
(1967) 01 KL CK 0007

In the High Court Of Kerala

Case No : Original Petition No. 2404 of 1965

C.C. Mathew

APPELLANT

Vs

State of Kerala and Others

RESPONDENT

Date of Decision : 12-01-1967

Acts Referred:

Constitution of India, 1950 — Article 226
Evidence Act, 1872 — Section 124
Kerala State and Subordinate Services Rules, 1958 — Rule 1, 27
Soldiers (Litigation) Act, 1925 — Section 6

Citation : AIR 1968 Ker 230

Hon'ble Judges : V.P. Gopalan Nambiar, J

Bench : Single Bench

Advocate : K.V. Surianarayana Iyer and M.P. Thomas and N.N. Venkitachalam, for the Appellant; Govt. Pleader and S. Narayana Potti, for the Respondent

Judgement

V.P. Gopalan Nambiar, J.—This writ petition was posted along with the representations received from the 6th and 8th respondents that the provisions of the Indian Soldiers' Litigation Act, 1925 may be taken into account and proceedings in this writ petition may be kept in abeyance. I considered these representations before arguments were heard on this writ petition.

2. Section 6 of the Indian Soldiers' Litigation Act in so far as it is material, reads as follows:

"6. Notice to be given in case of unrepresentative Indian Soldier -- (1) If a Collector has certified u/s 5, or if the Court has reason to believe, that an Indian soldier, who is a party to any proceeding pending before it, is unable to appear therein, and if the soldier is not represented by any person duly authorised to appear, plead or act on his behalf, the court shall suspend the proceeding, and shall give notice thereof in the prescribed manner to the prescribed authority:

Provided that the Court may refrain from suspending the proceeding and issuing the notice if-

(a) the proceedings is a suit, appeal or application instituted or made by the soldier alone or conjointly with others with the object of enforcing a right of preemption, or

(b) the interests of the soldier in the proceeding are, in the opinion of the Court, either identical with those of any other party to the proceeding and adequately represented by such other party or merely of a formal nature.

X X X X X".

3. The interests of respondents 2 to 8 in this writ petition are identical as would appear from the discussion following hereinafter. The 8th respondent is represented before me by an Advocate and being so, is not entitled under clause 1 of section 6, to have the proceedings suspended. The interests of the 6th respondent (as indeed of respondents 2 to 5 and 7), are, in my opinion, identical with those of the 8th respondent, and are adequately represented by him. I therefore refrain from suspending the proceedings under the proviso to Section 6 of the Act, and proceed to consider the matter on the merits.

4. The petitioner was commissioned as a Second Lieutenant in the Travancore State Forces on 1-10-1941. With the formation of the Travancore-Cochin State in 1949 the petitioner and others became Members of the Travancore-Cochin State Forces; and with the coming into force of the Constitution of India, and by reason of the provisions of Article 259(2) thereof, the Armed Forces of the Travancore-Cochin State, became part of the Armed Forces of the Union subject to the directions to be issued under clause (1) of the said Article. Respondents 2 to 8 were also Members of the Armed Forces of the Travancore-Cochin State. The petitioner. Respondents 2 to 8 and others were asked to appear before the Indian Army Service Selection Board, but were found unacceptable, and were ordered to be released from the ranks of the Army. Some of those so ordered to be disbanded, including the petitioner, filed writ petitions in the Travancore-Cochin High Court, the petitioner's writ petition being O. P. No. 14 of 1951. Respondents 2 to 8 were not among those who filed these writ petitions. These writ petitions are stated to have prayed for a mandamus directing the respondents not to release the petitioners from their ranks in the Army but either to retain them, or, in the alternative, to provide them with suitable alternate employment. The writ petitions were all dismissed by a common judgment dated 31-3-1951, and, the uncontroverted allegation in paragraph 3 of the petitioner's affidavit, is, that they were so dismissed on the ground that they were premature, as it was represented on behalf of the Union of India and State Government that they were taking the necessary steps for providing alternate employment to those released from the Armed Forces.

5. The petitioner was released from the Travancore-Cochin State Armed Forces on 1-8-1951, and, as stated in paragraphs 4 and 10 of the counter-affidavit of the 1st respondent, he served as an Assistant Commandant in Hyderabad Special Reserve Police on a contract basis from 26-4-1952 to 31-3-1953. He was

recruited as a Deputy Superintendent of Police in the Travancore-Cochin State on 19-6-1956 and joined as such on 20-7-1956. It is also undisputed that the Respondents 2, 4, 5, 6 and 7 were appointed as Palace Guards on 1-4-1950 and Respondents 3 and 8 were taken into the Armed Reserve on 1-11-1960. A controversy as to the inter se seniority among those so selected was adjudicated in O. P. Nos. 267 and 345 of 1958, vide 1960 Ker LT 1179: Madhusudan Nair Vs. State of Kerala and Others, . This Court found that seniority had been assigned without any rational basis and allowed the writ petitions with liberty to the State to assign rank to the petitioners on a rational basis, Following this judgment, the Government issued its proceedings dated 5-4-1961 (Ext. P-7) by which they accepted the principle laid down in earlier G. O. dated 11-3-1958 that relative seniority of the Ex-Army Officers of the Palaces Guards and the Armed Reserve unit shall be fixed with respect to the dates of their Commission in the Army, subject however to the inter se seniority of the Palace Guard Officers already fixed by the Selection Committee.

6. The petitioner has alleged in paragraph 10 of his affidavit that he knew of Ext. P-7 proceedings only in November 1962. He petitioned the Government on 10-12-1962 (Ext. P-8) complaining that when the ten Ex-State Officers mentioned in Ext. P-7 were absorbed in the Police Department, or as Palace Guards, the petitioner had neither been informed nor his willingness ascertained for similar absorption, and praying that his seniority with respect to those officers may also be fixed on the same principle envisaged in the Ext P-7 G. O. Ext. P-1 dated 23-3-1963 is a copy of the Government's reply by which the petitioner was informed that the principle in Ext. P-7 cannot be extended to Ex-Army Officers like the petitioner who were subsequently recruited to a particular post by the Public Service Commission, and that his petition was rejected. The petitioner preferred another representation Ext. P-10 dated 15-11-1964 in which he set out his case in detail and again prayed inter alia for a fixation if his relative rank as among the Ex-Travan-core-Cochin State Force Officers appointed to the Police Department, on the basis of the date of Commission in the Army, and for certain other reliefs. By Ext P-2 dated 26-6-1965, the petitioner was informed that he had not been recruited against a permanent post, and that the Government has no reason to re-consider the Ext. P-1 order. This writ petition seeks a writ of certiorari to quash Ext. P-1 and P-2 orders, and a writ of mandamus directing the 1st respondent to fix the petitioner's seniority and assign him rank senior to respondents 2 to 8. and a further writ of mandamus directing the 1st respondent at any rate, to assign rank to the petitioner senior to respondents 4 to 8.

7. The petitioner's case for seniority over respondents 2 to 8 was rested on two alternative grounds. First it was contended that if the principle that the date of commission in the Army determines seniority were to be applied, the petitioner would be senior to respondents 2 to 8, all of whom were admittedly commissioned only later than the petitioner (Vide Ext. P-7). Alternatively, it was contended that the petitioner had in any event been recruited as a Deputy

Superintendent of Police, Special Armed Police on 19-6-1956 in the Travancore-Cochin State, and had joined as such, on 20-7-1956, and that respondents 4 to 8 were promoted to that category or grade only subsequent to the petitioner. Therefore, it was claimed that the petitioner is entitled to seniority over respondents 4 to 8 at any rate, by reason of Rule 27 of the Kerala State and Subordinate Service Rules. It is the petitioner's case that consistent with the representation made at the time of dismissal of O. P. No. 14 of 1951 and the connected O. Ps. by the Travancore-Cochin High Court, no adequate opportunities were afforded and no offer was made to the petitioner at the time of the selection and appointment of respondents 2 to 8 as Palace Guards, or into the Armed Reserve. This has been expressly alleged by the petitioner in paragraphs 5, 6 and 11 of his affidavit.

It is also stated in the Ext. P-4 representation dated 14-4-1954 in the Ext. P-5 representation dated 30-3-1955 by the petitioner and certain other Ex-Army Officers to Raj Pramukh of Travancore-Cochin State; and again in detail in the Ext. P-10 representation to the Government. It is seen indicated also in the communication from the D. S. P. Armed Reserve, Trivandrum to the Inspector-General of Police, wherein it is stated that in making appointments to the Palace Guards all the retrenched State Forces were not given an opportunity to prefer their claim before the Selection Committee (Vide Ext. P-61). At the hearing, the Government Pleader contended that Ext. P-6 was only a part of an Inter-Departmental communication to which a claim of privilege would attach and which has been very wrongly and unfairly produced by the petitioner. No claim of privilege in the proper form or according to the proper procedure as required by law has been made by the proper authority, disclosing the reasons for the claim, I am, therefore, unable to entertain any claim of privilege. In the petitioner's representation dated 15-11-1964, (Ex. P10) the petitioner had very fully set forth his grievance against the selection of the Ex-Army Officers as Palace Guards and into the Armed Reserve. The petitioner's allegations on this aspect have been replied to in paragraphs 4 and 7 of the counter-affidavit on behalf of the 1st respondent. In paragraph 4 it is stated"

"The petitioner was released From the State Force on 1-8-1951, and had not been absorbed in any Department of the Travancore-Cochin Government, by way of alternate employment as was done in the case of respondents 2 to 8." In paragraph 7 it is averred:

"A few of such officers were selected and appointed for the Armed Reserve and some others for the Palace Guards as early as November 1950. The petitioner was not included in the selection made by the Board of Officers of the Travancore-Cochin State then."

8. There is no specific denial of the serious allegation made by the petitioner against the selection as Palace Guards and into the Armed Reserve and also about the denial of a proper opportunity to the petitioner and the others at the time of these selections. It appears to me that this is particularly important in

view of the different aspects relating to the selection and its consequences which are seen reflected in the various representations made by the petitioner from time to time. On the facts and materials placed before me, at the time of the selection of the Respondents as Palace Guards and into the Armed Reserve, the petitioner was not away in Hyderabad: and, if, as stated by him, in Ex. P-5, these selections were "In Camera", without affording the petitioner a chance for being considered for these selections, it is a matter for consideration whether there has been a denial of equality of opportunity to the petitioner in the matter of employment within the meaning of Article 16 of the Constitution. In neither of the orders passed by the Government. (Exts. P-1 and P-2) has there been any advertence to, or consideration of this aspect of the matter. In most, if not all of the representations filed by the petitioner, this aspect of the matter has been stressed also.

9 The petitioner's alternative claim to seniority over respondents 4 to 8 was based on Rule 27 of the Kerala State and Subordinate Service Rules. Counsel for the petitioner relied on Exts. P-7, P-11, P-13, P-14 and P-15 to make out that all except the 8th respondent had been promoted to the Cadre of Deputy Superintendent of Police, subsequent to 20-7-1956 when the petitioner was appointed to that post. Ext. P-11 is the Government Proceeding dated 11-3-1958, which laid down the principle of integration of the Palace Guards with members of the Armed Reserve Police. Statement (O) appended to the same, is the list of these officers showing their relative seniority in the integrated set up. From the said statement, the petitioner's counsel contended that on 11-3-1958 only numbers 1 and 2 in the list were Deputy Superintendents of Police. Nos. 3 to 9 were Circle Inspectors and No. 10 was a Sub Inspector. In particular, Nos. 6 to 9 and 3 in the list, are respectively. Respondents 4 to 8 herein. The petitioner's counsel was prepared to admit that, as seen from Ext. P-14, the 8th respondent was to be regarded as having been promoted as Deputy Superintendent of Police with effect from 11-4-1955. However, he relied on the Government Notification dated 13-11-1962, (Ext. P-13) by which the 7th respondent who was then senior to the 8th respondent is seen to have been promoted provisionally as Assistant Commandant only on 13-11-1962. He further relied on the Government proceedings dated 22-1-1959 (Copy Ext. P-15) by which the Government accepted the proposal of the Inspector-General that the amalgamation of the Palace Guards and the District Armed Reserve may be ordered to come into effect, only from 1-11-1958. It was the petitioner's contention that in the light of Ext. P-13 and P-15 read with Statement (C) appended to Ext. P-11 it was clear that respondents 4 to 8 were promoted to the category of Deputy Superintendent of Police only subsequent to 20-7-1956 when the petitioner was appointed to that post.

10. Counsel for the 8th respondent challenged the applicability of Rule 27 of the Kerala State and Subordinate Service Rules to the petitioner on the ground that his recruitment as a Deputy Superintendent of Police was itself only in 1956, prior to the promulgation of the Rules. This contention cannot be accepted in

view of the provisions in Rule 1 of Part II of the said Rules that the Rules in the said Part shall apply to the holders of all posts appointed thereto, before or after the date on which the Rules came into force. In paragraph 10 of the counter-affidavit of the State, it is stated that the petitioner's seniority is in conformity with the above Rule (Rule 27). There is no case for the State that the Rule is inapplicable to the petitioner; but an argument against the petitioner's case on the provisions of the Rules was attempted at the hearing. It appears to me that the question of the petitioner's seniority on the basis of the said Rule over respondents 4 to 8 in the light of the facts and circumstances, disclosed by Exs. P-11, P-13, P-14 and P-15 and other relevant materials, if any, requires examination by the Government. It is not possible to issue a writ of mandamus fixing the petitioner's seniority on the basis of Rule 27, as there has been no demand for justice by the petitioner on this ground, and no consideration nor refusal, of the same by the Government

11. The Government Pleader contended that the principle enunciated in Ex. P-7 namely that the date of commission determines seniority was an ad hoc principle formulated for the purpose of integration of the Palace Guards with the Special Armed Reserve and could have no application to the petitioner. This was sought to be supported by the title to Ex. P-7 G. O. and also by reference to the terms thereof. Granted that this may be so, the question which requires consideration is, whether at the time of absorption of respondents 2 to 8 as Palace Guards and as members of the Armed Reserve, there had been a denial of equality of opportunity in the matter of employment to the petitioner, and whether that, in its turn, brought about a denial of the benefits of Ex. P-7 G. O. to the petitioner. This, as I have indicated earlier, requires careful consideration, in the light of the petitioner's averments and allegations as to these selections. Incidentally, it may be noticed, that it was pointed out by the counsel for the petitioner, this contention now advanced about Ex. P-7 G. O. represents the third reason given against the petitioner's claim, Exs. P-1 and P-2 orders, setting forth the other two different reasons against it.

12. The Government Pleader contended that this writ petition is barred by delay and laches. It was pointed out that the Ex. P-8 representation by the petitioner had been rejected by the Government by Ex. P1 proceedings", on 23-3-1963, and that this writ petition has been filed only on 13-9-1965. There is no pleading in the counter-affidavit that the petition is barred by delay and laches, and the petitioner had no opportunity of placing facts and materials for explaining his delay and laches, if any. Besides, the petitioner's counsel pointed out that after Ex. P1, the petitioner filed another exhaustive representation (Ex. P 10) on 15-11-1964, which was disposed of by the Government, by Ex. P-2 dated 26-6-1965 giving a reason different from what had been given in Ex. P1 for rejecting his claim. This writ petition has been filed on 13-9-1965, The petitioner's counsel also drew my attention to the various representations which the petitioner had been making ever since his release from the Armed Forces (See Ex. P3 dated 19-4-1952, Ex. P 4 dated 14-4-1954. Ex. P5 dated 30-3-1955,

Ex. P8 dated 10-12-1962 and Ex P10, dated 15-11-1964). The petitioner is complaining of the violation of fundamental rights under Article 16. In the light of these, I cannot hold that the petitioner has been guilty of delay and laches

13. To what relief then, is the petitioner is entitled? It is not possible to grant a writ of mandamus directing the 1st respondent to assign rank and seniority to the petitioner over respondents 2 to 8, or even alternatively over the Respondents 4 to 8. These must essentially depend on the question as to whether there was a denial of equality of opportunity to the petitioner at, the time of the selection of the Respondents as Palace Guards and into Armed Reserve, and whether the said denial of equality of opportunity has resulted in the, petitioner's loss of seniority These would depend also on the further question of the applicability of Rule 27 of the Kerala State and Subordinate Service Rules to the petitioner vis-a-vis Respondents 4 to 8. These aspects, and the facts and circumstances bearing upon them do not seem to have been appreciated or even considered by the Government in their orders Exs. P1 and P2. The facts bearing on the applicability of Rule 27 of the Kerala State and Subordinate Service Rules and the petitioner's claim to seniority over respondents 4 to 8 do not even appear to have been squarely presented for consideration by the Government.

14. In the circumstances, I direct the Government to consider in the light of the the observations contained in this judgment:

(a) whether there has been any denial of equality of opportunity to the petitioner in the matter of employment at the time of the selection of Respondents 2 to 8 as Palace Guards and into the Armed Reserve Police, and consequent loss of seniority by the petitioner as against Respondents 2 to 8; and

(b) whether on the basis of Rule 27 of the Kerala State and Subordinate Service Rules, the petitioner is entitled to seniority over respondents 4 to 8.

15. The consideration directed by this judgment will be done in accordance with law and appropriate orders would be passed as early as possible. In view of the consideration directed, it is unnecessary to quash Exs. P1 and P2 orders, and the prayer to quash them, is, for that reason, declined.

16. The O. P. is allowed to the extent indicated above There will be no order as to costs.