(1978) 07 KL CK 0021

High Court Of Kerala

Case No: O.P. No''s. 1674/74B-1672/76B, etc.

Sreedharan and Others	APPELLANT
Vs	
State of Kerala and Others	RESPONDENT

Date of Decision: July 13, 1978

Acts Referred:

- Constitution of India, 1950 - Article 14, 16(3), 309, 32(3), 33
- Kerala State and Subordinate Services Rules, 1958 - Rule 35
- States Reorganisation Act, 1956 - Section 115, 119, 19, 2, 88

Hon'ble Judges: Gopalan Nambiyar, C.J; M.P. Menon, J

Bench: Division Bench

Advocate: V. Sivaraman Nair, M. Krishnan Nair and K. Kanakachandran, in O.P. 1672/74B, V.S. Moothath, N.R.K. Nair, K.J. Joseph and T.K.M. Unnithan, in O.P. 3003/73, S. Easwara Iyer and E. Subramonia, in O.P. 665/74, 1642/74B and 2620/74, K. Chandrasekharan, P.N.K. Achan and K. Vijayan, in O.P. and Nos. 1529, 1699 and 2078/74, K. Sudhakaran, K.K. Babu and V.K. Raveendran, in O.P. 2818/74, M.N. Sukumaran Nair and N.K. Sreedharan, in O.P. 4622/75 and S. Sankara Subban, in O.P. 4634/75, for the Appellant; A.G. for Respondents 1 and 2 and S.A. Nagendran and N.N.D. Pillai, for Respondents 7 and 8 in O.P. 3003/73, for the Respondent

Final Decision: Dismissed

Judgement

Gopalan Nambiyar, C.J.

These writ petitions raise a common question and have been heard together. The arguments were advanced in O.P. No. 1672 of 1974 and the fate of the other writ petitions was left to rest on the fate of the said writ petition. We shall, accordingly, proceed to deal with O.P. No. 1672 of 1974.

2. O.P. No. 1672 of 1974: The 24 Petitioners in this writ petition are Lower Division Clerks in the Public Works Department of the State, having been appointed to that category after the formation of the Kerala State on 1st November 1956, and

between the years 1961 to 1966. They were promoted to the category of Upper Division Clerks between the years 1967 and 1972. They allege that the promotion was on the basis of the unit system of promotion sanctioned by the Madras Ministerial Service Rules, as in the State of Madras, and continued even after the formation of the State of Kerala, and the transfer of the Malabar area to this State, by reason of Section 119 of the States Reorganisation Act. The Petitioners are persons from Malabar area of this State, and therefore, they claim to be governed by the provisions of the Madras Ministerial Service Rules. While so, by Ext. R-1 order, G.O. (MS) No. 374/PW., dated 9th December 1964, the Government recalled that, in the Travancore-Cochin area of the State the Public Works Department comprises the general P.W.D. and the Government Engineering Workshop for the purposes of appointment, promotion etc., while the Malabar area was functioning as a separate unit comprising the two North Circles, each P.W.D. Circle being, according to the Madras Rules, a separate unit for the purpose of appointment, promotion, etc. The question of evolving a uniform system for the whole State were under consideration by the Government; and, as it was not conducive to the administrative efficiency to have two different organisational set ups in the two areas, orders were issued under Ext. R-1 G.O. regarding the proposals for appointments and promotions. According to the G.O., the staff of the entire P.W.D. was to be divided into Headquarters staff and Circle-wise staff. There were to be 8 units, each officer was to be allotted to the unit in which he was then functioning as a provisional measure; permanent allotment to follow on the basis of options exercised by the officers subject to administrative convenience; and so on. By Ext. R-6, G.O. MS. No. 122/73, dated 15th June 1973, the unit system introduced by Ext. R-1 G.O. stood abolished with effect from 9th December 1964. There were to be only two units, one for P.W.D. Engineering Workshop, Trivandrum, and, the other, to the P.W.D. personnel, except those who were in position on 31st October 1956. In respect of the allotted personnel, i.e., who were in position on 31st October 1956, the unit system prevalent in the Travancore-Cochin and Malabar areas prior to 1st November 1956 shall be allowed to continue till they retire from the service. The writ petition prayed to quash Ext. R-6 G.O. and the consequential order issued by the Chief Engineer dated 2nd March 1974 publishing a new seniority list of Upper Division Clerks as on 31st July 1973, effecting a review of promotion of the Upper Division Clerks after 9th December 1964 upto 31st July 1973. As the Petitioners'' names were not in the list they apprehended reversion and moved this Court for the reliefs prayed for.

3. The contentions raised on behalf of the Petitioners were: that they are governed by the Madras Ministerial Service Rules which continued to apply to the Malabar area of this State to which they belong, by reason of Section 119 of the States Reorganisation Act; that Ext. R-6 G.O. alters the conditions of services of the Petitioners and thereby violates Rule 35(b) of the Kerala State and Subordinate Services Rules; that Ext. R-6 is also bad by reason of the retrospectivity given to it from 9th December 1964; and that Ext. R-6 violates Article 14 of the Constitution as

it sanctions certain special treatment and affords certain special protection to the allotted personnel from Madras,

4. We shall examine these arguments seriatim.

5. Reliance is placed on Rule 36(a), (b) and (c) of the Madras Ministerial Services Rules framed under Article 309 of the Constitution of India. According to Rule 36(a), the unit of application of the General Rules shall be the departmental unit. According to Clause (c), the unit of application of the General Rules governing promotion shall also be the jurisdiction of each of the authorities which are competent to make the promotion as provided in the Annexure. Section 19 of the States Reorganisation Act reads:

119. The provisions of Part II shall not be deemed to have effected any change in the territories to which any law in force immediately before the appointed day extends or applies, and territorial references in any such law to an existing State shall, until otherwise provided by a competent Legislature or other competent authority, be construed as meaning the territories within that State immediately before the appointed day.

It is the Petitioners'' contention that, by virtue of the above provision of the States Reorganisation Act, the Madras Rules are continued in force and govern the Petitioners. For this they placed reliance on the decision of a Full Bench of this Court in Sreedharan Pillai v. State of Kerala 1973 KLT 151 on the decision of the Supreme Court in The Director of Industries and Commerce, Government of Andhra Pradesh, Hyderabad and Another Vs. V. Venkata Reddy and Others, and on decision of a Division Bench of this Court in Krishnan v. State of Kerala 1975 KLT 744. Properly analysed and understood, none of these decisions have any application to the question arising for decision in this case. In Sreedharan Pillai v. State of Kerala 1973 KLT 151 the continuance of the Madras Ministerial Service Rules visa-vis allotted personnel from Madras fell for consideration. It was ruled that the rules will continue to be operative even after 1st November 1956 by reason of Section 119 of the States Reorganisation Act. The question considered was the applicability of that law in regard to the service personnel from Madras, in service on 1st November 1956, who stood allotted to Kerala, on and from that date. In The Director of Industries and Commerce, Government of Andhra Pradesh, Hyderabad and Another Vs. V. Venkata Reddy and Others, again, the position disclosed is quite different. The question was how far the Mulki Rules can be said to continue in the Andhra Pradesh State after its formation on and from 1st November 1956. The question was discussed with respect to Article 35(b) of the Constitution. The said Article reads:
35. Notwithstanding anything in this Constitution, --

(a) Parliament shall have, and the Legislature of a State shall not have, power to make laws --

(i) with respect to any of the matters which under Clause (3) of Article 16, Clause (3) of Article 32, Article 33 and Article 34 may be provided for by law made by Parliament; and

(ii) for prescribing punishment for those acts which are declared to be offences under this Part;

and Parliament shall, as soon as may be after the commencement of this Constitution, make laws for prescribing punishment for the acts referred to in Sub-clause (ii);

(b) any law in force immediately before the commencement of this constitution in the territory of India with respect to any of the matters referred to in Sub-clause (i) of Clause (a) or providing for punishment for any act referred to in Sub-clause (ii) of that clause shall, subject to the terms thereof and to any adaptations and modifications, that may be made therein under Article 372, continue in force until altered or repealed or amended by Parliament.

Explanation: In this Article, the expression ''laws in force'' has the same meaning as in Article 372.

And Article 16(3) reads:

Nothing in this Article shall prevent Parliament from making any law prescribing, in regard to a class or classes of employment or appointment to an office under the Government of, or any local or other authority within, a State or Union Territory, any requirement as to residence within that State or Union territory prior to such employment or appointment.

It was in the light of these provisions that the validity of the Mulki Rules providing for weightage in the matter of appointment to residents within the Telangana area of the State of Andhra Pradesh was upheld. In the third of the decisions in Krishnan v. State of Kerala 1975 KLT 744 again, the Madras Ministerial Service Rules was held to have been saved and continued by Rule 35 of the Kerala State and Subordinate Rules in respect of allotted personnel from Madras.

6. The position disclosed here is fundamentally different. The Petitioners are not allotted personnel from the Madras State, in service in that State on 31st October 1956 and allotted to this State on and from 1st November 1956. No question can arise of the applicability or the continuance in regard to them, of the Madras Ministerial Service Rules. They are plainly and essentially, service personnel appointed in the Kerala State after the formation of that State, into the category of Lower Division Clerks between the years 1961 and 1966. It seems incongruous to contend that in regard to such personnel the Madras Ministerial Service Rules will apply, merely because for quite different purposes it is continued in force by Section 119 of the States Reorganisation Act as a law in force in the territory of the Madras State, part of which, came to this State. Those rules are promulgated under Article

309 of the Constitution, which, on its language, is meant "to regulate the recruitments and conditions of services of persons appointed to Public Services in connection with the affairs of the Union or of any State". In respect of service personnel appointed by the Kerala State alter its formation, we fail to see how the Madras Ministerial Service Rules continued though it be under the States Reorganisation Act, can have application. That is hardly the province or the content of Section 119 of the States Reorganisation Act. We have, therefore, no hesitation in rejecting the contention of the Petitioners that they are governed by the Madras Ministerial Service Rules.

7. Equally unsubstantial and unacceptable is the contention that Ext. R-6 alters the Petitioners'' conditions of service to their disadvantage, and is, therefore, contrary to the guarantee under Rule 35 of the Kerala State and Subordinate Service Rules. The said Rule, in so far as it is material, provides:

35. Savings. -- (a)(i) Unless a contrary intention is expressly indicated therein, nothing contained in these rules shall adversely affect any person who was member of any service on the date of the coming into force of the rules.

(ii) Unless a contrary intention is expressly indicated therein nothing contained in any Special Rules governing a service, shall adversely affect any person who was a member of such service on the date of the coming into force thereof.

(b) Subject to the provisions of Sub-rules (c) and (d) where these rules or the Special Rules would adversely affect in respect of any matter a person who was a member of any service before the date of coming into force thereof, he shall, in respect of such matter, be governed by the rules and orders, if any, which were applicable to him immediately prior to such date.

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The argument on the basis of Rule 35 was also, built up on the hypothesis that the Madras Ministerial Service Rules is applicable to the Petitioners. We have held that it is not Besides, there is a fundamental fallacy underlying this argument. All the Petitioners were appointed after 1st November 1956 as admitted in the petition and in the statement of facts filed with the memorandum of appeal. There cannot, therefore, be any question of adversely affecting their conditions of service as they stood on the date of the coming into force of the Kerala State and Subordinate Services Rules. The contention to this effect must fail. For the same reason should also fail the smaller contention that Ext. R-1 Rules cannot be varied to the disadvantage of the Petitioners by Ext. R-6. Rule 35 having no application,. Ext. R-1 as an executive order, can certainly be varied by another executive or other order of the type of Ext. R-6, so long as Statutory Rules have not occupied the field.

8. It was then contended that Ext. R-6 cannot enure beyond the date of the commencement of the Public Services Act, 1968, and, therefore, giving it

retrospective effect from 9th December 1964 would not be justified. For this, reliance was placed on the recent Full Bench judgment of this Court in State of Kerala v. Haridas 1978 KLT 238. This part of the contention of the learned Counsel for the Petitioners is well-founded. This was recognised by the learned Advocate General, who rightly and promptly conceded that the retrospective effect of Ext. R-6 may well be ignored, and that the same may be treated as having application only prospectively. On that basis the learned Advocate General explained the background and history of the events leading to Ext. R-6. Stated briefly the position was that, as noticed in Ext. R-1 the evolution of a uniform system of promotion for the two wings of this State Travancore-Cochin and Malabar -- was engaging attention of the Government. And, as a Provisional measure, certain arrangements, were proposed by Ext. R-1, to be finalised after receipt and examination of the options to be exercised by the officers concerned. Follow up action in pursuance of Ext. R-1 was taken by the Chief Engineer, pointing out that the vacancies since 9th December 1964 may be filled by the unit officers. Provisionally, subject to review after final allotment (vide Ext. R-2). It is seen that there was a meeting, in the room of the Minister, on 11th July 1967 attended to by several prominent officials as well as by representatives of various staff associations and unions. It was decided that various view points urged be discussed by the Minister with the two Chief Engineers and the Public Works Secretary and a decision taken on the question of cancelling or continuing the unit system (vide Ext. R-3). Ext. R-4 dated 16th November 1968 is the copy of a letter from the Chief Engineer to the Superintending Engineer pointing out the difficulties experienced on account of the delay in the implementation of the unit system of promotion and requesting immediate steps Pending review and finalisation. Ext. R-5, dated 21st January 1971 is from the Secretary to Government, Public Works Department, to the Chief Engineer, directing that promotions and appointments may be made on the basis of Ext. R-1 G.O. on a provisional basis, subject to review after issue of final orders. It was, thereafter, Ext. R-6 was issued. In the light of this background and history, the learned Advocate General urged that the Petitioners can have no grievance if their provisional promotions and appointments are sought to be reviewed on the basis of Ext. R-6. From the records referred to, there is force in this contention of the learned Advocate General, and we accept the same.

9. The learned Advocate General cited the decision of a Division Bench of this Court in Inspector-General of Police v. Xavier 1976 KLT 438 in support of his contention that provisional appointments of the type here in question made especially for facilitating the organisational set up of a wing of the administration, cannot confer any rights on the Petitioners. He also relied on the decisions in Chacko v. State of Kerala 1974 KLT 215 The Director of Panchayat Raj and Another Vs. Babu Singh Gaur, and State of U.P. v. Nand Kishore AIR 1977 S.C. 1267. All these decisions sanction the principle that a temporary or provisional appointment cannot mature into a permanent one except under some service rule or order which provides for

such maturity. The proposition is well-settled, and in the light of these, the Petitioners cannot have any grievance against Ext. R-6. Theirs were purely provisional appointments. Their review was directed by Ext. R-6.

10. It was strongly contended for the Petitioners that Section 119 of the State Reorganisation Act applies to continue the Madras Ministerial Service Rules. This may, easily, be granted; but the difficulty, as we pointed out, is to hold that it applies to the Petitioners who were appointed to the Service in this State after the formation of the Kerala State. That seems impossible. The scope and content of similar provisions of the Punjab States Reorganisation Act fell for consideration by the Supreme Court in State of Punjab and Others Vs. Balbir Singh and Others, . We may extract paragraphs 12 and 13 therein:

12. Law is defined in Clause (g) of Section 2 of the Act to say:

"law" includes any enactment; ordinance, regulation, order, bye-law, rule, scheme, notification or other instrument having, immediately before the appointed day, the force of law in the whole or in any part of the existing State of Punjab;

We agree with the High Court that the impugned orders in question were not law within the meaning of Section 2(g) and hence were, in terms, not saved by Section 88. We think the High Court is right when it says:

Section 88 appears to have been introduced as a matter of abundant caution. In my opinion, mere splitting up of the territories of Punjab into four successor States would not ipso facto result in the abrogation or repeal of the laws which were immediately in force before the appointed day in those territories. There is nothing in the 1966 Act, not even in Section 88, which expressly or by necessary intendment repeals the laws which were in force immediately before the appointed day in the territories of the former Punjab. Those laws derived their force dehors the 1966 Act. The first part of Section 88 is merely clarificatory of any doubts which might arise as a result of the reorganisation of Punjab, while the latter part of this section is merely an adaptative provision, to the effect, that the territorials references in any such law to the State of Punjab shall continue to mean the territories within that State immediately before the appointed day. Thus, read as a whole Section 88 merely dispel doubts as to the continuity of the laws which were in force before the appointed day in the former State of Punjab, until the competent legislature or authority of the successor States effects any change in those laws.

13. If this could be the position in the continuance of the law in the successor States, on what principles one can say that the administrative order made by the erstwhile State of Punjab automatically lapsed and came to an end on and from the appointed day on the coming into existence of the successor States. Is it possible to take the view that the Legislature when it made so many provisions in the Act in its various parts in regard to the matters already referred to, did not think it appropriate to make a provision for the continuance of the effect of the administrative orders,

passed by the Government of the erstwhile State of Punjab until the Governments of the Success or States modified or charged it? Or is it, as a matter of law and propriety, reasonable to think that the Legislature did not consider it necessary at all to make such an express provision, as the continuance of the effect of such orders was so obvious even without such a provision? In our judgment when there is no change of sovereignty and it is merely an adjustment of territories by the reorganisation of a particular State, the administrative orders made by the Government of the erstwhile State continue to be in force and effective and binding on the successor States until and unless they are modified, changed or repudiated by the Governments of the successor States. No other view is possible to be taken. The other view will merely bring about chaos in the administration of the new States: We find no principle in support of the stand that administrative orders made by the Government of the erstwhile State automatically lapsed and were rendered ineffective on the coming into existence of the new successor States.

The position was, if we may say so, succinctly explained in Rattan Lal and Co. and Another Vs. The Assessing Authority and Another, It was stated:

It is argued that the reorganisation of the State took place on November 1st, 1956 and the amendment in some of its parts seeks to amend the original Act from a date anterior to this date. In other words, the legislature of one of the States seeks to amend a law passed by the composite State. This argument entirely misunderstands the position of the original Act after the reorganisation. That Act applied now as an independent Act to each of the areas and is subject to the legislative competence of the Legislature in that area. The Act has been amended in the new States in relation to the area of that State and it is inconceivable that this could not be within the competence. If the argument were accepted, then the Act would remain unamendable unless the composite State came into existence once more. The scheme of the States Reorganisation Act makes the laws applicable to the new areas until superseded, amended or altered by the appropriate Legislature in the new States. This is what the Legislature has done and there is nothing that can be said against such amendment. (para 12).

The above exposition puts the position neatly. After the formation of the Kerala State it appears to us, it was well within the province of that State to pass an order of the type of Ext. R-6, in the absence of Rules, reorganising the administrative set up of the Public Works Department for the purposes of appointment and promotion. The Petitioners can have no grievance against the same.

11. Finally, we turn to the argument of the counsel on the basis of Article 14 of the Constitution. The argument rests on the last paragraph of Ext. R-6. According to the counsel, no grounds have been made out to treat the allotted personnel as separate and distinct from personnel coming from the Malabar area of the State. We are quite unable to agree. The allotted personnel have a service history of their own, which made it necessary for them to carry the laws which had application in the

original State under which they served, part of which, by transfer, became the territory of the Kerala State. The historical reason is sufficient to justify their classification as a rational and proper one, having relation to the subject matter, and based on the statutory guarantee under the proviso to Section 115, and on Section 119 of the States Reorganisation Act.

12. The contentions urged by the Petitioners'' counsel fail except the contention as to the retrospectivity of Ext. R-6, on which as stated by the learned Advocate-General, we would treat it as operative only from its date of issue. Subject as above, we dismiss these writ petitions with no order as to costs.

13. In view of our judgment in O.P. No. 1672 of 1974 all the other writ petitions are also dismissed with no order as to costs. The C.M.Ps. in these petitions are also dismissed.