

(1981) 10 KL CK 0013
In the High Court Of Kerala
Case No : O.P. 4916/80-J

A.N. Padmanabhan

APPELLANT

Vs

State of Kerala and Others

RESPONDENT

Date of Decision : 22-10-1981

Acts Referred:

Kerala Public Service Commission Rules of Procedure, 1976 — Rule 10, 11, 12, 13, 6
Kerala State and Subordinate Services Rules, 1958 — Rule 2(2), 3, 31

Citation : (1981) 10 KL CK 0013

Hon'ble Judges : R.Bhaskaran, J

Bench : Single Bench

Advocate : V. Sivaraman Nair, V.M. Nayanar, R. Krishnan Nair and V. Rajendran, for the Appellant; Mustafa Kani Rowther, Government Pleader for Respondents 1 and 2 and T.P. Kelu Nambiar, for the 3rd Respondent, for the Respondent

Final Decision : Allowed

Judgement

Bhaskaran, J.—The Petitioner was one of the Applicants for selection and appointment to the post of Junior Engineer (now redesignated as Assistant Engineer) in the Radio Branch of the Kerala Engineering Subordinate Service attached to the Office of the 2nd Respondent, the Chief Engineer, (Buildings and Roads), Public Works Department, Government of Kerala, Trivandrum, pursuant to the notification issued by the 3rd Respondent, the Kerala Public Service Commission. Ext. P-1 is the copy of the ranked list showing 13 persons selected in the order of merit. The Petitioner's rank in Ext. P-1 is 10. Ext. P-1 being, dated 25th January 1979, in terms of Rule 13 of the Kerala Public Service Commission Rules of Procedure it was to lapse after 24th January 1981. According to the Petitioner, till 1979 the cadre strength of Junior Engineer (Radio Branch) was 23, out of which there were only 2 direct recruits, whereas there should have been 14 direct recruits, applying the ratio of 3:2 as per the Kerala Engineering Subordinate Service (Radio Branch) Rules issued in G.O. M.S. 26/67/P.W., dated 3rd February 1967; the shortfall was occasioned by the delay in recruitment caused by a variety of circumstances. The grievance of the Petitioner

is that though there were enough number of candidates who were eligible to be recruited, the recruitment did not take place till about the middle of 1979; the remaining vacancies earmarked for direct recruits were filled up by promoting Radio Mechanics temporarily, in excess of the ratio available to them. Ext. P-2 is a copy of the appointment order temporarily promoting two hands from service to fill up the posts earmarked for the direct recruits. In Ext. P-2 it is made clear that the promotion was purely provisional subject to the condition that the promotees would be reverted when the Public Service Commission hands joined duty; it was after obtaining a declaration to that effect that the incumbents shown in Ext. P-2 were allowed to join duty as Junior Engineers. Having noticed that the ranked list Ext. P-1 was about to lapse shortly, and only 6 out of the 10 candidates in the main list had been advised for appointment, the Petitioner on 18th December 1980 filed this writ petition seeking the following reliefs:

(a) to direct the 1st and 2nd Respondents by issue of a writ in the nature of mandamus to appoint the Petitioner as Junior Engineer now redesignated as Assistant Engineer (Radio) in one of the vacancies earmarked for direct recruits according to the Kerala Engineering Subordinate Service (Radio Branch) Rules prior to its amendment by Ext. P-3 order;

(b) to direct the 2nd Respondent to appoint the Petitioner as a Junior Engineer-redesignated as Assistant Engineer (Radio) subject to final orders of this Hon'ble Court.

This Court on 21st January 1981 in G.M.P. No. 722 of 1981 issued the following order:-

Heard counsel for the Petitioner and the learned Government Pleader. The 2nd Respondent, the Chief Engineer (B and R), P.W.D., Trivandrum, will appoint the Petitioner as a provisional Junior Engineer (Radio) on or before 24th January 1981, if there is a vacancy for that post and if the Petitioner has been advised by the Public Service Commission and if the candidates above him have already been appointed or having been advised they have not joined the service.

It is admitted on all hands that the direction contained in the said order has not been implemented.

2. Sri Rawther, the Government Pleader, appearing on behalf of Respondents 1 and 2, submitted that the direction contained in the order, dated 21st January 1981 could not be implemented because there was no vacancy for absorbing the Petitioner; and Ext. P-1 ranked list had ceased to be in force after 24th January 1981. He also submitted that the Petitioner not having been advised by the 3rd Respondent, he could not have been appointed for the reason that the mere inclusion in the ranked list prepared by the Public Service Commission by itself did not confer any title to the post in so far as the person included in the list was concerned. It was also his submission that in Ext. P-1 ranked list the Petitioner ranked No. 10; and Public Service Commission having advised only 6 among the persons mentioned therein, the Petitioner would not have been advised or

appointed in the next vacancy to be filled up. A further submission made by Sri Rawther is that the Kerala Engineering Subordinate Service (Radio Branch) Rules, 1967, having been amended by Ext. P-3 Government Order, and in consequence the ratio between the direct recruits and promotees having been altered from what was 3:2 previously to 25:75, the Petitioner could not have aspired to get the appointment if and when the amended rules which came into force on 28th July 1979 was put into operation. Lastly, it was submitted by Sri Rawther that assuming that the Petitioner was entitled to some relief, that could not be granted to him for the reason that those who were likely to be affected by his appointment were not made parties to the writ proceedings.

3. On behalf of the 1st Respondent a counter-affidavit has been filed. The 3rd Respondent, the Kerala Public Service Commission, also has filed a counter-affidavit. Sri T.P. Kelu Nambiar, the counsel for the 3rd Respondent, submitted that there was no dispute that from 25th January 1981. Ext. P-1 ranked list had ceased to be in force; and, therefore, the 3rd Respondent could not have advised any person included in that list once the list had lapsed. He also submitted that even if one more person had to be advised from Ext. P-1 ranked list for the next available post, the choice would not fall on the Petitioner as, according to the counsel, when the communal rotation principles are applied, it would have been necessary for the Petitioner to yield place for one of the persons belonging to the backward classes mentioned in the supplemental list contained in Ext. P-1 itself.

4. Sri V. Sivaraman Nair, the counsel for the Petitioner, submitted that from the Respondents' own showing it could be seen that there existed on the relevant date vacancies in the post of Junior Engineer (Radio) to absorb the Petitioner. He drew my attention to the averments made to paragraph 4 of the counter-affidavit filed by the 1st Respondent. For the sake of convenience and precision I would extract below that paragraph, which reads as follows:-

4. On the date of issue of Ext. P-3 viz., G.O. (P) 85/79/P.W. and E., dated 28th July 1979, cadre strength of Junior Engineers (Radio) was 23, of them 7 posts were held by direct recruits. As per the G.O.MS. 26/67/P.W., dated 3rd February 1967 promotees were entitled to get 9 posts and direct recruits 14 posts. But in view of the proposal which led to the issue of Ext. P-3 which was under the consideration of Government, the vacancies were filled up by the 2nd Respondent by provisionally promoting the Radio Mechanics and so there was shortfall in the quota for direct recruits, as per the Government Order dated 3rd February 1967.

5. Elaborating his argument, Sri Sivaraman Nair submitted that the admitted fact is that the cadre strength of Junior Engineers was 23; 14 were to be filled up by direct recruits, and 9 by promotees; only 7 posts were held by direct recruits; this was the position as on 28th July 1979; thereafter, therefore, there were 7 posts to be filled up by direct recruits against which the 3rd Respondent admittedly had advised only six persons out of whom three did accept the post, thus leaving four posts to be filled up by direct recruitment. He also drew my

attention to paragraph 9 of the counter-affidavit of the 3rd Respondent to highlight his contention that if only the 2nd Respondent had reported the vacancy, the Petitioner would have been the person whom the 3rd Respondent would have advised. Again, for the sake of precision and to avoid any vagueness, I shall quote the averments made in the earlier part of that paragraph which read as follows:

9. Regarding the averments of the Petitioner in paragraphs 4 to 7 of the O.P., the following facts are submitted. Only two vacancies were reported by the Chief Engineer for making direct recruitment and those vacancies were notified in the Gazette dated 12th July 1977. The number of vacancies notified was only two and not 13 as stated by the Petitioner. Altogether 6 candidates were however advised for recruitment from the ranked list, as per this office letters No. RIIA (4) 17881/77/GW., dated 8th February 1979, GR 1(4) 17881/77/GW., dated 2nd October 1980, GR I (4) 17881/77/GW., dated 10th November 1980, GR I (4) 17881/77/GW., dated 12th November 1980 and GR I (4) 17881/77/GW., dated 17th November 1980, in four vacancies, two being the vacancies which arose consequent on the cancellation of the advice on recruitment of two candidates, viz., S. Ganeshan and M.D. Ramachandran who were not willing to accept the appointment. The vacancy that arose consequent on the relief of Sri Vijayachandran had not been reported to the Commission. No more vacancies in the post were reported during the pendency of the list.

Sri Sivaraman Nair contended that the facts disclosed in the passage quoted above themselves would show that actually 6 persons were advised, 3 persons advised had declined to accept the post, and the next post was to be filled up by the 10th in the list, namely, the Petitioner. There, of course, is dispute between the Petitioner on the one hand, and the Respondents on the other, as to whether, on the application of the principles of communal rotation, it would be the Petitioner belonging to the forward community, ranked 10th in the list, or any one among the three belonging to the backward class shown in the supplementary list that would be entitled to the post if the post was to be filled up. Sri Sivaraman Nair would contend that as against 7 posts 6 persons were advised, 3 persons alone accepted the appointment, thus leaving four posts vacant, and even assuming that the posts declined by Sri Vijayachandran, rank No. 3, is to go to an Ezhava or Thiyya (serial No. 13), then also, in the next turn, the appointment would have gone to the Petitioner. I would revert to this question after considering the other contentions raised in the writ petition.

6. The major point at issue between the Petitioner on the one hand, and the Respondents on the other, is whether, when Ext. P-1 ranked list had ceased to be in force from 25th January 1981, this Court could direct the Respondents to appoint the Petitioner to the post assuming that the post remained vacant. In this connection Sri Kelu Nambiar, on behalf of the 3rd Respondent, contended that it being the first appointment, as per Rule 3 of the Kerala State and Subordinate Services Rules, 1978, the appointment could not be made otherwise

than on the advice of the Public Service Commission. Rule 3 (a) of the said rules reads as follows:

3 (a). All first appointments to the service shall be made by the appointing authority on the advice of the Commission in respect of posts falling within the purview of the Commission and in all other cases by the appointing authority from a list of approved candidates prepared in the prescribed manner.

As per Rule 13 of the Kerala Public Service Commission Rules of Procedure the ranked lists published by the Commission shall remain in force for a period of one year from the date on which it was brought into force provided that the said list would continue to be in force till the publication of a new list after the expiry of the minimum period of one year or till the expiry of two years whichever was earlier. So, according to Sri Nambiar, as things then stood, no question of the Public Service Commission advising the appointment of any person from Ext. P-1 ranked list arose, and this Court would not be justified in compelling the Public Service Commission to advise anyone for appointment from a ranked list which had already lapsed. He also submitted that no vacancy had been reported to the Public Service Commission, and for that reason also the question of the 3rd Respondent advising anybody from the ranked list could not arise.

7. From Ext. P-2 and also from the averments made in paragraph 4 of the counter-affidavit filed on behalf of the 1st Respondent, it is clear that out of the 14 posts to be filled up by direct recruitment only 7 posts were filled up by such recruitment, and the rest of the posts were held by temporary promotees; this evidently was made possible only by resort to Rule 31 (a) (i) of the general rules of the Kerala State and Subordinate Services Rules. Sub-rule (ii) of that rule requires:

No person who does not possess the qualification, if any prescribed for the said service, class or category, shall ordinarily be promoted under Clause (i). Every person who does not possess such qualification and who has been or is promoted under Clause (i) shall be replaced as soon as possible by promoting a person possessing such qualifications.

The mandate of the rule, therefore, is that the 2nd Respondent ought to replace the persons provisionally promoted as soon as direct recruits are available for the purpose. Ext. P-1 ranked list is dated 25th January 1979; that would mean that ever since that date, as many as 13 candidates were available for appointment to the posts required to be filled up by direct recruits; and yet the appointing authority refrained from carrying out its statutory duty for the sole reason:

In view of the proposal which led to the issue of Ext. P-3 which was under the consideration of Government, the vacancies were filled up by the 2nd Respondent by provisionally promoting the Radio Mechanics (vide paragraph 4 of the counter-affidavit filed on behalf of the 1st Respondent).

Now the question is: What is the method to be adopted in filling up the posts

which existed as on 28th July 1979, the date of coming into force of Ext. P-3? Is it to be done following the ratio mentioned in the rules as amended by Ext. P-3, or applying the ratio as it stood before the amendment by Ext. P-3? The contention raised by Sri Rawther is that whatever might have been the ratio before the coming into force of the amendment, once the amendment came into force, not only the vacancy that arose after the amendment, but also all the vacancies which arose before the amendment, but remained without being filled up, had to be filled up following the ratio mentioned in the rule as amended. I am afraid, this construction sought to be placed to the rule in question is not correct. The amendment does not claim to have retrospective operation. In the absence of any intention to the contrary it should be deemed to have prospective operation; prospective operation would mean that the ratio mentioned in the amended rule could be applied only in relation to vacancies that arose from the coming into force of the amendment. Any other view is not only not warranted by the true spirit of the rules of construction, but also would tend to defeat the very principle underlying the provisions of rule 31 (a) (ii) of the Kerala State and Subordinate Services Rules, as it would pave the way for unfair practices tainted with mala fides by refusing or omitting to fill up the vacancies by direct recruits, as and when vacancies arise, with ulterior motives.

8. Once the question discussed above is settled, it follows that on the 1st Respondent's own showing 14 posts, out of a total cadre strength of 23, had to be filled up by direct recruits; only 7 posts having been filled up by direct recruits, the remaining 7 posts had to be filled up by direct recruits. We have already noticed from the passage extracted from paragraph 9 of the counter affidavit filed on behalf of the 3rd Respondent that as against those 7 vacancies the 3rd Respondent had advised only 6 persons out of whom only 3 persons accepted the post. It would mean that as many as 4 vacancies in the post of Junior Engineers (now Assistant Engineers") which were to be filled up by direct recruits were left without being filled up by those who were competent to fill up those posts.

9. The further question is whether, even when the Court is satisfied that there were posts to which the Petitioner could have been appointed, but he had not been appointed, this Court could compel the 2nd Respondent to appoint the Petitioner to the next post which, according to the Petitioner, falls to his lot. No doubt, on the question of advice the 3rd Respondent has a case that the Public Service Commission would have nothing to do with it, the list having lapsed on 25th January 1981, and also for the reason that no requisition for advice was received from the 2nd Respondent. Is the Court helpless in this matter in the situation stated? Having considered the magnitude and complexity of the problem in its depth, I am of the view that the Court has not only the right but also the duty to ensure that the appointing authority does not circumvent its statutory obligation under Rule 31 (a) (ii) of the Kerala State and Subordinate Services Rules by delaying and defeating the rights of the selected candidates to get appointed to the posts which fall to their lot. Procedure, after all, is meant to

further justice, not to frustrate it.

10. The appointment has to be made from a list of approved candidates as enjoined by Rule 3 of the Kerala State and Subordinate Services Rules; and an "approved candidate" has been defined in Rule 2(2) of Part I of the said rules which reads as follows:

Approved candidates" means a candidate whose name appears in an authoritative list of candidates approved for appointment in any service, class or category.

There could be no doubt that the personnel included in Ext. P-1 ranked list answer the description given to the term "approved candidate" in Rule 2(2) of the said Rules. Rules 6 to 13 of the Kerala Public Service Commission Rules of Procedure prescribe the procedure to be followed in the preparation of the ranked list. There is no mention about any other list to be prepared by the Public Service Commission. I am, therefore, of the opinion that on the facts and circumstances of the case, interest of justice requires, without violence to any of the provisions of the rules governing the appointment, that this Court could compel the 2nd Respondent to make appointment from the ranked list Ext. P-1, which really is the authoritative list as defined in Rule 2(2) of the Kerala State and Subordinate Services Rules, to the posts held by temporary hands, not replaced by Public Service Commission hands. I find support for this view I take in the judgment of Raman Nayar, C.J. and Mathew, J. dated 12th January 1971 in Writ Appeal No. 1016 of 1969 which arose out of the judgment rendered by Isaac, J. in O.P. No. 4854 of 1967, dated 11th November 1969.

11. Lastly, there remains the point raised by Sri Rawther that assuming that the contentions raised by Sri Sivaraman Nair are correct, even then the Petitioner would not be entitled to seek appointment to the post unless the parties likely to be affected are on party array in the writ petition. This is a question to be verified. Sri Sivaraman Nair would emphatically contend for the position that there exists vacancy to be filled up by direct recruitment reverting the promotees who are holding the post temporarily and whose appointments to the post had not so far been regularised. Sri Rawther would not admit that the position is so. If they have been regularised, such persons could not be disturbed, but, if out of the posts to which reference had already been made any post remained without being filled up or is occupied by a promotee provisionally promoted, and who has not been regularised in the post, the Petitioner would be entitled to be appointed to that post, and accordingly there will be a direction to the 2nd Respondent to do so.

12. Sri Rawther's contention that this Court is not competent under any circumstance to issue direction to the appointing authority to make an appointment from a ranked list without obtaining advice from the Public Service Commission could not be upheld for the reasons already stated. It has already been pointed out that the appointing authority had a statutory duty to replace

the provisional hands at the earliest possible time, and in case the appointing authority fails in the discharge of that duty, it will certainly be open to the Court to compel the appointing authority to make the appointment out of the approved list which in the present case can mean none other than Ext. P-1 ranked list.

For the foregoing reasons the writ petition is allowed. There will be a direction to the 2nd Respondent to appoint forthwith the Petitioner to one of the posts of Assistant Engineer (Radio) (previously Junior Engineer) if there exists a place, out of the 14 posts in the cadre strength of Assistant Engineers to be filled up by direct recruits as referred to in paragraph 4 of the counter of the 1st Respondent, either for the reason that the post remains vacant, or has been filled up by promotions provisionally under Rule 31 (a) (i) of the Kerala State and Subordinate Services Rules. There will be no order as to costs.