

(2010) 01 KL CK 0076
In the High Court Of Kerala
Case No : W.A. No. 1873 of 2009

Elsy P. Sebastian and Others

APPELLANT

Vs

K.I. Sudhamony and Others

RESPONDENT

Date of Decision : 19-01-2010

Acts Referred:

Constitution of India, 1950 — Article 14, 16

Citation : (2010) 1 KLJ 719 : (2010) 1 KLT 680

Hon'ble Judges : K. Balakrishnan Nair, J;C.T. Ravikumar, J

Bench : Division Bench

Advocate : S.P. Aravindakshan Pillay, T.N. Santha, K.A. Balan, Peter Jose Christo and S.A. Anand, for the Appellant; K. Jaju Babu, M.U. Vijayalakshmi, Dhanya Chandran, Titus Mani, A.J. Jose and Benny Gervasis (Sr. G.P.), for the Respondent

Judgement

K. Balakrishnan Nair, J.

W.A. No. 1873 of 2009

1. The appellants were respondents 3 to 6 in the Writ Petition. The first respondent herein was the writ petitioner. The point that arises for decision in this case is the constitutional validity of the Special Rules for the Kerala Social Welfare Service, to the extent they concern the method of appointment to the post of Regional Probation Officer/Assistant Regional Director/Assistant Director of Social Welfare (Category No. 4). The brief facts of the case are the following; As per the Special Rules, the District Social Welfare Officer, Inspector, Special Nutrition Programme Grade I and District Probation Officer Grade I are the feeder categories for promotion to the post of Regional Probation Officer/Regional Assistant Director/Assistant Director of Social Welfare. The appellants were appointed to the post of District Probation Officer Grade I on 24-10-1998, 4-3-1999, 29-11-1999 and 29-11-1999 respectively. The first respondent/writ petitioner was appointed to the feeder category post of District Social Welfare Officer on 14.12.2000. The method of appointment to Category No. 4, which was prevailing at the relevant times was promotion from Category

No. 5 (District Social Welfare Officer/Inspector, Special Nutrition Programme Grade I) and Category No. 6 (District Probation Officer Grade I). A common seniority list of the incumbents in Category Nos. 5 and 6 is to be prepared and promotions are ordered to Category No. 4 (Regional Probation Officer/Regional Assistant Director/Assistant Director of Social Welfare), strictly on the basis of their dates of appointment to the respective category. Because of the dearth of vacancies and resultant absence of promotional chances in the Department, persons like the first respondent were appointed to Category No. 5 (District Social Welfare Officer) only belatedly. The persons who joined as Lower Division Clerk, like the appellants, got accelerated promotions and reached the feeder category, that is, Category No. 6 (District Probation Officer Grade I) earlier. Since promotion to Category No. 4 is made from the common seniority list prepared with reference to the date of appointment to the respective categories, persons from Category No. 6 got promotion earlier, to the post in Category No. 4.

2. The Departmental Promotion Committee constituted for considering promotion to Category No. 4 met and based on its decision, the Government published a list on 30.10.2007, of eligible officers in Category Nos. 5 and 6, for promotion to the post in Category No. 4. On coming to know of the meeting of the Departmental Promotion Committee, the first respondent filed the Writ Petition, mainly seeking the following reliefs:

(i) Issue a writ, order or direction declaring that Ext.P1 Special Rules as unconstitutional and to strike down the same.

(ii) Declare that the petitioner is entitled to get her due promotions in preference to respondents 2 to 6.

As evident from the submissions of the learned counsel for the first respondent before us, the only ground canvassed before the learned Single Judge, in support of the above reliefs, was ground A, which reads as follows:

A. Ext.P1 Special Rules is violative of the Constitution as it is discriminatory and offends Art. 14 and hence to be struck down. The special Rules treat unequals equally and equals unequally. The Rules are admittedly "anomalous", a soft word used by the administration for "unconstitutional".

3. The State filed a counter affidavit, supporting the impugned provisions of the Special Rules. But, it is clear from the said affidavit that the respondent has noticed the anomaly in the operation of the Rules inasmuch as the persons belonging to Category No. 5 are not getting the desired percentage of promotion and, therefore, proposals were put forward to amend the Rules, incorporating a ratio for promotion between Category Nos. 5 and 6. The learned Single Judge, after hearing both sides, came to the conclusion that the impugned Rules, to the extent they were challenged, were arbitrary and discriminatory and, therefore, violative of the fundamental rights of the first respondent/petitioner guaranteed under Articles 14 and 16 of the Constitution of India. The method of appointment, provided under the Special Rules, to Category No. 4 was quashed

by the learned Single Judge and a direction was issued to follow the provisions of Rule 28(b)(i)(7)(vi) of Part II of the Kerala State and Subordinate Services Rules (for short "KS & SSR") in making promotions to Category No. 4 until the Special Rules are suitably amended. Aggrieved by the said direction, respondents 3 to 6 in the Writ Petition have preferred this Writ Appeal.

4. We heard Sri. S.P. Aravindakshan Pillay, learned counsel for the appellants, Sri. Titus Mani, learned counsel for the first respondent Sri. K. Jaju Babu, learned counsel for the additional 4th respondent and also Sri. Benny Gervasis, learned Senior Government Pleader for the State.

5. The learned counsel for the appellants submitted that the Special Rules were framed in 1971 and they were holding the field since then. The first respondent has not chosen to challenge the Rules earlier. So, the challenge now made to the Rules is belated. Secondly, it is pointed out that though the General Rules provide for preferring persons in the higher grade for promotion when there are more than one category of posts in the feeder category, in this case, the Special Rules have made a conscious departure from the said course by providing that promotions shall be made to Category No. 4 strictly in accordance with the combined seniority list of persons in Category Nos. 5 and 6 the seniority being determined with reference to the date of appointment to the concerned feeder category. Rule 28 of Part II of the KS & SSR also provides that the provisions of Rule 28(b)(i)(7)(iv) will apply unless otherwise specifically ordered. In this case, the Special Rules specifically provided otherwise and, therefore, the provisions of the Special Rules have to be followed, it is submitted. Rule 2 of Part II of the KS & SSR also provides that if there is conflict between the Special Rules and the General Rules, the provisions of the Special Rules will prevail. Going by the principles laid down by this Court and also the Apex Court, concerning the grounds available for impugning a subordinate legislation, it is submitted that no ground has been made out in this case warranting interference with the method of appointment, provided in the Special Rules, to Category No. 4. The learned senior Government Pleader also supported the above submissions. Though some anomalies are noticed and steps are being taken to amend the Rules, until the Rules are amended, the old Special Rules have to be followed and the Government have no intention not to effect promotions until the Rules are amended. It has been so stated in paragraphs 3 and 9 of the counter affidavit filed by the first respondent in the Writ Petition, it is submitted.

6. The learned counsel for the first respondent, on the other hand, submitted that unequals are treated equally and, therefore, the method of appointment impugned is violative of Articles 14 and 16 of the Constitution of India. The Government have also admitted in their counter affidavit regarding the anomaly that existed in the method of appointment. That will amount to admission of the unconstitutionality of the Rules.

7. We considered the rival submissions made at the Bar and went through the pleadings and materials on record. The contention of the appellants that there is

delay in challenging the Rules, from the part of the first respondent, cannot be accepted. She need challenge the Rules, only when they adversely affect her. Before referring to the other contentions urged before us, we will presently refer to the relevant Rules, Rule 2 of Part II of the KS & SSR deals with the general principle that the Special Rules will oust the General Rules. The said Rule reads as follows:

2. Relation to the Special Rules- If any provision in the general rules contained in the Part is repugnant to a provision in the Special Rules applicable to any particular service contained in Part III, the latter shall, in respect of that service, prevail over the provision in the general rules in this Part.

Note (vi) to Rule 28(b)(i)(7)(vi) reads as follows:

28 (b)(i) Promotion and appointment by transfer according to merit and ability:--

(7) xx xx

(vi) When there are more than one feeder category carrying different scales of pay, they shall be shown in separate lists and persons in a lower scale of pay shall be appointed only after appointing all persons on a higher scale of pay, unless the Special Rules prescribe a ratio or any special order of preference for each feeder category.

When there is no specific provision in the Special Rules concerning preference in the matter of appointment from different categories, the above quoted rule will apply, when there are more than one post in the feeder category for promotion. The method of appointment prescribed in the Special Rules for the Kerala Social Welfare Service, for the post of Regional Probation Officer/Regional Assistant Director/Assistant Director of Social Welfare, which is included as Category No. 4. reads as follows:

Going by the above method of appointment it is seen that the incumbents in both the feeder categories are treated equally. Apparently, there is nothing wrong with such a prescription, But, the learned counsel for the first respondent pointed out that Category No. 5 is on a higher grade when compared to Category No. 6, Further, having regard to the method of appointment to the post in Category No. 5, persons reach that category only belatedly, but there are better chances for promotion at the lower level to those in the feeder category for Category No. 6 and they reach Category No. 6 earlier. In view of the said position prevailing in the Social Welfare Department most of the vacancies in Category No. 4 are filled up from among the persons in Category No. 6, So, the method of appointment which treats unequals equally is liable to be struck down as violative of Articles 14 and 16 of the Constitution of India, it is submitted. Therefore, the learned Single Judge has rightly interfered with the impugned Rules, it is pointed out.

8. The above contention has to be examined in the light of the principles governing the invalidation of a subordinate legislation, A Division Bench of this

Court in *P. Pankajakshy Amma and Another Vs. George Mathew and Others* , after analysing all the decisions on the point, laid down as follows:

12. Thus, the rule made under a statute by an authority delegated for the purpose can be challenged on the ground (1) that it is ultra vires of the Act; (2) it is opposed to the Fundamental rights; (3) it is opposed to other plenary laws. To ascertain whether a rule is ultra vires of the Act, the Court can go into the question (a) whether it contravenes expressly or impliedly any of the provisions of the statute; (b) whether it achieves the intent and object of the Act; and (c) whether it is "unreasonable" to be manifestly arbitrary, unjust or partial implying thereby want of authority to make such rules.

Going by the above dictum if the provisions of the rule are ultra vires of the parent Act the said rule can be struck down. If the rule is in conflict with any other statutory provision, then also the said rule can be struck down as ultra vires and beyond the rule making power of the delegate of the Legislature. A rule can be struck down as unreasonable, if it is grossly arbitrary and partial in its operation whereupon the court would say that the Legislature should not be intended to have conferred power to frame such arbitrary rules. Then, again this ground comes under the first ground, that is, ultra vires of the provisions of the parent Act. In this case, we think, none of the above grounds enumerated by the Division Bench is available. By the operation of the Rule, promotion chances of persons in Category No. 5 may not be bright from the administrator's point of view. It is an anomaly that requires to be rectified. But, the fact that persons belonging to one category do not get sufficient promotion chances when compared to the persons in the rival feeder category, we think, is not a ground available for striking down a subordinate legislation. Thus the provisions in the rule which say that persons in both the feeder categories are to be put in a common seniority list and the promotions ordered from that list cannot be said to be arbitrary, or irrational, or unjust or partial in its operation. Of course, the same would generate some grievance to persons belonging to one category. Only the delegate of the Legislature can act to remedy that and not the court. Such inequities which may come to light during the operation of the Rules are not grounds for declaring them as unconstitutional. The direction of the learned Single Judge has created a situation whereby the entire vacancies in Category No. 4 will be cornered by members of Category No. 5, as they are having a higher scale of pay when compared to those in Category No. 6. It means, if there is an incumbent in Category No. 5, those in Category No. 6 cannot aspire for promotion to Category No. 4. Thus, the remedy suggested by the learned Single Judge will be worse than the disease. In view of the above position, the judgment of the learned Single Judge cannot be sustained. Accordingly, the judgment is reversed and the Writ Petition is dismissed. The Writ Appeal is allowed as above.

W.A. No. 1960 of 2009

In view of the judgment in W.A. No. 1873 of 2009, this Writ Appeal is also

allowed.