

(2003) 08 KL CK 0008

In the High Court Of Kerala

Case No : Writ Petition (C) No. 1706 of 2003

Chandrasekharan, K.K.

APPELLANT

Vs

State of Kerala and Others

RESPONDENT

Date of Decision : 26-08-2003

Acts Referred:

Constitution of India, 1950 — Article 226
Notaries Act, 1952 — Section 15, 2, 3, 4, 5
Notaries Rules, 1956 — Rule 2, 3, 4, 5, 6

Citation : (2003) 08 KL CK 0008

Hon'ble Judges : Jawahar Lal Gupta, C.J;A.K. Basheer, J

Bench : Division Bench

Advocate : S. Ramesh Babu, N. Govindan Nair, N. Sankara Menon, Asok M. Cherian, C.V. George, P.R. Radhakrishnan, K. Jagadeesh, T.S. Harikumar, T.G. Rajasenan, John Varghese, A. Shanavas, T.A. Ramadasan, P.M. Pareeth, K.P. Dandapani, Santhosh Mathew, S. Rajashekar Nair, Philip M. Varghese, Joseph Sebastian, T.A. Abdul Latheef, E. Pushparajan, Ambili, M.A. Firoz, C.S. Ullas, M. Ramesh Chander and P.B. Sahasranaman, for the Appellant; Abdul Rahim, Govt. Pleader for Respondent No. 1 and D. Kishore, Additional C.G. S.C. for Respondent No. 2 and T. Sanjay, Addl. C.G.S.C. and P.S. Sreedharan Pillai, Sr. C.G.S.C. for Union of India, for the Respondent

Final Decision : Dismissed

Judgement

Jawahar Lal Gupta, C.J.—Is the action of the Respondents in refusing to renew the certificates of the Petitioners for practising as Notaries illegal and violative of the Notaries Act, 1952 Or the rules framed thereunder? This is the primary question that arises for consideration in this bunch of cases. Learned Counsel for the parties have referred to the facts in Writ Petition (Civil) No. 17061/2003. These may be briefly noticed.

2. The Petitioner was appointed as a Notary in the year 1984. His appointment was periodically renewed. On June 4, 1999, his prayer for extension of the certificate was accepted. With effect from June 23, 1999, he was given extension

for a period of three years. Before the expiry of this period of 3 years, the Petitioner submitted an application dated May 17, 2002 for the grant of further extension. When the application was not considered and decided, he approached this Court through a petition under Article 226 of the Constitution, viz. O.P. No. 27241/2002. The Court disposed of the petition vide its Order dated September 26, 2002 with a direction to the competent authority to decide.

3. In pursuance to the direction given by the Court, the Respondent-authority considered the Petitioner's application. Vide Order dated April 23, 2003, the application was rejected on the ground that the quota for District Kollam had already been exhausted. A copy of this order has been produced as Ext. P-5. The Petitioner alleges that the Central Government issued a Notification dated May 9, 2001. A copy of this notification has been produced as Ext. P-8. By this notification, the Central Government had amended the Notaries rules, 1956. Clause (d) was added to the original Rule 2 and a provision for insertion of a schedule was made. Still further, Sub-Rule 4A was added to Rule 8. In the schedule, the total number of Notaries that could be appointed by the Central and State Government indifferent States was specified. So far as the State of Kerala is concerned, the number was fixed at 375 each.

4. In pursuance to the notification dated May 9, 2001, the State Government had issued a Notification dated August 14, 2002. Noticing the fact that the total strength of Notaries to be appointed by the State of Kerala had been fixed at 375, the Government fixed "the number of Notaries to be appointed for each District...". So far as District Kollam is concerned, the number was fixed at 32. Allocations were made to all the 14 Districts in the State. Still further, it was also observed that "the number of Notaries whose certificate of practice has been renewed under Sub-section (2) of Section 5 of the Notaries Act, 1952 (Central Act 53 of 1952) after 9th May 2001 and the number of Notaries appointed afresh after the said date shall be included in the total number of Notaries appointed for the purpose of counting the number of Notaries specified for each district in the Schedule", The State Government also laid down that "the number of Notaries, as fixed, shall be filled up by renewal and fresh appointment in the ratio of 6:4".

5. The Petitioner alleges that under the provisions of Sub-rule 4A inserted vide Notification dated May 9, 2001, he has a right to continue as a Notary despite the fact that his term had expired on June 22, 2002. He maintains that the Notification dated August 14, 2002 issued by the State Government is violative of Section 5(2) and Rule 8(4A). It also suffers from the vice of arbitrariness. On these premises, the Petitioner prays that the Order dated April 23, 2003 by which his application was rejected (Ext. P-5); the Notification dated May 9, 2003 by which he was debarred from practising as a Notary "since his term of certificate of practice has already expired on 23rd June 2002" and the Notification dated August 14, 2002 (Ext. P-7) be quashed. He further prays that a writ of mandamus be issued directing the State Government to renew his certificate of practice as a Notary for a period of five years with effect from June

23,2002.

6. A bunch of writ petitions having been filed, the Respondents have not submitted counter-affidavits in all the cases. However, in O.P. No. 4511/2003, a counter-affidavit has been filed on behalf of the Union of India. In this affidavit, it has been inter alia averred that in view of the provisions of Section 5(2) of the Act the Petitioner's plea that he is entitled to an automatic renewal of his certificate of practice cannot be sustained. Still further, it has been pointed out that the provisions contained in the rules were amended by the Central Government in exercise of its power u/s 15. Quotas have been fixed in view of the "need to rationalize the numbers". The fixing of quota is in consonance with the purpose of the Act. It is "to regulate the provision of Notaries". The grounds as raised in the petition have been controverted.

7. A statement has also been filed on behalf of the Law Secretary, State of Kerala. It has been inter alia mentioned that the Petitioner had no right to function as a Notary after the expiry of the term as his certificate had not been renewed. The Union of India having fixed the number of Notaries who could be appointed, the State had considered it appropriate to apportion the number for each District. It was proportionate to the actual number of Notaries practising as on May 9, 2001. In view of the amendment of Section 5, the Petitioner had no right to claim renewal of the certificate. Still further, it has also been averred that there were a total of 884 Notaries functioning in Kerala on May 9, 2001. The Central Government has fixed the number without consulting the State Government. The Law Secretary as well as the Minister had sent separate communications for revision of the number. In paragraph 7 of the Statement, it has been averred that "Rule 8(4A) and the schedule to the Notaries rules, 1956 as inserted by the Notaries (Second Amendment) Rules 2001 are ultra vires the Notaries Act, 1952". However, at the hearing, Mr. Rahim has stated that there is a typographical error. The word "not" has been missed. He submits that the rules are valid. On these premises, the Respondents pray that the writ petition be dismissed.

8. The cases were initially placed before a learned Single Judge. Various contentions were raised. Reliance was placed on certain decisions. The learned Judge had some reservation about the view expressed in the orders passed by the learned Single Judge in O.P. 23001/2001 and another case. Thus, the matter was referred to a Division Bench.

9. Learned Counsel for the parties have been heard.

10. On behalf of the Petitioners, it has been contended by Mr. Ramesh Babu that the Petitioners have a right to the renewal of their certificates and to practice as Notaries. Relying upon the second proviso to Rule 8(4A), it has been contended that the action of me authority in refusing to renew the Certificate is illegal and untenable. It has been further contended that the State Government had no right to make allocations to different Districts or to fix the ratio in which the old

and new candidates shall be appointed. Still further, Mr. Sahasranaman, learned Counsel for the Petitioners in some of the cases, contended that there is a distinction between appointment and renewal. Even if the Government has the power, the Government could not have refused the request to renew the certificates on the basis of the allocation of the number of Notaries to different Districts. These contentions were adopted by learned Counsel for the Petitioners in the connected matters. However, it may be noticed that Mr. Santhosh Mathew, learned Counsel for the Petitioner in W.P. (C) No. 21712/2003, contended that fixation of number for each State by the Central Government was arbitrary and against the Rules, Various persons had been granted renewal. Thus, the rejection of the Petitioner's request was arbitrary.

11. On the other hand, Mr. D. Kishore, learned Counsel for the Central Government, submits that the claim as made by the Petitioners in various cases for renewal of their certificates was not in conformity with the provision of Rule 8(4A) as introduced on May 9, 2001. He further contends that the discretion of the State Government as conferred under Rule 7(3) has not been curtailed by the fixation of the quota by the Central Government. In fact, 375 appointments can be made by the State Government and Notaries can be appointed in different Districts according to the needs as may be assessed by the competent authority.

12. Mr. Rahim, Senior Government Pleader appearing for the State of Kerala, has submitted that even though administratively, the State was of the opinion that a higher number of Notaries could be appointed, tile Petitioners have no indefeasible right to claim renewal. Thus, the action in refusing to renew their certificates is in conformity with law.

13. In view of the contentions as raised by the learned Counsel, the primary question that arises for consideration is--Do the Petitioners have a right to continue to practice as Notaries under the provisions of the Act and the rules?

14. A peep into the past shall be instructive. The Act was promulgated to regulate the "profession of Notaries". Section 2 defines various expressions. Section 3 empowers the Central and State Governments to make appointments of Notaries. Section 4 provides for the registers, which are to be maintained by the respective Governments. Section 5 as it existed prior to the amendment dated December 20, 1999 provided as under:

Entry of names in the register and issue or renewal of certificates of practice-

(1) Every Notary who intends to practice as such shall, on payment to the Government appointing him of the prescribed fee, if any, be entitled:

(a) to have his name entered in the register maintained by that Government u/s 4; and

(b) to a certificate authorizing him to practice for a period of three years from the date on which the certificate is issued to him.

(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 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.

(Emphasis added)

A perusal of Clause (2) shows that under the original provision, a Notary was "entitled to have his certificate of practice renewed for three years at a time". This provision had fallen for consideration before a Division Bench of this Court in *State of Kerala v. Jacob Zacharia* 1991 (2) KLT 552. On a consideration of the matter, the Bench had taken the view that the Parliament had "deliberately" used the word "shall" and that "the words "be entitled" in Section 5(2)...it is difficult to say that there is any residuary discretion vested in the Government at the time of the renewal of an application filed by a Notary". Thus, it was held that "Section 5(2) is mandatory and the right of renewal is automatic and there is no discretion vested in the Government to restrict the right only to two renewals".

15. The provision of Section 5(2) was amended by Act 36 of 1999 with effect from December 17, 1999 to provide as under:

5. Entry of names in the register and issue or renewal of certificates of practice:

(1) Every Notary who intends to practice as such may, on payment to the Government appointing him of the prescribed fee, if any, be entitled:

(a) to have his name entered in the Register maintained by that Government u/s 4; and

(b) to a certificate authorizing him to practice

(2) The Government appointing the Notary, may, on receipt of an application and the prescribed fee, renew the certificate of practice of any Notary for a period of five years at a time.

A perusal of the above provision shows that in Clause (1), the word "shall" has been substituted by "may". In Clause (2), the Government has the discretion to renew the certificate.

16. Section 15 of the Act empowers the Central Government to make rules so as to carry out the purposes of the Act. The specific purposes for which the rules can be framed have also been provided. In exercise of the power u/s 15, the Central Government had framed the Notaries rules, 1956. Rule 2 defines various expressions. Rule 3 lays down the qualification for appointment as a Notary. Rule 4 deals with the procedure for submission of application. Rule 5 was omitted vide Notification dated March 14, 1958. Rule 6 deals with the processing of applications. Rules 7 and 8 relate to the appointment of a notary. On May 9, 2001, Clause (4A) was added to Rule 8. It provides as under:

(4A) The appropriate Government may on and after the ninth day of May, 2001, appoint notaries in a State or Union Territory, as the case may be, not exceeding the number of Notaries specified in the Schedule:

Provided that the number of Notaries whose certificate of practice has been renewed under Sub-section (2) of Section 5 of the Act shall be included in the total number of notaries appointed for the purpose of counting the total number of Notaries specified in the schedule:

Provided further that if in a State or Union Territory the number of Notaries appointed before the ninth day of May, 2001 exceeds the number of Notaries specified in the schedule, such Notaries shall continue to be so appointed in that State or Union Territory, as the case may be.

17. Learned Counsel for the Petitioners have placed heavy reliance on the second proviso. It has been contended that the Notaries who had been appointed before May 9, 2001 have a right to "continue to be so appointed" and that the action of the Government in refusing to renew their certificates is contrary to the plain language of the provision.

18. It is undoubtedly true that under the provisions of Section 5 as it existed prior to the amendment of Act 36 of 1999, the person working as a Notary was entitled to claim renewal. The word "shall" in Clause (1) and the provision of Clause (2) were interpreted to mean that the incumbent has the right and that the competent authority was under a duty. However, the provision was amended. The duty was converted into a discretion and the competent authority was empowered to decide as to whether or not the extension had to be given. The amendment was symbolic of the legislative intent. The obvious purpose of the amendment was to ensure that the competent authority was vested with the power to either grant or refuse a request for renewal. The Parliament having made the necessary changes in the substantive provision of the Act, the Central Government proceeded to further regulate the appointments of Notaries. With the object of regulating the appointments, the Government issued the Notification dated May 9, 2001. By this notification, Clause (4A) was inserted and a schedule was added to the rules. A perusal of the provision contained in Rule 8(4A) shows that a restriction has been placed on the right of the appropriate Government regarding the number of Notaries who could be appointed in a State. The mandate of the provision is that the number shall not exceed as specified in the Schedule. Still further, by the first proviso, it was provided that the persons whose certificates had been renewed shall also be included "in the total number of Notaries appointed for the purpose of counting the total number" as specified in the schedule. Thus, it is clear that under the substantive provision of the Act, a discretion was conferred on the appropriate authority. By the provision in the rule, the exercise of discretion was regulated and the number of persons who could be appointed was restricted.

19. Factually, it is the admitted position that prior to May 9, 2001, a total of 884

persons were practising as Notaries in the State of Kerala. What was to be done with the number of persons who were in excess of the number as specified in the Schedule? Were their certificates to be immediately cancelled? Or were they entitled to continue? It was to deal with this situation that the second proviso was added. It was stipulated that if "the number of Notaries appointed before the ninth day of May, 2001 exceeds the number of Notaries specified in the schedule, such notaries shall continue to be so appointed in that State....". The plain words of the provision show that the purpose was to allow the excess number of persons who had been appointed prior to May 9, 2001 to continue on the terms of their appointment.

20. On a consideration of the original and the amended provisions of the Act as well as the rules, the position that emerges is that prior to May 9, 2001, there was absolutely no restriction on the number of persons who could be appointed as Notaries. The provisions of the Act imposed a duty on the appropriate authority to renew the certificates of persons who were discharging notarial functions. However, by the amendment of Section 5 and insertion of Clause (4A) in Rule 8, the position was altered. The appropriate authority was vested with the discretion to renew or refuse the request for renewal. The ceiling was placed on the number of persons who could be appointed. However, in the case of persons who had been appointed prior to May 9, 2001, a limited protection was provided. They were to be allowed to continue till such time as their term expired.

21. Learned Counsel for the Petitioners contend that the Notification issued by the Central Government on May 9, 2001 takes away the discretion conferred on the State Government under Rule 7(3). Is it so?

22. Rule 7 inter alia provides that the competent authority can consider an application for appointment of a Notary. It can make a recommendation to the appropriate Government. In the process of making this recommendation, the competent authority is required to have due regard to various matters including "the commercial importance of the area in which the applicant proposes to practice and the number of existing Notaries practising" therein. In other words, the provision requires the competent authority to assess the need and then to make a recommendation to the appropriate Government. The provision does not say that the competent authority can appoint as many Notaries as it likes. Apparently, it places no restriction on the number. The provision, if so construed, may appear to be totally vague. The power may even be arbitrarily exercised. One authority may appoint 40 persons in a small town. The successor may think that only four would suffice. It is to regulate this that the Central Government appears to have inserted Clause (4A) in Rule 8. It has placed a ceiling on the number of persons who can be appointed in a State. The State Government has been left with the discretion to assess the commercial needs of different areas within its jurisdiction and to make allocations of the number to each District. The regulatory provision as inserted by Clause (4A) does not impinge upon the discretion available to the competent authority under Rule 7(3). It is only

regulatory. Thus, the contention that the Notification dated May 9, 2001 impinges upon the provisions of Rule 7(3) cannot be sustained.

23. An ancillary contention was raised. It was contended that the action of the State Government in fixing the ratio of 6:4 for appointment of Notaries by renewal and from the open market is arbitrary and illegal. Is it so?

24. Apparently, under the Act as well as the rules, the State Government has a discretion to grant or refuse renewal. Equally, it also has the discretion to make appointments. Should all the appointments be confined to persons who are already practising as Notaries? Should there be an inflow of fresh blood? The rule imposes no restriction. The State Government has chosen to impose a restriction on its own discretion. It has given a larger share to the persons who are already practising as Notaries. 60% has been reserved for appointment by renewal. 40% has been provided for fresh appointments. The action is totally just and fair. It strikes a reasonable balance. It is intended to help the needy. It is also calculated to ensure that there is no monopoly with those who had been appointed prior to May 9, 2001. The provision does not violate either the Act or the rules. We find that it is just and fair. Thus even on this basis, we do not find that the State Government has erred in fixing the ratio.

25. Mr. Mathew has submitted that the Central Government had arbitrarily fixed the number of Notaries for different States. To illustrate his submission, learned Counsel points out that for the State of Kerala, the number had been limited to 375 while in Himachal Pradesh, the number had been fixed at 300. Similarly, various other States had been given different numbers without laying down any criteria.

26. The declared objective of the Act is to regulate the profession of Notaries. The Central Government is the authority empowered to regulate the appointments. The Act authorizes the Central Government to make rules for achieving the objective of the Act. It is the best Judge of the needs. In any event, there is a presumption of validity in favour of every legislative provision. The burden of proving that the rule making authority has acted arbitrarily lies on the person who makes the challenge. If it is the Petitioners' case that the number as fixed by the Central Government is arbitrary, they ought to have placed the data on record so as to show that the volume of work justified the appointment of a large number of persons. There is an old saying that too many cooks spoil the broth. The Central Government may have well thought that it is time that the number was restricted. It is true that certain States have been permitted to appoint more than a thousand Notaries. Reference in this behalf can be made to entries at SI. Nos. 6 and 13, viz., Madhya Pradesh and Uttar Pradesh. But it is known that these are very large States. The area is many times more than that of Kerala. Thus, a higher number would be appropriate and justified. Equally, the density of population cannot be the sole basis. The real fact, which has to be taken into consideration, is the volume of work. The Petitioners have not placed any material on the record to show that the volume of work demanded a larger

number than 750. Admittedly, the Central and State Governments have the authority to appoint 375 Notaries each. Thus, the total number for the State of Kerala is actually 750. Is this number too inadequate? There is nothing before us, which may impel us to take that view.

27. Learned Counsel for the Petitioners have pointed out that actually 884 persons were practising as Notaries prior to May 9, 2001. It may be so. Yet, there is nothing on record to show that all of them had enough work. Equally, there is nothing to show that the reduction in the number would cause any problem. There is no such evidence on the file of any of the cases. At least, no evidence has been pointed out, which may indicate that after the restriction, there has been any adverse effect in the performance of notarial functions. In this situation, we cannot say that the action of the Central Government in fixing the number was either arbitrary or unfair.

28. Learned Counsel for the Petitioners have also submitted that the Government has granted renewal in certain cases while their applications have been rejected. On this basis, it has been contended that the action suffers from the vice of discrimination.

29. It is undoubtedly true that in some of the petitions, vague averments regarding renewal of the certificates of certain persons have been made. However, it has not been shown that the renewal exceeded the number allocated to the particular Districts. Still further, the persons whose names have been mentioned in some of the petitions have not been impleaded as parties except in W.P. (C). No. 21712/2003. Even in this case, there is no specific allegation, which may warrant a finding that there was any violation of the quota as fixed by the Central Government or even of the number of posts allocated to each District. Thus, it cannot be said that there was any illegality in the renewal of the certificate of any particular person.

30. Learned Counsel for the Petitioners pointed out that vide two separate communications dated October 22, 2001 and October 24, 2002, the State Law Secretary and the Minister had requested the Central Government to increase the number of Notaries. On this basis, it is contended that there is need for increase in the number.

31. There is no data before us to show that there is actually a need for enlargement of the number. However, that is a matter between the Central and State Governments. So far as this Court is concerned, it cannot be said that the Notifications dated May 9, 2001 or August 14, 2002 are violative of the provisions of the Act or the rules. Equally, it cannot also be said that the refusal of the State Government to renew the certificates of the Petitioners was an infraction of the second proviso to Rule 8(4A).

32. Learned Counsel for the Petitioners referred to the two Single Bench decisions of this Court in O.P. Nos. 23001 & 28816 of 2001.

33. We have perused these decisions. We find mat the amended provisions have not been noticed. We cannot say that these decisions conform to the provisions of Section 5 as amended in December, 1999 and by the Notification dated May 9, 2001. Thus, these do not lay down the correct rule of law.

34. No other point has been raised.

In view of the above, we find no ground to interfere. Resultantly, the writ petitions are dismissed. However, the parties are left to bear their own costs.