

(1994) 08 KL CK 0006
In the High Court Of Kerala
Case No : O.P. No. 1134 of 1981-F

Babu Raj and Others

APPELLANT

Vs

State of Kerala and Others

RESPONDENT

Date of Decision : 01-08-1994

Acts Referred:

Constitution of India, 1950 — Article 226

Kerala State and Subordinate Services Rules, 1958 — Rule 17A, 18, 27, 31, 39

Citation : (1994) 08 KL CK 0006

Hon'ble Judges : V.V. Kamat, J;K.T. Thomas, J;K. Narayana Kurup, J

Bench : Full Bench

Advocate : C.P. Sudhakara Prasad, for the Appellant; A.G., for the Respondent

Judgement

Nafayana Kurup, J.—The question referred to the Full Bench particularly concerns the interpretation of Rule 31(e) of the Kerala State and Subordinate Service Rules, 1958 (for short the service rules). When persons directly recruited were pushed down in the seniority list below some persons who were promoted provisionally, they contended that as per the rules, that cannot be done. But Government maintained that what they did was correct. So those persons who are directly recruited challenge the Government orders. As the original petitions were referred to a Division Bench, their Lordships, in turn, referred them to the Full Bench. This was in view of an apparent conflict between the Full Bench decision of this Court in *State of Kerala v. Somarajan and Ors.* 1984 K.L.T 293 and the decision of Justice Dr. Kochu Thommen and Justice Balakrishnan in *W.A. No. 258/1981* in which the Full Bench decision was quoted.

The facts in O.P. 1134/1981 can be stated as the factual fabric for deciding the question:

Petitioners were directly recruited as Deputy Superintendents of Police (Dy. S.Ps.). They belong to S.C./S.T. At the time of recruitment of the Petitioners as Dy. S.Ps. the party Respondents herein, were in service and were holding the post of Dy. S.Ps. Those persons were given regularisation with retrospective

effect. When Petitioners were advised by the Kerala Public Service Commission (for short, "the P.S.C.") for appointment as Dy. S.Ps. under Rule 17A of the Service Rules, they thought that they would be seniors to those who were provisionally promoted earlier. Petitioners were advised on various dates in 1976 upto January 1977 and they joined duty before the end of January, 1977. They completed probation before the end of January, 1979. Respondents 3 and 4 were provisionally promoted as Dy. S.Ps. on 4th February 1972 and 15th March 1972 respectively. Respondents 5 to 7 were promoted in 1975 and the 8th Respondent was promoted in 1974.

2. Exhibit P-2 Government order was issued on 14th July 1977 by which services of Respondents 2 and 3 were regularised from the date of their promotion. Exhibit P-3 is another Government order by which other persons similarly promoted as Dy. S.Ps. were also given regularisation of their services.

3. Exhibit P-1(a) is the seniority list of Dy. S.Ps. dated 16th August 1979 in which Respondents 3 and 4 are shown as above the Petitioners" in rank (their ranks respectively are 26 and 27 whereas Petitioners ranked as 74, 81 and 92 respectively).

4. Repeated representations were made by the Petitioners before Government. By Exhibit P-8 order Government rejected all the representations on 21st February 1981. Thus the main challenge in this Original Petition is against Exhibits P-1, P-1(a), P-2, P-3 and P-8.

5. For considering the main question referred to the Full Bench, it would be advantageous to refer to Rule 27 of the Service Rules which deals with seniority. It provides that seniority of a person in a service, class, category or grade shall be determined by the date of the order of his first appointment to such service, class, category or grade. However, in the explanation it is specified that for the purposes of this rule appointment made under Rule 9 or appointment by promotion under Rule 31 shall not be included. The former relates to fresh appointment on a temporary basis while the latter relates to appointment by promotion. Where it is necessary in public interest to fill a vacancy, the appointing authority is given the discretion to appoint a person when he finds that there would be undue delay in making appointment in accordance with the rules, to appoint a person temporarily "otherwise than in accordance with the said rules". This is the purport of Rule 9. A corresponding provision is made in regard to appointment by promotion. In this context we have to refer to Rule 18(a). It provides that if a person, having been appointed temporarily, is subsequently appointed to the service, he shall commence his probation from the date of such subsequent appointment. However, the appointing authority is given the discretion to make the appointment "from such earlier date as the appointing authority may determine, without prejudice to seniority of others". A number of decisions have been rendered by this Court holding that any appointment given to a person who was already provisionally appointed would not affect the seniority of others when the appointing authority regularises his services with

effect from an earlier date vide *Puruskolhaman v. State of Kerala* ILR 1976 Ker 548, we are not called upon to decide whether the aforesaid decision pertaining to Rule 18(a) is correct or not. Even the Counsel for the Respondents did not canvas for any position different from the one laid down by the Division Bench in the aforesaid decision.

6. But the contention here is that a different approach has to be made in regard to the appointment made by promotion as envisaged in Rule 31(e). That clause is extracted below:

If such person is subsequently promoted to the higher category in accordance with the rules he shall commence his probation, if any, in such category from the date of such subsequent promotion or from such earlier date as the appointing authority may determine without prejudice to seniority.

The difference in the language employed as between Rule 18(a) and Rule 31(e) was highlighted by the Counsel for Respondents in order to distinguish the principle enunciated by the Division Bench of this Court in ILR 1976 Ker. 548. In other words, the contention is that when a fresh appointment is made with effect from an earlier date, such appointment cannot be done to the prejudice of the seniority of others as envisaged in Rule 18(a) whereas such prejudice is not contemplated as for the seniority of others while promotion is made. We do not think that such a departure is concerned by the legislature or rule making authority when it framed Rule 31(e). The mere fact that the last limb of the clause does not contain the words "of others", we cannot conceive of a seniority unless it is in relation to others. The word "seniority" mentioned in the clause is seniority vis-a-vis others in the same service, class, category or grade.

7. True, a Full Bench of this Court has held in *State of Kerala v. Somarajan and Ors.* 1984 KLT 293 that retrospective regularisation/promotions were not invalid for the reason that they violated the rights of direct recruits founded on Rule 18(a) and Rule 27(c) of the Rules. Their lordships pointed out in paragraph 18 that Rule 18(a) has no application to the cases involved therein since "there were no statutory rules governing the matter and no prohibition of probation thereunder". In paragraph 20 of the decision there Lordships further pointed out when the attention of the Court was drawn to the decisions interpreting the scope of Rule 18(a) that all those cases related to provisional appointments or promotions made under Rule 9 "at a time when rules governing regular appointments were in existence". Those decisions quoted before the Full Bench in Somarajan's case (supra) were distinguished mainly on the said premises. When the Full Bench decision was cited before the Division Bench (Dr. Kochu Thommen, Ag. C.J. and Balakrishnan J.) in W.A. 258/1981, it has been pointed out that regularisation to the prejudice of seniority of others cannot be granted particularly when appointments were made under Rule 17(A) and that the Full Bench decision in Somarajan's case (supra) was without considering the scope and application of Rule 17(A).

8. According to us the interpretation placed by the Division Bench in Purushothaman's case ILR 1976 Ker. 548 in regard to Rule 18(a) would apply with equal force to appointment by promotion contemplated in Rule 31(e) despite the slight difference in the phraseology.

9. Now the question is whether this Court should interfere under Article 226 of the Constitution with the impugned orders. It is well settled that the extraordinary jurisdiction conferred under Article 226 of the Constitution is neither appellate nor revisional, but to advance substantial justice to the parties when there is infraction of any statutory provision or rule. Even if a legal lacuna is traced out in the orders impugned, the discretionary power need not be exercised unless such lacuna has resulted in substantial injustice to the party concerned vide *Iyyappan Mills Ltd. v. I.M.W. Union* 1961 KLT 589.

10. Here, we have a case in which under the Rule some persons, who were holding posts much much longer than the direct recruits, albeit provisionally, were placed above those who came in much later, though on a regular basis. The regularisation was given to those persons who were in service at a time when the challengers were not even contemplated to be absorbed. There is glaring absence of equity if the subsequently recruited persons can steal a march over others who are provisionally promoted by clinging to the letter of the rule. Government action in giving seniority to those persons who were holding office for long could have been saved had there been no such rule. That precisely was what the Full Bench of this Court has adopted in Somarajan's case (*supra*) in the absence of such Rules. Even in *A. Janardhana v. Union of India* AIR 1984 S.C. 1995 the apex Court had sounded in favour of a recast of the service Jurisprudence. The following passage in the decision will be of help in this domain:

But avoiding any humanitarian approach to the problem, we shall strictly go by the relevant Rules and precedents and the impact of the rules on the members of the service and determine whether the impugned seniority list is valid or not. But, having done that we do propose to examine and expose an extremely undesirable, unjust and inequitable situation emerging in service jurisprudence from the precedents namely, that a person already rendering service as a promotee has to go down below a person who comes into service and who may be a schoolian, if not in embryo, when the promotee on being promoted on account of the exigencies of service as required by the Government started rendering service. A time has come to recast service jurisprudence on more just and equitable foundation by examining all precedents on the subject to retrieve this situation.

11. Similar view has been expressed by the Supreme Court in *O.P. Singla and Anr. v. Union of India* A.I.R 1983 S.C. 769 and in *S.B. Patwardhan v. State of Maharashtra* A.I.R 1984 S.C. 1995.

12. Could the Government, under any of their powers, have rectified this

anomaly de hors Rule 18(a) and Rule 31(e) of the Service Rules. Learned Counsel for the Respondents made a recourse to Rule 39 of the Service Rules which reads thus:

Notwithstanding anything contained in these rules or in the Special Rules or in any other Rules or Government Ordersthe Government shall have power to deal with the case of any person or persons serving in a civil capacity under the Government of Kerala or any candidate for appointment to a service in such manner as may appear to the Government to be just and equitable:

Provided that where such rules or orders are applicable to the case of any person or persons, the case shall not be dealt with in any manner less favourable to him or them than that provided by those rules or orders.

A Full Bench of this Court has upheld the validity of the aforesaid Rule in T.C. Sreedharan Pillai and Ors. v. State of Kerala and Ors. 1973 KLT 151.

13. Sri Sudhakara Prasad, learned Counsel for the Petitioners contended that Government have not specified either in Ext. P-2 Government Order or in any other order that the impugned orders were passed in exercise of the residuary powers envisaged in Rule 39, nor has the said Rule been quoted anywhere. He also contended that the Full Bench which upheld the validity of Rule 39 in Sreedharan Pillai's case (supra) has highlighted the position that residuary powers conferred by the Rule are not to be exercised in violation or in derogation of the other provisions in the Rules.

14. In the above context we make a reference to the decision of a Constitution Bench of the Supreme Court in Narender Chadha v. Union of India A.I.R 1986 S.C. The Bench was considering a case where the allegation was that some persons were given promotion in violation of certain specific Rules. The Supreme Court was concerned with the question of seniority of persons who have been holding the post for nearly 15 to 20 years and had never been reverted vis-a-vis the direct recruits. It was held that in such cases Government must be deemed to have relaxed the Rules and appointed them to the posts to meet the administrative requirement.

15. Yet another Constitution Bench of the Supreme Court had considered this position from a different angle in The Direct Recruit Class-II Engineering Officers' Association and others Vs. State of Maharashtra and others, . The contention raised was that as the initial appointment was not made following the procedure laid down by the Rules, such appointees cannot gain precedence over others who came later despite the fact that the former continued in the post uninterruptedly till the regularisation of their services. The Constitution Bench pointed out that the later appointees may have been young students still prosecuting their studies when those who were regularised were in service, though provisionally. In paragraph 44 of the judgment their Lordships summed up the conclusions. One of the ratio laid down is that:

Where the Rules permit the authorities to relax the provisions relating to the quota, ordinarily a presumption should be raised that there was such relaxation when there was some deviation from the quota rule.

The aforesaid decision is an authority that the Government action in giving retrospective regularisation for conferring seniority to the Respondents was in exercise of the residuary powers. Such a residuary power can certainly be traced to Rule 39 as quoted above. Even if the Rule was not mentioned as such, we are of the opinion that the action of the Government can be supported by tracing the source of power in the said rule.

In view of our stand regarding the regularisation with retrospective effect and giving seniority to such persons over those who were directly recruited subsequently, we are not inclined to grant the reliefs prayed for in all these Original Petitions. Accordingly we dismiss all the Original Petitions.