
(1969) 08 KL CK 0004
In the High Court Of Kerala
Case No : O.P. No. 884 of 1968

A. Junus and Another

APPELLANT

Vs

Comptroller and Auditor General of India and Others

RESPONDENT

Date of Decision : 18-08-1969

Acts Referred:

Constitution of India, 1950 — Article 148(5), 313, 376
Government of India Act, 1915 — Section 96D(1)
Government of India Act, 1935 — Section 246, 247, 276

Citation : (1970) KLJ 855

Hon'ble Judges : K.K. Mathew, J

Bench : Single Bench

Advocate : K. Chandrasekharan and T. Chandrasekhara Menon, for the Appellant; C. Sankaran Nair, for the Respondent

Final Decision : Dismissed

Judgement

K.K. Mathew, J.—The petitioners are Upper Division Clerks in the office of the Accountant-General, Kerala. By an order passed by the 3rd respondent on 8-9-1967 (Ex. P-1), 104 Upper Division Clerks have been promoted to what is called the selection graded By another order passed on 15-1-1968 (Ex. P-3) by the 3rd respondent, 16 Upper Division Clerks have been promoted to the same grade. The petitioners complain that most of the parsons so promoted are juniors to the petitioners and that the promotions granted to the juniors overlooking their claims were illegal. The petitioners contend that promotions have been made on the basis of paragraph 224 of the Comptroller and Auditor-General's Manual and Standing Orders. According to the petitioners, the promotions should have been made only on the basis of paragraph 224, as amended on 2-1-1958, and as evidenced by Ex. P-7, whereas they were actually made on the basis of paragraph 224 before it was amended. The petitioners further contend that even if the rules evidenced by Ex. P-7 are not passed by the President under. Art. 148 (5) they were binding on the 2nd respondent and promotions should have been made on the basis of these rules.

2. On the other hand, it is contended for the respondents that the Manual of Standing Orders contains instructions issued by the Auditor-General under the powers vested in him by the Auditor-General's Rules issued by the Secretary of State for India u/s 96-D (1) of the Government of India Act, 1919, that these Rules have been kept alive by section 276 of the Government of India Act, 1935, and that they continue in force by virtue of Articles 313 and 376 of the Constitution. Whether after the Constitution came into force, in view of Art, 148 (5) the Auditor-General is competent to issue instructions regulating the conditions of service of the employees of the Department, and therefore, he was competent to amend paragraph 224 on 2-1-1958 is a moot question. There is nothing on record to show that paragraph 224 was amended in the exercise of any statutory power vesting in the Auditor General. Be that as it may, since the 2nd respondent claims that the promotions were made on the basis of the rules mentioned in Ex. P-7 he must stand or fall by that claim. If, in making the promotions, the 2nd or 3rd respondent has violated or not followed these rules, the promotions must be adjudged bad, whether those, rules have statutory force or not. The proposition that violation of administrative rules, unless backed by statute, is not justiciable, has to be understood with certain reservations. I made certain observations on this aspect of the question albeit obiter in *Karunakaran v. Bureau of Economics & Statistics* 1966 KLT 372. There, I quoted the following passage from "Nature and Source of Law" by John Chipman Gray, (page 108):

Section 246: Are these regulations and orders sources of the Law? It is hard to imagine any of them which may not be brought before a court for application and whose ultimate sanction is not that the Courts will apply them. Let us take one of Mr. Harson's instances, a regulation from the British War Office that no recruit shall be enlisted who is not five feet six inches high. Suppose a recruiting officer musters in a man who is five feet five inches only in height, and pays him the King's shilling; afterwards the officer is sued by the Government for being short in his accounts; among other items he claims to be allowed the shilling paid to the undersized recruit. The Court has to consider and apply this regulation, and whatever its effect may be, that effect will be given to it by the court exactly as effect will be given to a statute providing that murderers shall be hanged, or that last wills must have two witnesses.

Section 247: It is, therefore, on the best consideration I can give the subject, impossible to say that any general rule of conduct laid down by an administrative organ of a political (or other) organised body, and applied if necessary, by its courts is not a source of law.

3. This apart, I think, the principle of the decision of the Supreme Court of America in *Vaterelli v. Seaton* 359 U.S. 535 should govern the situation here. In that case, the Secretary of the Interior had dismissed a civil servant without observing the Department's regulations which provided that he should be given a specific statement of the charges against him. This regulation had no statutory force. The court held the dismissal illegal and void because the Department had

disregarded the standard which it had voluntarily adopted for itself. Mr. Justice Frank-further vividly expressed the principle:

An executive agency must be rigorously held to the standards by which it professes its actions to be judged. Accordingly, if dismissal from employment is based on a defined procedure, even, if generous beyond the requirements that bind such agency, that procedure must be scrupulously observed. This judicial rule of administrative law is now firmly established and, if I may add, rightly so. He "that takes the procedural sword shall perish with that sword".

Commenting on this passage W.H.R. Wade in his article "Anglo-American Administrative Law", said:

The implication of this passage is clear. The Court is prepared to create what might be called a special administrative law to govern the exercise of powers. It does, indeed, some times rely on what to an English lawyer would seem the more natural argument that departmental regulations may be regarded as delegated legislation having the force of law so as to bind the department. And sometimes, there is a broader constitutional argument, that the regulations are a kind of crystallisation of due process, which when once it has been so formulated must thereafter be observed. But whatever the detailed reasoning, the underlying attitude is that the Court want to see powers exercised according to ascertainable rules and standards, and so is disposed to seize upon any rules standards that can be related to the case, whether or not they are prescribed with binding legal force. (81 Law Quarterly Review 357 at P. 376).

4. Now, let me examine the question whether the rules mentioned in Ex. P-7 have been followed in making the promotions. The contention of the petitioner as already stated, was that the rules to be applied are those contained in Ex. P-7, and that according to those rules, promotions to the selection grade must be on the basis of merit-cum-seniority. They contend that promotions were not made on the basis of merit-cum-seniority but only on the basis of merit as envisaged in Ex. P-6-namely, paragraph 224 before it was amended. In the affidavit filed on behalf of respondents 1, 2 & 3, it is specifically averred that a Departmental Promotion Committee consisting of the Accountant-General, the Head of the Office, the Deputy Account-General and the Deputy Controller of Accounts has been constituted, that the Committee examined the record of service and confidential reports of the candidates and took into consideration the efficiency, integrity, aptitude for work and mental equipment of the candidates, and made the selections giving the weight to the seniority. The affidavit says that the Committee first made an evaluation of the merits of each candidate, and from the candidates found suitable, promotions were made on the basis of seniority. In other words, the averment is, the Committee made an assessment of the merit of the candidates on the basis of an objective standard and the promotions to the selection grade were made on the basis of seniority from out of the candidates, who, according to the Committee, satisfied the objective standard of merit. Mr. G. Viswanatha Iyer, Counsel for some of the petitioners in the

connected O.P.s. which were also heard along with O.P. referred to the rulings in State of Mysore Vs. M.H. Bellary, , and State of Mysore and Another Vs. Syed Mahmood and Others, and contended that the promotions should have been made on the basis of seniority subject to the fitness of the candidate to discharge the duties of the post. He relied specifically on two sentences in paragraph 4 of the latter case which read as follows:

Where the promotion is based on seniority-cum-merit, the officer cannot claim promotion as a matter of right by virtue of his seniority alone. If he is found, unfit to discharge the duties of the higher post he may be passed over and an officer junior to him may be promoted.

In a selection made on the basis of merit-cum-seniority merit must be given its proper or, if I may say so, the dominant place. The object of constituting a selection grade was to form a group, which could be entrusted with work carrying greater responsibilities. I think, seniority was given its due importance in making the promotions and that the promotions were made in accordance with the provisions of the rules evidenced by Ex. P-7.

5. The petitioners contended that the adverse remarks in their confidential records were not communicated to them, and therefore, they had no opportunity to have their say as regards the adverse remarks. The averment in the counter affidavit makes it clear that the adverse remarks were communicated to the petitioners.

6. It was contended by Mr. K. Chandrasekharan that there is no provision for constituting Departmental Promotion Committee in the rules evidenced by Ex. P-7, although there was such provision in the rules evidenced by Ex. P-6, and that in spite of the omission of such a provision in the rules evidenced by Ex. P-7, a Departmental Promotion Committee was unauthorisedly constituted, and therefore, the selections were made by an agency having no authority. The contention, I think, is devoid of any merit. The constitution of a Departmental Promotion Committee consisting of persons who have direct knowledge about the work and the conduct of the petitioners cannot be said to be unauthorised. The rules visualise an assessment of the merits of the candidates and who can do it better than the persons who constituted the Departmental promotion Committee? I think there was nothing wrong in the Accountant-General obtaining the assistance of the Departmental Promotion Committee for making an assessment of the merits of the candidates, even if there was no specific provision for constituting such a Committee in the rules evidenced by Ex. P-7.

7. The contention of the petitioners that they have crossed the efficiency bar, and therefore, they were fit for promotion to the selection grade is also without any merit. The mere fact that the petitioners crossed the efficiency bar is no ground for holding that they are fit to discharge the duties attached to the selection grade. In the rules evidenced by Ex. P-7, it is stated that detailed instructions will be issued for making the selection, and it is contended by the petitioners that

no such instructions have been issued as to how the merit of the candidates should be assessed, and therefore, the Departmental Promotion Committee had no criterion for making an assessment of the merit of the candidates. It is impossible in an area like this to lay down detailed rules. A large amount of discretion must necessarily be left to the persons who make the assessment. You cannot avoid imponderable factors entering into the verdict. The ultimate guarantee of a proper selection based on merit is in the integrity and impartiality of the persons making the selection. I do not think that the persons who constituted the Committee were swayed by alien considerations.

I dismiss the petition. No costs.