
(2000) 07 KL CK 0038
In the High Court Of Kerala
Case No : W.A. No. 666 of 2000

George

APPELLANT

Vs

State of Kerala

RESPONDENT

Date of Decision : 25-07-2000

Acts Referred:

Constitution of India, 1950 — Article 14, 226, 233(2), 236, 246

Citation : (2000) 2 KLJ 535

Hon'ble Judges : M.R. Hariharan Nair, J;K.K. Usha, J

Bench : Division Bench

Advocate : Benoy Thomas and Paulson Thomas, for the Appellant; Preethy Ramakrishnan (Govt. Pleader), for the Respondent

Final Decision : Dismissed

Judgement

Usha, J.—Common question arises in these cases. W. A. 666/2000 is at the instance of the petitioner in O.P. 8859/99. which was dismissed by a learned Single Judge. Petitioners challenged the provisions contained under the Kerala Service Rules where the age of retirement of Government employees is fixed as 55 years. Similar contentions taken by petitioners in several other writ petitions where the above-mentioned question was raised were dismissed by a learned Single Judge and were affirmed by a Division Bench. This Court has taken the view that there is no reason to re-consider the view taken by this Court in the earlier decisions in N. Srinivasan v. State of Kerala. 1967 KLT 853 (FB) and Kerala Gazetted Officers Front & Others v. State of Kerala. 1987 (1) KLT 336. This Court also noted that the above view is in consonance with the decisions of the Supreme Court in K. Nagaraj and others v. D. Shankaran etc. AIR 1985 S.C. 551, George v. State of Kerala. 1992 (1) KLT 793 (SC) and SLP 1884/87 arising out of the judgment in W.A. 784/86.

2. But, learned counsel appearing on behalf of the petitioners submitted before us that petitioners in these cases have taken additional ground which this court had no occasion to consider in the earlier decisions. Petitioners herein seek a

declaration that Section 3 of the Kerala Public Services Act is repugnant to Article 309 of the constitution that it suffers from the vice of excessive delegation of State legislature. It is also contended that Sec. 2(1) of the Kerala Public Services Act, 1968 is repugnant to Article 309 of the Constitution of India and that the State legislature abdicated its essential legislative functions rendering the Section a piece of excessive legislation arbitrary and violative of Article 14 of the Constitution. Similar prayer is made against Sec. 4 of the above Act.

3. Learned counsel for the petitioners made three points. He contended that Sec. 2 of the Kerala Public Services Act, 1968 is invalid for excessive delegation. No guidelines are given in the section and therefore Rule 60 of K.S.R. issued by the Governor of Kerala in exercise of the powers conferred by the proviso to Article 309 of the constitution is invalid. Second contention was that the court can give a mandate to the government when it is found that the age of retirement fixed is low. Thirdly, learned counsel would submit that the decision in 1967 KLT 853 (Full Bench) is no longer good law in the light of the decisions of the Supreme Court in *All India Judges Association v. Union of India*, 1992 (1) KLT 103 and *All India Judge Association v. Union of India* 1993 (2) KLT 581.

4. Kerala Public Services Act, 1968 is an Act to regulate the recruitment and conditions of service of persons appointed to public services and posts in connection with the affairs of the State of Kerala. Sec. 2 of the above Act reads as follows:

2. Regulation of recruitment and conditions of service:- (1) The Government may make rules either prospectively or retrospectively to regulate the recruitment and conditions of service of persons appointed, to public services and posts in connection with the affairs of the State of Kerala.

2) Every rule made under this section shall be laid as soon as may be after it is made before the Legislative Assembly while it is in session for a total period of fourteen days which may be comprised in one session or in two successive sessions, and if before the expiry of the session in which it is so laid or the session immediately following the Legislative Assembly agrees that the rule should be either modified or annulled, the rule shall thereafter have effect only in such modified form or be of no effect as the case may be; so however that any such modification or annulment shall be without prejudice to the validity of anything previously done under that rule.

Section 3 provides that all rules made under the proviso to Article 309 of the Constitution of India, regulating the recruitment, and conditions of service of persons appointed to public services and posts in connection with the affairs of the State of Kerala and in force immediately before the 17th September, 1968, shall be deemed to have been made under this Act and shall continue to be in force unless and until they are superseded by rules made under this Act. Kerala Service Rules, which- were promulgated on 10-11-1959 under Article 309 of the Constitution shall, thus, be deemed to have been made under the Kerala Public

Service Act, 1968.

5. The contention raised by the learned counsel for the petitioners is that the provisions contained under Sec. 2(1) is bad for excessive delegation. -We find that this very question had been considered by a Bench of this Court as early as in 1972 in *R. Prabhakaran Nair & others v, State of Kerala & others* 1973 KLT 373. It was argued by the petitioner therein that Art; 309 makes it clear that regulation of recruitment of conditions of service has to be by appropriate legislature and in view of this provision, service conditions can be regulated by a law enacted by the legislature and not by the rules framed under an enactment passed by the legislature by the delegated authority. It was contended that no law made under the power conferred by Art. 309 can provide for any delegated authority to make rules in relation to recruitment of conditions of service. Rejecting " the above contention the Bench observed as follows:

As regards the first point, we think that the power of the legislature is derived by virtue of Article 246 read with item 41 in List II of the Seventh Schedule to the Constitution. Item 41 in List 11 of the Seventh Schedule to the Constitution is in these terms:

41. State public services: State Public Service Commission

This gives ample and wide powers to the Legislature to make rules not only regarding the recruitment but relating to the service conditions of the State Employees. It is not suggested that in exercise of such power by the legislature it has no power at all to delegate. Article 309 does not Confer power on the Legislature. Nor do we think that the Article limits the power conferred by Art. 246 read with Item 41 in List 11 of the Seventh Schedule to the Constitution. So we have to reject the first contention that there can be no delegation at all by any law passed by the State Legislature in regard to the fixation of conditions of service of the State employees.

6. The contention regarding excessive legislation was also considered. The Bench pointed out that in view of the specific provision in sub-section (2) of Section 2, there is no merit in the contention based on excessive legislation.

7. We are respectful agreement with the above view taken by the Bench of this Court. Therefore, the argument put forward by the learned counsel based on the theory of excessive legislation allegedly invalidating-Sec. 2 of the Kerala Public Service Act, 1968 is only to be repelled.

8. We do not think that the decisions of the Supreme Court in 1992 (1) K.L.T 103 and 1993 (2) KLT 581 should make any difference in the legal position which would require reconsideration of 1967 KLT 853. In 1992 (1) KLT 103. Supreme Court while considering the issue of improvement of service conditions of members of subordinate judiciary took the view that the age of retirement would be fixed at 60 years; Several aspects peculiar to the service of the Judicial Officers were taken into consideration before arriving at the above conclusion.

The court noted that unlike in other services, the entry into the judicial service is always at a later stage in life. While in the civil service age of recruitment varies from 25 to 28 years, in judicial service at the basic level most of the States permit entry upto the age of 32. In some States where direct recruitment of Judicial Officers for an intermediate stage was permitted the age of entry is even upto 35 years. In the light of the provisions contained under Art. 233(2) of the Constitution requiring an advocate to have not less than seven years standing for appointment as District Judge entry is permitted upto the age 45 years in many States for direct recruitment for District Judges. The fact that retirement age for the High Court Judges is 62 and a substantial portion of the High Court Judges are those who are elevated from the cadre of District Judges was also taken note of. The recommendation of the Law Commission for fixing the age at a higher level for officers of subordinate judiciary was also referred by the Supreme Court.

9. Distinction between judicial service and other services has been specifically noted by the Supreme Court in 1993(2) KLT 581. It is observed:

The judicial service is not service in the sense of employment. The judges are not employees. As members of the judiciary, they exercise the sovereign judicial power of the State. They are holders of public offices in the same way as the members of the council of ministers and the members of legislature. The council of ministers or the political executive is different from the secretarial staff or the administrative executive which carries out the decision of the political executive. Similarly, the legislators are different from the legislative staff. So also the judge from the judicial staff. The parity is between political executive the legislators and the judges and not between the judges and administrative executive. The Judges, at whatever level they may be represent the State and its authority unlike the administrative executive or the members of the other services. The members of the other services therefore cannot be placed on par with the members of the judiciary either constitutionally or functionally..... It is high time that all concerned appreciated that for the reasons pointed out above there cannot be any link between the service conditions of the judges and those of the members of the other services. It is true that under Art. 309 of the Constitution, the recruitment and conditions of service of the members of the subordinate judiciary are to be regulated by the Acts of the appropriate legislature and pending such legislation, the President and the Governor or their nominees, as the case may be are empowered to make rules regulating their recruitment and the conditions of service. It is also true that after the Council of States makes the necessary declaration under Art. 312, it is the Parliament which is empowered to create All India Judicial Service which will include posts not inferior to the post of District Judge as defined under Art. 236. However this does not mean that while determining the service conditions of the members of the judiciary a distinction should not be made between them and the members of the other Services or that the service conditions of the members of all the services should be the same..... This leaves us with the contention of the review petitioners that by the directions in question, this Court has encroached upon the powers of the

executive and the legislature under Art. 309 to prescribe the service conditions for the members of the judicial Service. In view of the separation of the powers - under the Constitution and the need to maintain the independence of the judiciary to protect and promote democracy and the rule of law, it would have been ideal if the most dominant power of the executive and the legislature over the judiciary, viz., that of determining its service conditions had been subjected to some desirable checks and balances. This is so even if ultimately, the service conditions of the judiciary have to be incorporated in and declared by the legislative enactments. But the mere fact that Art 309 gives power to the executive and the legislature to prescribe the service conditions of the judiciary does not mean that the judiciary should have no say in the matter. It would be against the spirit of the constitution to deny any role to the judiciary in that behalf, for theoretically it would not be impossible for the executive or the legislature to turn and twist the tail of the judiciary by using the said power. Such a consequence would be against one of the seminal mandates of the Constitution, namely, to maintain the independence of the judiciary.

It is for this reason again that the present practice of entrusting the work of recommending the service conditions of the members of the subordinate judiciary to the same Pay Commissions which recommend the service conditions of the other services requires reconsideration. The service conditions of the judicial officers should be laid down and reviewed, from time to time by an independent Commission exclusively constituted for the purpose and the composition of such commission should reflect adequate representation on behalf of the judiciary.

However, it cannot be contended that pending such essential reforms, the overdue demands of the judiciary can be overlooked.

It was in this background, the Court took upon itself the exercise of revision of the service conditions of the members of Subordinate judiciary which included raising the age of retirement to 80.yeaRs. We are therefore of the view that the above mentioned two decisions of the Supreme Court would not be of any help to the appellant and petitioners to contend mat this Court should examine their claim for enhancement of the age of retairement while exercising jurisdiction under Article 226 of the Constitution.

In the result, the writ appeal and original petitions fail and they stand dismissed.