accordance with said rules. It is further directed that the Constables who were given promotions as Head Constables on the basis of Rule 10(i) of the Rules issued under order dated May 17, 1963 would not be entitled to claim seniority in the cadre of Head Constables over Constables who were entitled to such promotion as Head Constables on the basis of Rules 28(b)(10) and 28(bb) of the State and Subordinate Service Rules.

The appeals are disposed of accordingly, No order as to costs.