

**Statute 66 Of Calicut University Enables Incumbent In Lower Category To Claim Promotion Only To Immediate Next Higher Grade: Kerala HC**

**2022 LiveLaw (Ker) 573**

**IN THE HIGH COURT OF KERALA AT ERNAKULAM**

***P.B. SURESH KUMAR; J., C.S. SUDHA; J.***

**Writ Appeal No.1441 of 2022; 31<sup>st</sup> October, 2022**

**STATE OF KERALA *versus* M.V. DINES**

AGAINST THE JUDGMENT DATED 08.07.2022 IN WP(C) 28195/2019 OF HIGH COURT OF KERALA

*Appellants / Respondents 1 TP 3 in W.P.(C): A.J. Varghese Sr. Government Pleader*

*Respondents / Petitioner and 4th Respondent in W.P.(C): by Advs. M.R. Anison, T.K. Vipindas*

**J U D G M E N T**

**P.B. Suresh Kumar, J.**

This appeal is directed against the judgment dated 08.07.2022 in W.P.(C) No.28195 of 2019. The appellants were respondents 1 to 3 in the writ petition. The first respondent was the petitioner in the writ petition. Parties and documents are referred to in this judgment for convenience, as they appear in the writ petition.

2. The petitioner who was working as Peon in Sree Krishna College, Guruvayoor (the College) since 07.03.2000 was promoted as Lower Division Typist on 16.10.2007 and later as Lower Division Clerk on 01.09.2010. He was promoted thereafter as Upper Division Clerk on 01.03.2013. The next grade to which the petitioner was entitled to be considered for promotion was the grade of Head Accountant. The grade next higher to the grade of Head Accountant is Junior Superintendent. A vacancy in the grade of Head Accountant and in the grade of Junior Superintendent arose in the College on 01.06.2017. Since there was no incumbent entitled to be considered for promotion to the grade of Junior Superintendent, the management promoted the petitioner directly to the said grade with effect from 01.06.2017. The Director of Collegiate Education who is empowered to approve the said appointment by promotion, entertained a doubt as to whether such a promotion could be made at all, and consequently, referred the matter to the Government. In terms of Ext.P4 order, the Government clarified that the feeder category for promotion to the grade of Junior Superintendent being the grade Head Accountant, the petitioner is not entitled to be promoted straight away to the grade of Junior Superintendent, without completing probation in the category of Head Accountant. In the light of Ext.P4 clarification, the Director declined approval to the appointment of the petitioner by promotion to the grade of Junior Superintendent. Ext.P5 is the communication issued by the Director to the Principal of the College in this regard. Exts.P4 and P5 orders were under challenge in the writ petition.

3. The learned Single Judge allowed the writ petition at the admission stage itself taking the view that Statute 66 of the Calicut University (Conditions of Service of the Teachers and Members of Non-Teaching Staff) First Statutes, 1979 (the Statutes) creates an exception to the normal rule that promotion to higher grades shall only be from the immediate lower category and in the light of the said provision, the promotion of the petitioner is in order. Consequently, the writ petition was allowed, Ext.P5 communication was quashed and the competent authorities were directed to approve the promotion of the petitioner as Junior Superintendent with effect from 01.06.2017 and disburse to him the eligible benefits. The State and the official respondents are aggrieved by the said decision of the learned Single Judge and hence, this appeal.

4. Heard the learned Government Pleader as also the learned counsel for the petitioner.

5. The learned Government Pleader contended that the view taken by the learned Single Judge that Statute 66 creates an exception to the normal rule that promotion to higher grades shall only be from the immediate lower category, is unsustainable in law. According to the learned Government Pleader, Statute 66 which enables the petitioner to claim promotion to higher grades

is subject to the rules in force in similar Government institutions concerning qualifications and method of appointment and since Rule 28(a)(i) of the Kerala State and Subordinate Service Rules (the KS and SSR) applies to similarly placed employees in Government colleges, it applies to the petitioner also, and in the light of the provision contained in Rule 28(a)(i), the petitioner is not entitled to promotion to the grade of Junior Superintendent without completing probation in the category of Head Accountant. The submission of the learned Government Pleader, therefore, was that the petitioner ought to have been first promoted as Head Accountant and only thereafter, he could have been considered for promotion as Junior Superintendent, that too, after completion of probation in the category Head Accountant.

6. Per contra, the learned counsel for the petitioner conceded that in the light of Statute 46 of the Statutes, every person, other than persons in the Last Grade Service appointed by educational agencies of private colleges, shall be on probation for a period of one year within a period of two years, as specified in Section 59 of the Calicut University Act, 1975. But, according to him, the said provision would only preclude the petitioner from claiming promotion to higher grades from the category of Upper Division Clerk, if he has not completed probation in that category. It was submitted by the learned counsel that insofar as the petitioner has completed probation in the category of Upper Division Clerk, the same does not, in any manner, affect the right of the petitioner to claim promotion directly to the grade of Junior Superintendent. As found by the learned Single Judge, the learned counsel for the petitioner also relied on Statute 66 to bring home the point that in the absence of any incumbent to be considered for promotion to the grade of Junior Superintendent in the College, the petitioner who has completed probation in the category of Upper Division Clerk, was entitled to be promoted as Junior Superintendent. According to the learned counsel, the said provision enables an incumbent to claim promotion to a higher grade from any of the lower categories. The said submission was made by the learned counsel placing emphasis on the expression “next lower categories” used in Statute 66. It was argued by the learned counsel that if as a matter of fact, the object behind the provision was to effect promotion only from the immediate next lower category, there is no reason why the expression “next lower categories” should be used in the provision and in its place, the Statute would have used the expression “next lower category”. On a query from the Court as to the reason why the prefix “next” is used together with the expression “lower category”, the learned counsel submitted that the same is intended only to clarify that if there is a qualified person in the immediate next lower category, he will have to be preferred over those qualified in the categories below the immediate next lower category.

7. We have anxiously considered the submissions made by the learned counsel for the parties on either side.

8. There is no dispute in this case as regards the relevant facts. The petitioner is a person who has completed probation in the category of Upper Division Clerk satisfactorily. As noted, from the category of Upper Division Clerk, the petitioner was promoted directly to the grade of Junior Superintendent, which is a grade next higher to the immediate higher grade of Upper Division Clerk. The immediate higher grade to the category of Upper Division Clerk is the grade of Head Accountant. The stand of the State is that the petitioner ought to have been first promoted as Head Accountant, and in the absence of any other incumbent for promotion to Junior Superintendent, he should have been considered for promotion to the grade of Junior Superintendent only after completion of probation in the category of Head Accountant, whereas the stand of the petitioner is that Statute 66 enables the petitioner to claim promotion directly to the grade of Junior Superintendent. The learned Single Judge took the view that Statute 66 creates an exception to the requirement that one is entitled to be considered for promotion to a particular grade only from the next lower category. The short question which falls for consideration, therefore, is as to whether Statute 66 creates such an exception. Statute 66, without its proviso which is not relevant in the context, reads thus:

**Filling up of vacancies:-**Subject to the rules in force in similar Government Institutions regarding qualifications and method of appointment, the vacancies in the higher grades shall be filled up by

promotion from the next lower categories. If qualified persons are available, according to seniority in the case of non-selection posts, and according to merit and seniority in the case of selection post and if there are no candidates available for promotion to the higher grades the posts shall be filled up by direct recruitment by inviting applications and selection by the Management in the manner laid down in these Statutes.

There is no dispute to the fact that Statute 66 enables the competent authority to fill up vacancies in higher grades by promotion from the next lower categories. It is placing emphasis on the expression “lower categories” used in the Statute, that the petitioner contends that promotion need not be from the immediate lower category and that the promotion can be effected from any one of the lower categories. According to the petitioner, since the category of Upper Division Clerk is also one of the lower categories of the grade Junior Superintendent, the promotion of the petitioner to the grade of Junior Superintendent was in order. The pointed question is as to whether from the expression “next lower categories” contained in Statute 66 alone, it could be inferred that promotion need not be from the immediate next lower category, but can be from any of the lower categories. Statute 66 is a provision in Chapter 3 of the Statutes dealing with the conditions of service of non-teaching staff in private colleges. Statute 66 is a general provision dealing with the manner in which the vacancies in all higher grades sanctioned to private colleges are to be filled up, in contradistinction to the vacancies in a particular grade sanctioned to private colleges. It appears to us that it is on account of the said reason that the expression “next lower categories” is used in the provision and from the said expression alone, it cannot be said that promotion need not be from the immediate next lower category. This view of ours is fortified by the use of the word “next” prefixed to the expression “lower categories” in the provision. We take this view also for the reason that if Statute 66 is interpreted as put forward by the petitioner, one would be enabled not only to claim promotion to a grade next to the immediate next grade in which he is substantively appointed as in the case on hand, but also claim promotion to still higher grades, if there are no eligible incumbents entitled to be considered for promotion. Such a course cannot be said to be one contemplated by the framers of the Statutes, for in the absence of a specific enabling provision, when promotions are effected to non-selection posts solely based on seniority, the expectation is that having regard to the experience in the lower category, one would acquire the suitability to discharge the duties and functions attached to the higher grade, and if a person who had not worked in the immediate lower category is promoted to a higher grade, he may not have the suitability to discharge the duties and functions attached to the grade to which he is promoted. That apart, in terms of Statute 46, every person appointed in a private college shall be on probation for a period of one year, within a period of two years. No one can dispute the fact that the purpose of the requirement of probation is to enable an assessment to be made as to whether the appointee is suitable for being retained in service. In other words, the scheme of the Statutes is that an appointee will be considered as duly appointed in a category only on completion of probation. If a person is given promotion as claimed by the petitioner without completing probation in the immediate next lower grade, in the event of abolition of the promoted grade, he can be reverted only to the category in which he was substantively appointed after the completion of probation and if in the meanwhile, a junior of the person is promoted to the immediate next grade and if he has completed probation in that category, that person will be able to claim seniority over his former senior. Such promotions would, therefore, result in anomalous situations as well. It is therefore, evident that when promotion is provided for under the rules to non-selection posts solely based on seniority, the same can be claimed only to the immediate next higher grade and he/she can be promoted further to the next higher grade only after completion of probation in that grade. Needless to say, Statute 66 enables an incumbent in a lower category to claim promotion only to the immediate next higher grade.

In the result, the writ appeal is allowed, the impugned judgment is set aside and the writ petition is dismissed.