

K.A. ABDUL MAJEED

v.

THE STATE OF KERALA AND ORS.

AUGUST 7, 2001

[SYED SHAH MOHAMMED QUADRI AND S.N. PHUKAN, JJ.]

Service Law:

Seniority—Advertisement issued for appointment of Lower Division Typist by Development Authority under its Byelaws—Appointment of appellant, who possessed requisite qualifications, as Lower Division Typist and later promoted to Upper Division Typist—Disapproval of Byelaws by State Government subsequently—Power of appointment now vested with State Public Service Commission—Qualifications prescribed by the Commission subsequently obtained by the appellant—Period counted for determination of seniority—Held, initial appointment of appellant, who possessed requisite qualifications as per the advertisement, is regular—Initial appointment cannot be re-opened for altering his seniority after long lapse of the time—Authority to prepare fresh seniority list accordingly—Direction issued.

Kerala Subordinate Service Rules, 1958—Rule 27—Application of the Rules for determination of seniority—Held, as per the Rules, the seniority of an employee is to be determined from date of first appointment unless he was reduced in rank as punishment or any period of service during probation.

Pursuant to an advertisement issued by respondent-Authority for the post of Lower Division Typist, appellant, who fulfilled requisite qualifications, was appointed for the post in 1981. He completed the period of probation satisfactorily. In 1983, the appellant was promoted to the post of Upper Division Typist and completed two years of probation. Subsequently, during the period 1984-85, private respondent 4,5 and 6 were appointed as Lower Division Typists. In 1987, a provisional seniority list was published in which the appellant was placed on top of the list. Respondent 4 filed a representation before the Authority claiming seniority over the appellant on the ground that the appointment of appellant was illegal as on the date of his appointment, the appellant was not qualified for the post. In 1988, the Authority revised the seniority list wherein the appellant was shown junior to the private

A respondents. The appellant filed a Writ Petition before High Court. The High Court dismissed the Writ Petition and the writ appeal.

In appeal to this Court, the appellant contended that he had the requisite qualifications as per the advertisement issued by the respondent-Authority and on his application, he was duly appointed after selection; that he successfully completed his period of probation both as Lower Division Typist and as Upper Division Typist; that after more than 7 years of his appointment, the respondent-State Government and the Authority cannot hold that the appointment of the appellant was irregular; and that the private respondents, who were appointed subsequently, have no legal right to question the initial appointment of the appellant and, being juniors in terms of period of service, they cannot claim seniority over the appellant.

The respondent-Authority contended that the initial appointment of the appellant to the post was irregular as the appointment was made under the Byelaws framed by the Authority and that the Byelaws were not approved by the respondent-State Government; that the authority was not the appointing authority as the power of appointment for the posts was brought within the purview of the State Public Service Commission; that the appellant did not possess the desired qualifications prescribed by the Commission; that the Commission gave concurrence to the appellant's appointment only in 1990 after the appellant obtained the requisite qualifications prescribed by the Commission; that the seniority of the appellant has been fixed from 1990 and that he cannot claim seniority from the date of initial appointment; and since there is no Rules of the Authority regarding seniority of the employees, the State Subordinate Service Rules would apply and that the seniority has to be fixed in terms of Rule 27 of the said Rules.

F The private respondents contended that the appointment of the appellant was through back door whereas they were appointed through State Public Service Commissions and, therefore, the appellant cannot get seniority over them.

Allowing the appeal, the Court

G HELD: 1. It is an admitted position that the post was advertised by the respondent-authority and the appellant possessed all the qualifications as shown in the advertisement. He was duly selected and appointed. He successfully completed his period of probation. He was given one promotion to the next higher grade and his probation was declared in the promoted post of Upper Division Typist. In view of these admitted facts, after long lapse of

time, the question of initial appointment cannot be re-opened at the instance of private respondents and that too for altering his seniority. As the appellant was appointed after the post was advertised and he was duly selected before appointment, it cannot be said that the appointment of the appellant was through back door. [355-F, G, H; 356-A] A

2. The language of Rule 27 of State Subordinate Service Rules is clear and unambiguous. The seniority of an employee has to be determined by the date of the order of the first appointment in the service unless he has been reduced to lower rank as punishment or any portion of his service not being counted towards probation. Admittedly, the appellant was never reduced to lower rank. It was neither pleaded nor any records were placed to show that the portion of the service of the appellant could not be counted towards probation. Indeed in the post of Lower Division Typist as well as Upper Division Typist, his probation was declared based on his initial appointment and subsequent promotions respectively. The question whether initial appointment was regular or not cannot be considered at the time of fixation of seniority under Rule 27. As the re-fixation of seniority of the respondent-Authority by the seniority list is not in accordance with Rule 27, it is bad in law and consequently the seniority list is liable to be quashed. The respondent-Authority is directed to prepare and publish a fresh seniority list showing the appellant senior to the private respondents on the basis of provisional seniority list of 1987. [356-D, E, F, G] B C D

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 5122 of 2001. E

From the Judgment and Order dated 6.4.2000 of the Kerala High Court in W.A. No. 1308 of 1998.

D.A. Dave, Haris Beeran and A. Raghunath for the Appellant. F

T.L.V. Iyer, K. Sukumaran, T.G. Narayanan Nair, B.V. Deepak, Ms. Karthika, S. N.R. Shonker and G. Prakash for the Respondents.

The Judgment of the Court was delivered by

PHUKAN, J. Leave is granted. G

This appeal by special leave is against the judgment of the Division Bench of the High Court of Kerala in Writ Appeal No.1308 of 1998. The writ petition filed by the appellant was dismissed by the learned Single Judge, which was affirmed in appeal. H

- A** The following facts are not disputed. On 16.02.1981, an advertisement was issued by the Greater Cochin Development Authority (for short 'the GCDA'), respondent No.3 calling for applications from the last Grade Servants of the GCDA for the post of Lower Division Typist. The appellant, who fulfilled the qualifications specified in the advertisement, was appointed on 27.03.1981 after proper selection. Subsequently, he completed the period of probation satisfactorily in the said post. On 02.07.1983, the appellant was promoted to the post of Upper Division Typist and was placed on probation for two years. He completed satisfactorily the said period of probation also. Respondent Nos.4, 5 and 6 were appointed as Lower Division Typist on 20.09.1984, 23.02.1985 and 15.07.1985 respectively. On 1.1.1987 a provisional seniority list was published in which the appellant was placed on the top of the list whereas respondent No.4 was placed at position No.2 in the said list. Respondent No.4 filed a representation claiming seniority over respondent No.1 on the ground that appointment of appellant as Lower Division Typist was illegal, as on the date of his appointment he was not qualified for the post. On 7.1.1988 impugned final seniority list was published by the respondent
- B**
- C**
- D** No.3, wherein appellant was shown junior to respondent Nos. 4, 5 & 6. This list was challenged by the appellant by filing a Writ Petition which was dismissed and so also the writ appeal. That is how the parties are before us in this appeal.
- E** The writ petition was resisted by respondents on the ground that when the appellant was appointed to the post of Lower Division Typist on 27.3.1981, he did not possess requisite qualifications for the post and the GCDA was not the appointing authority, as the power of appointment for the posts under the GCDA was brought within the purview of the Kerala Public Service Commission (for short 'the Commission') by an Act of the State Legislature.
- F** Though, the appellant was shown to have been appointed under the Greater Cochin Development Authority (Establishment) Bye-laws, 1977, those were only draft Bye-laws framed under Section 53(2) of the Town Planning Act (IV of 1108) and Section 54(2) of the Madras Town Planning Act, 1920 and were not approved by the State Government as required under the above two
- G** Acts. As the Commission was the appointing authority, the GCDA requested concurrence of the Commission for the appointment of the appellant but it was refused. Subsequently, appellant was given time to obtain the requisite qualification which he did and again the matter was taken up with the Commission. The Commission gave concurrence for the appointment of appellant from the date of acquiring the requisite qualification i.e. 21.4.1990
- H** and accordingly his seniority was fixed with effect from that date and the

draft seniority list was revised. A

Mr. Dave, learned senior counsel for the appellant has urged that the appellant had the requisite qualifications as per the advertisement and accordingly applied, thereafter he was duly appointed after selection. On these facts, the learned senior counsel has submitted that after more than 7 years of his appointment, respondents cannot turn around and take the plea that the appointment was irregular. In support of this contention, the learned senior counsel has drawn our attention to the facts that the appellant not only successfully completed his period of probation as Lower Division Typist but subsequently he was also promoted to the higher post in which also he completed the period of probation. In any event according to the learned senior counsel the private respondents 4 to 6 who were appointed subsequently have no legal right to question the initial appointment of the appellant and being junior in terms of period of service they cannot claim seniority over the appellant. B C

Mr. Iyer, learned senior counsel for the GCDA, has contended that as initial appointment of the appellant to the post was irregular, he cannot claim seniority from the said date of appointment and that his seniority was correctly fixed by the GCDA in consultation with the Commission from the date the appellant acquired the necessary qualification. D

Mr. Sukumaran, learned senior counsel appearing for the private respondents 4 to 6 has urged that the appointment of the appellant was through back door whereas the private respondents were appointed through Public Service Commission and, therefore, the appellant cannot get seniority over the private respondents. E

It is an admitted position that the post was advertised by the GCDA and the appellant possessed all the qualifications as shown in the advertisement. He was duly selected and appointed. He successfully completed his period of probation. He was given one promotion to the next higher grade and his probation was declared in promoted post of Upper Division Typist. In view of these admitted facts we find force in the submission of Mr. Dave that after long lapse of time the question of initial appointment cannot be re-opened at the instance of private respondents and that too for altering his seniority. Therefore, the contention of Mr. Iyer, learned senior counsel, has to be rejected. F G

As the appellant was appointed after the post was advertised and he was duly selected before appointment it cannot be said that the appointment H

A of the appellant was through back door and therefore we reject the contention of Mr. Sukumaran, learned senior counsel.

B Mr. Iyer, learned senior counsel has very fairly submitted that there is no rule regarding seniority of the employees of the GCDA, and the Kerala Subordinate Services Rules, 1958 would apply and seniority has to be fixed in terms of Rule 27. The relevant portion of Rule is extracted below:

C “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. If any portion of the service of such person does not count towards probation under the Rules, his seniority shall be determined by the date of commencement of his service which counts towards probation.”

D The language of above Rule 27 is clear and unambiguous. The seniority of an employee has to be determined by the date of the order of the first appointment in the service unless he has been reduced to lower rank as punishment or any portion of his service would not be counted towards probation. Admittedly, the appellant was never reduced to the lower rank. It was neither pleaded nor any records were placed to show that any portion of the service of the appellant could not be counted towards probation. Indeed E in the post of Lower Division Typist as well as Upper Division Typist, his probation was declared based on his initial appointment and subsequent promotions respectively. The question whether initial appointment was regular or not cannot be considered at the time of fixation of seniority under this Rule. As the re-fixation of seniority by GCDA by the impugned seniority list F is not in accordance with Rule 27, referred to above, it is, therefore, bad in law and consequently the impugned seniority list is liable to be quashed.

G For the reasons stated above we find merit in the present appeal and accordingly it is allowed by setting aside the judgment of the learned Single Judge as well as the Division Bench of the High Court. Consequently, the impugned seniority list is quashed and respondent No.3 is directed to prepare and publish a fresh seniority list showing appellant senior to private respondents 4 to 6 on the basis of provisional seniority list of 1.1.1987. In view of the facts and circumstances of the case we direct the parties to bear their own cost.

H B.S.

Appeal allowed.