

**(2010) 03 KL CK 0118**

**High Court Of Kerala**

**Case No:** Writ Petition (C) No. 17133 of 2007

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APPELLANT

Vs

State of Kerala

RESPONDENT

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**Date of Decision:** March 12, 2010

**Acts Referred:**

- Kerala Police Subordinate Service (Amendment) Rules, 1980 - Rule 3
- Kerala State and Subordinate Services Rules, 1958 - Rule 27, 39

**Citation:** (2010) 2 KLT 265 : (2010) 5 SLR 60

**Hon'ble Judges:** P.N.Ravindran, J; K. Balakrishnan Nair, J

**Bench:** Division Bench

**Advocate:** S.P. Aravindakshan Pillay, N. Santha and Peter Jose Christo, for the Appellant; K.R.B. Kaimal Suman Chakravarthy and Benny Gervasis, Government Pleader, for the Respondent

**Final Decision:** Dismissed

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### **Judgement**

K. Balakrishnan Nair, J.

The petitioners approached this Court challenging Ext.P5 order of the Government allowing the representations of some inter-district transferees and granting them seniority over the petitioners and other similarly placed Police Constables and Ext.P7 order passed by the Director General of Police granting identical reliefs. Initially this Court granted interim stay of those orders. Later, after hearing both sides this Court vacated the interim order by order dated 6.9.2007. The said order reads as follows:

The petitioners in this Writ Petition challenge Ext.P5 order of the Government and also the order of the Director General of Police, Ext.P7. They are presently working in the District Armed Reserve, Idukki. Initially, they were recruited to the Kerala Armed Police Battalion V. They were transferred to the District Armed Reserve, Idukki, according to their turn. Before they joined the District Armed Reserve, respondents 4 and 5 were transferred from the District Armed Reserve, Ernakulam

to the District Armed Reserve, Idukki on 29.09.2001, on inter-district transfer basis as juniors to the junior most in Idukki. Those respondents are entitled to count their seniority in the District Armed Reserve, Idukki, with effect from the date they joined that unit. The petitioners are entitled to count their seniority in the District Armed Reserve, Idukki, only with effect from the date of the order, transferring them. According to the petitioners, they are entitled to count their seniority, with effect from the date of advice of the Public Service Commission, to the Kerala Armed Police Battalion V, by virtue of the proviso to Rule 3 of the Special Rules. The said Rule, as given in the book, Special Rules for the Kerala Subordinate Services, authored by M/s. N. Sugathan and A.V.R. Panicker, reads as follows:

Units of Appointment: The District Armed Reserve and Armed Police Battalions shall be separate units for appointment and the posts in the District Armed Reserve shall be filled up by transfer of Constables from the Armed Police Battalions as per the guidelines to be fixed by the State Government from time to time.

Provided that notwithstanding anything contained in Rule 27 of the General Rules of the Kerala State and Subordinate Service Rules, 1958. the seniority of a Police Constable appointed to a District Armed Reserve from an Armed Police Battalion shall be determined by the date of the order of his first appointment or the date of first effective advice of the Public Service Commission for his appointment, as the case may be, to the post of Police Constable in the Armed Police Battalion.

Provided further that nothing contained in the above proviso shall adversely affect the seniority of those Police Constables who have already been appointed to the District Armed Reserves before the date of coming into force of the Recruitment Rules to the post of Police Constable in the Kerala Police Subordinate Service (Amendment) Rules, 1980 published under Notification G.O.(MS)125/80/Home dated 26.12.1980.

Provided also that nothing contained in the above provisos shall adversely affect the seniority of a Police Constable directly recruited as a Police Constable in the Armed Reserve and subsequently transferred to the local police or such Police Constables of the Armed Reserve promoted as Head Constables in the Armed Reserve.

(emphasis supplied)

The petitioners' claim is founded on the first proviso to the above quoted Rule. Going by the first proviso, the impugned orders of the Government and that of the Director General of Police, are liable to be interfered with. Those orders say, the transferees from the Armed Police Battalion to the District Armed Reserve are entitled to count their seniority in the District Armed Reserve only with effect from the date of the order transferring them.

2. But the respondents have filed a counter affidavit and have come up with a contention that the Rule quoted above is not the Rule, which now prevails. The

official respondents as well as the contesting respondents have filed counter affidavits, stating that after the amendment to the Rules introduced on 10.03.1989, the provisos to the above quoted Rule no longer survive: It is submitted, Rule 3 as it stands after the amendment, reads as follows:

Units of Appointment - The District Armed Reserve and Armed Police Battalions shall be separate units for appointment and the posts in the District Armed Reserve shall be filled up by transfer of Constables from the Armed Police Battalions as per the guidelines to be fixed by the State Government from time to time.

While this Writ Petition and the other connected Writ Petitions were admitted, relying on the first proviso, interim orders were granted. In the light of the above quoted Rule, the respondents contend that the petitioners do not have any case on merits and therefore, the interim orders may be vacated.

3. Heard the learned Counsel on both sides. The learned Counsel for the writ petitioners raised the following contentions:

1) Even after the amendment introduced in 1989, the provisos are still remaining in force.

2) As per the Special Rules, the method of appointment to the District Armed Reserve, is only by transfer from the Armed Police Battalion. The appointment made by transfer from other District Armed Reserves is illegal and unauthorised.

3) The point raised by the petitioners is covered in their favour by the decision of the Division Bench of this Court in W.A. No. 3090/00.

4) The Government, in other cases, have filed counter affidavits, endorsing the stand that the provisos are still in force.

5) The impugned order of the Government has been issued in violation of the direction of this Court in Writ Petition(C) No. 14158/06 and connected cases, to hear the affected parties. Only the District Superintendent of Police heard the affected parties and not the Government.

6) Even if the provisos to the Rule are deleted, the executive order, introducing the amendment Rule (G.O.(MS) No. 125/80/Home dated 26.12.1980) is still in force.

4. The copy of the gazette notification, introducing the amendment to the Rule in 1989 is marked in this Writ Petition as Ext.R4(b). A perusal of the said notification would show that the entire old Rule 3 has been substituted by the newly introduced Rule. So, the contention that the provisos of the old Rule are even now surviving, cannot be accepted. Along with this point, we would refer to the 6th point raised by the petitioners that even if the amendment Rule introduced in 1980 is deleted, still, the executive order will remain in force. The said contention runs counter to the fundamental principle that no executive order can modify a statutory provision. The Government, when it decides to amend a Rule, normally issues an executive order,

containing the said policy. The said policy is later given effect to by introducing the corresponding amendment to the statutory Rule. In this case, the Government issued the executive order containing the policy decision to amend the Rule on 26.12.1980. Simultaneously, the Government implemented that policy by amending the Rule on the said date itself. If the statutory amendment is withdrawn, the executive order in which the policy decision was notified by the Government regarding the proposed amendment cannot survive.

5. The next contention raised is that the only method of appointment available for appointment to the District Armed Reserve is through transfer from the members of the Armed Police Battalion. But the orders permitting inter-district transfer are orders issued under Rule 39 of the General Rules of the K.S. & S.S.R. The said Rule confers power on the Government to issue appropriate orders, notwithstanding anything contained in the Special Rules or the General Rules. Inter-unit and inter-district transfers have been permitted since 1961 under the order of the Government G.O.(MS) No. 4/61/PD dated 02.01.1961. It appears, recently, the Government have imposed a restriction on the percentage of vacancies to which inter-district transfers can be ordered. That is, orders have been issued to safe-guard the interests of the candidates included in the PSC list, awaiting appointment. We are of the view that the Government have power to permit inter-district transfer and the general orders governing the same are valid, notwithstanding anything contained in the Special Rules. So, the contention of the petitioners that inter-district transfer is impermissible in the light of the provisions of the Special Rules, cannot be accepted.

6. The next point raised is based on the judgment in W.A. No. 3090/00. The petitioners herein are not parties to that judgment. The direction in that judgment will bind the parties thereto, even if the decision is demonstrably wrong, by virtue of the principle of "res-judicata". The official respondents are also bound by the said judgment, but only in relation to the appellants therein. The said decision will not bind even as a precedent as it was rendered without adverting to the statutory Rules governing the issue. We notice that the point raised in this Writ Petition was not the point that arose for decision in that case. A decision is an authority for what it decides and not for what can be deduced from it. The decision in the Writ Appeal Judgment was rendered without adverting to the factual position that the provisos to Rule 3 stood deleted with the amendment introduced in 1989. So the benefit of that decision will be confined, only to the appellants therein.

7. It is true, the Government and the Director General of Police may have filed counter affidavits in the earlier Writ Petitions, relying on the provisos to the aforementioned Rule. But, there can be no estoppel against the statute. When their stand is found wrong, they are always free to correct it.

8. The next point urged is that the order is issued in violation of the principles of natural justice. Prima facie we are of the view that even if the petitioners were heard

by the Government, the result would not have been different as we have already dealt with the substantive contentions raised by the writ petitioners. So, remand of the matter to the Government for granting a hearing to the petitioners will only be a futile exercise.

9. In the result, the interim order granted by this Court is vacated. But, it is made clear that the above findings made by us are made as prima facie findings for the purpose of deciding on the question of continuance of the interim order. The petitioners' contentions, if any, against the above findings can be urged at the time of final hearing of the Writ Petitions and this Court can consider the same on merits, notwithstanding this interim order.

2. We heard learned Counsel on both sides.

3. After hearing both sides we find no reason to change the view we have taken on various contentions raised in the above quoted interim order. We reiterate the said view and make it our final decision. In view of the said position the Writ Petition is dismissed.