
(1990) 12 KL CK 0035
In the High Court Of Kerala
Case No : O.P. No. 5178 of 1989

A. Gourisankar

APPELLANT

Vs

The State of Kerala

RESPONDENT

Date of Decision : 19-12-1990

Acts Referred:

Constitution of India, 1950 — Article 14, 19(1)
Notaries Act, 1952 — Section 5
Notaries Rules, 1956 — Rule 7

Citation : AIR 1991 Ker 225

Hon'ble Judges : K. Sukumaran, J

Bench : Single Bench

Advocate : M.R. Parameswaran, for the Appellant; Sankara Menon, Govt. Pleader, for the Respondent

Final Decision : Allowed

Judgement

K. Sukumaran, J.—Those who ordinarily appear in Court for others, are themselves in Court now. They complain against an illegality on the part of the Government; on the part of the Law Department of the Government. A legal question is involved concerning a Central enactment. Viewed from another aspect, a larger one of constitutional perspective is also involved in view of a somewhat strange stand taken by the Government in its counter-affidavit. The petitioners, as hinted earlier, are legal practitioners, Advocates, practising in different Courts, from one end of the State to the other. They had been appointed by the Government, as Notary Public. Most of them have been appointed under the provisions of the Notaries Act, 1952 (hereinafter referred to as "the Act"), a comprehensive legislation adopted by the Parliament in the early years of the Republic. The appointment is for a term but is renewable. The statutory requirements for the renewal were complied with by all of them. They were, however, confronted with the policy decision of the State Government. It was through a section officer of the Law Department that this policy decision was conveyed to the Court by a counter-affidavit. The stand point of the Government

can be exposed to public gaze by extracting the very words:

"The Government thought fit to restrict appointment of any person as a notary for a maximum period of 6 years and accordingly the policy decision was taken that appointment will not be given for more than 2 terms..... that the said decision being is intended to ensure that applications for renewal are dealt with on a uniform basis, without giving room for complaints of discrimination.

The reasons for stipulating the maximum period as 6 years, is for giving opportunity to other Advocates who did not have, opportunity to get appointment as notary. I Submit that the said reason is quite justified."

(It is not necessary to comment on the murderous attitude adopted by the deponent towards an alien language. Many such murders take place every day. Courts do not have time to cast a glance at these heaps of corpses. They have to get on with their work and with the day.)

2. Two contentions are prominently projected. (A) The State Government has no authority to decline a renewal, when a notary who wishes to continue to practise after the expiry of the period, makes an application and pays the prescribed fee. (B) The policy decision indicated in the counter-affidavit is totally arbitrary, irrational and unreasonable and liable to be struck down.

3. An examination of these rival contentions would justify a recapitulation of the history of the institution of the notary public.

4. India imported this legal institution (like many other images of Anglo-Saxon Jurisprudence) from the English Law. England had its intimate connection with India, for about three centuries. Industrial Revolution and explosion of commercial activities in that country had their reflections and reactions in territories then treated as part of the empire. Notary public was referred to in the Negotiable Instruments Act, 1881, by its definition -- an inclusive definition -- in Section 3 of the Act reading :

"Notary public includes also any person appointed by the Governor-General in council to perform the functions of a notary public under this Act."

A broad view of the past history of the English Law on Notaries could in a sense be useful and helpful. A noted text book on that topic is Brooke's "Notary Public". A handy information on the history and working of that institution as it now obtains is available in pages 85 to 97, paragraphs 201 to 300 of Halsbury's Laws of England, Fourth Edition, Volume 34. In the first edition of that classical work "on Negotiable Instruments Act by Bhashyam and Adiga, a short but succinct narrative is given on notary public. The ancient character of the institution as it existed in England, and its original ecclesiastical nature, and even the continued role of Archbishop of Canterbury in effecting appointments of certain categories of notary public. The history could be traced to the English enactments of the years 1801-1843. The inter-twining of the institution with ecclesiastical robes, would attract one to browse through the earlier enactments

such as the Ecclesiastical Licence Act, 1533. The intimate connection with the legal profession is discernible all through, particularly in the context of qualification considered appropriate for the appointment, whether as a solicitor or a clerk or an apprentice, the nexus with the profession and the Courts of law both as regards personnel and as regards the nature of the duties performed, cannot be ignored. A thrust that may be profitably noticed in this context is the professional attribute of the institution. It is not just another employment. Days are gone when appointment of a notary was treated as a bounty of an ecclesiastical head. Pages of history dealing with very many transformations of institutions and about the silent but substantial revolutions in areas of concepts and practices need not be traced and carefully sketched in the limited canvass of the case. The admission as a notary public, for example, used to be made under a faculty. In those ancient days, a faculty signified a privilege or special dispensation granted to a person by favour and indulgence to do that which by the law he cannot do. Halsbury's Laws of England points out;

"His office, which is one of great antiquity, is recognised in all civilised countries, and by the law of nations his acts have credit everywhere."

Statutes of England of 1801, 1833 and 1843, have covered more aspects of the changes in relation to that institution. Other enactments also had their effect and impact on the notary : Commissioners for Oaths Act, 1889 and 1891, Statutory Declarations Act, 1835 and the like.

5. As for India, the Negotiable Instruments Act of 1881, containing limited references to the notary public has now been replaced by the Notaries Act of 1952 (Act LII1/1952) which came into effect on 11-8-1952. There are 16 sections in that Act. In exercise of the powers, rules have been framed by the Central Government, the Notaries Rules, 1956. There are 17 rules and 18 forms.

6. The definitions of a notary (Section 2(d) and of the legal practitioner (Section 2(c)) may be initially noted. The power of appointment is dealt with in Section 3. The power of the Central Government extends to the whole or any part of India. The State Government has such powers for the whole or any part of the State. The appointees are legal practitioners or other persons who possess such qualifications as may be prescribed ("Prescribed" means, prescribed by the rules under the Act.) Rule 3 is the amplification of the requirement of the qualification as contained in Section 3. One who has been appointed by the Master of Faculties in England (in accordance with the Public Notaries Act as it exists in that country), is qualified to be appointed as notary public in India also. Not all the legal practitioners could aspire to become a notary public. He should have practice as legal practitioner for at least 10 years. Ten years is a significant period. Under Article 217(2), ten years of standing at the Bar or judicial experience, or of combination of both, speaking generally, is the minimum that is insisted upon for the appointment of a Judge of the High Court. The appointment itself is subjected to detailed scrutiny at various levels. An initial sifting of the application is made, when the competent authority on examination is satisfied

about the absence of the qualification or an earlier rejection within the preceding six months period of an earlier application. If the application crosses that hurdle, the application is published in the Gazette inviting objections. The competent authority would ascertain from the Bar Council, Bar Association, Incorporated Law Society or other authority in the area where the applicant proposes to practice, the objections, if any, to the appointment of the applicant as notary, to be submitted within the time fixed for the purpose. A recommendation of the competent authority is put forward to the Government. Rule 7(3) gives useful guidelines in formulating the recommendations: such as whether applicant ordinarily resides in the area in which he proposes to practise as a notary; the necessity for appointment having regard to the commercial importance of the area and the already existing notaries. The fitness to be appointed as a notary having regard to the knowledge and experience of commercial law, the extent of practice, are also to be adverted to. Objections, if any, received have also to be given due consideration. A special situation is in relation to an application coming from a legal practitioner attached to a firm, when another member of the very firm is already functioning as a notary. An adjudgment of the better entitlement of an applicant is called for in the event of there being a plurality of applications from an area. It is on the receipt of the report of the competent authority that the Government appoints one as a notary in the manner indicated in R. 8. The applicant has to be informed of the order passed by the Government. The applicant is permitted to seek a review of the Government's order subject to the conditions contained in sub-rule (3). On the appointment, the name is entered in the register of notaries maintained u/s 4. A certificate is then issued authorising the applicant to practise, as a notary for a period of three years from the date on which the certificate is issued to him. An extension of an area of practice can be sought for under Rule 8A.

7. The list of notaries appointed, and in practice at the beginning of an year, together with prescribed details pertaining to them has to be published by the Governments, Central and State during the month of January each year. Without a certificate of practice in force issued u/s 5, no person shall practise as a notary or do any notarial act under the seal of a notary. The particulars to be contained in the seal are covered by Rule 12. Seal is indeed a symbolic one of the authority. (Royal persons seldom parted with the company or custody of the seal. The books on legal history and the biographies of royal personalities have all referred to the Great Seal, of the English royalty). The biography of Bloody Jeffreys -- The Hanging Judge by Robert Milne-Tyte refers to the flight of James II with the seal:

"As he crossed the Thames to Lambeth on the first stage of his flight to France, he threw the Great Seal into the river....."

More serious references are made in the book "The Lord Chancellor" by Nicholas Underbill.

8. Section 10 delineates four circumstances under which an appointed notary

could be removed from the register maintained u/s 4. There are (a) a request by the notary himself, (b) failure to pay the prescribed fee, (c) becoming an undischarged insolvent and (d) being found guilty of professional or other misconduct which in the opinion of the Government renders him unfit to practise as a notary. Rule 13 details the procedure for an enquiry into the allegations of professional or other misconduct of a notary. The notification of removal is to be published in the gazette and communicated to the notary concerned. Rule 14 obligates every notary to submit annual return to the Government about the notarial acts rendered by him during the preceding year. The annual publication of the list of notaries has to be done in the form referred to in Rule 17.

9. It is in the above background that the substantial section about the renewal of a certificate of practice as contained in Section 5 has to be considered. Sub-section (2) reads as follows:

"(2) Every such notary who wishes to continue to practice after the expiry of the period for which his certificate of practice has been issued under this section shall on an application made to the Government appointing him and payment of the prescribed fee, if any, be entitled to have his certificate of practice renewed for three years at a time."

10. The scheme of the enactment and the rules abundantly make it clear that the greatest scrutiny is made at the time of the initial entry. Once enrolled, continuation is almost automatic. Application for renewal and payment of the fee are matters of a mechanical character. Removal is a matter of significance and for that separate provision is made.

11. There are other enactments which contain similar schemes. Many of the professional bodies insist on such minute scrutiny at the point of entry. Thereafter, the practice is permitted unchecked almost, till serious events disqualify him to continue the practice and entail his removal. Even in relation to matters of trade, taxing enactments contain such provisions. A firm registered for Income Tax purposes, ordinarily gets an automatic renewal, when the Constitution of the firm does not undergo any substantial change, (vide Section 184 of the Income Tax Act.) So too the position as regards the renewal of registration of a dealer under the Sales tax laws. Many licences are that way automatic. When disruption is made, it furnishes a cause of action for the person injuriously affected. Case law has grown up in the background of exercises of powers by authorities denying or delaying renewal of a registration.

12. Having regard to the general scheme of the Act, the mandatory character *prima facie*, indicated by the employment of the word "shall", gets further strengthened and fortified by supportive circumstances. The stand taken by the Government, viewed even technically, cannot be sustained in the face of the statutory provision which entitles a notary public, once registered as such, an automatic renewal on making an application and payment of fee.

13. The State Government is a functionary of limited power under the scheme of

the Act. The exercise of its powers is conditioned by the statutory provision. It is not a free agent either in relation to the appointment or as regards the termination of notaries" status. It has to function within the frame-work of the rules framed by the Central Government. Policy considerations are already taken care of when Parliament passed the law. Even subsidiary details got covered by the rules. The State Government cannot therefore inject into the system something which according to its notion, is a better nutrient.

14. The State Governments have attempted to issue instructions in relation to the appointment of notaries. Such attempts at enlarging the area of action of the State Government or adding to the functions which could be discharged by the State Government, have been attacked by the aggrieved petitioners. When the incursion is not serious or substantial, the challenge has failed. Such was the case in relation to the issue of a general circular on the question of appointment of more notaries, as issued by the State of Uttar Pradesh. The Allahabad High Court dealt with the question in Hukan Chand Goyal Vs. The State of Uttar Pradesh and Others, . Some discussion on the public policy vis-a-vis the notary public, is discernible from a later decision of the same High Court in Kashi Nath Srivastava v. Mrs. G.S. Tewari 1982 ALJ 642. As to how public interest and interest of the litigants are served by a nearby notary has been demonstrated by the Allahabad decision in 1982 ALJ 642 (supra). The Court observed (at page 646; All LJ 1982):

"Notaries are responsible officers and are readily available all over the country."

Reference may, in that context, be made to the decision of the Supreme Court in Jugraj Singh and Another Vs. Jaswant Singh and Others, .

15. There is an illuminating review of the history of the institution of notary public in the decision of P. B. Mukerji, J. of the Calcutta High Court in In Re: K.K. Ray (Private) Ltd., . That decision discarded a narrow view about the functioning of that great institution of notary public. The international perspective of the operation and utility of the institution was picturesquely portrayed by the Court. The decision incidentally suggested to the Government of India to replace some of the obsolescent parts of the frame work of the Act. In the light of the foregoing discussion, wherein prominent features of notary public could, necessarily, be emphasised thus: it is an ancient institution; it is integrally linked with the legal profession, members of the profession with long enough standing at the Bar, forming the eligible category for appointment as notaries. The history of the institution and the frame-work of the statute, will clearly frown upon an idea that a notary public is only yet another employee, or a shrewed trader, rivetting his attention on rising wages or phenomenal profits. The State Government grievously erred in not adverting to these salient and substantial factors, when it formulated its policy decision. It missed much about the hoary tradition of the legal profession, which for over a century in our own land, had contributed to the community of notary public. In equating them as mere wage earners, and in viewing the power of appointment of notary as an available

avene for doling out some jobs for the educated but unemployed groups, the State acted arbitrarily and therefore unconstitutionally.

16. The present is a case where a direct and daring aggression has been directed against the core scheme of the Notaries Act. That cannot be permitted having regard to the limited leverage and State Government enjoys under the statutory scheme. Imposing a restrictive period for practising as a notary --a six year period is unduly restrictive -- is on the face of it arbitrary and uncalled for, Experience in relation to the functioning of notaries wills show that there have been reputed legal firms which have, from generation to generation carried on with great credit and honour the onerous and responsible duties to be discharged by a notary public. It will be manifestly against public interest if one who has an accumulated experience of a sizeable six years is scuttled merely for giving another a new "job opportunity*. An advanced age is only an added advantage for performing the duties of an ancient legal institution. "Age, "Samuel Johnson said," will perform the promises of youth." (The quotation is from an Article in 104 Harvard Law Review, November, 1990 page 1).

17. It is somewhat unfortunate that those who should have shown greater concentration on the position of the legal profession, did not bestow adequate attention on it. A counter-affidavit dealing with a serious issue, affecting the fate and future of a large number of persons belonging to the learned profession of law, should have received greater attention from the official head of the Bar and the constitutional functionary -- the Advocate-General. The Government has missed his earlier guidance; and the Court has missed his assistance in the course of the arguments. By any standard, the cases deserved more serious treatment at the hands of the Law Department of the Law Officers.

18. In the light of the aforesaid discussion, the policy decision as projected by the Government in its counter-affidavit is declared, as unconstitutional and illegal. The orders terminating the appointments of the petitioners as notary public are quashed. It is declared that subject to the provisions of the Act and Rules, those who have already registered are entitled to automatic renewal of their registration on the payment of the fee and making of the application. "The writ petitions are accordingly allowed. Despite a pressing provocation, I do not make any order as to costs.