
(1963) 03 KL CK 0028
In the High Court Of Kerala
Case No : O.P. No. 1717 of 1961

Gopinathan

APPELLANT

Vs

State of Kerala

RESPONDENT

Date of Decision : 18-03-1963

Acts Referred:

Constitution of India, 1950 — Article 13(3), 19, 19(1)(a), 19(1)(c), 19(2)

Citation : (1963) KLJ 463

Hon'ble Judges : C.A. Vaidialingam, J

Bench : Single Bench

Advocate : P. Subramonian Potti, L. Gopalaktishnan Potti and S.A. Nagendran,
for the Appellant;

Final Decision : Allowed

Judgement

Vaidialingam J.

1. In this writ petition Mr. P. Subramonian Potti, learned counsel for the petitioner, challenges the order Ext. P. 5, passed by the State Government dated 3-5-1961. Under Ext. P. 5, the State Government has dismissed the petitioner from service, on the basis of certain disciplinary proceedings taken as against him. The legal contention that has been taken, apart from the contention taken on facts regarding the sustainability of the findings on the evidence, is as follows: On the dates when the petitioner is alleged to have taken part in political activities, the rules that were in force were the Government Servants' Conduct Rules, 1950, promulgated by the Travancore-Cochin Government on 22-2-1950. Those rules not having been framed under Article 309 of the Constitution, are not "law" Only if they have been framed under Article 309, the question may have to be considered as to whether the restrictions imposed on Government servants by those rules are reasonable restrictions or otherwise. But the petitioner is considered to have committed a violation of the provisions of Rules 67 and 69 of the Kerala Government Servants' Conduct Rules, 1960, and he has also been found guilty of contravening those rules, by the Tribunal. According to

the learned counsel for the petitioner, those rules admittedly were framed by the Governor, in exercise of his powers conferred by the proviso to Article 309 of the Constitution, and came into force only with effect from 12-1-1960. That is, according to the learned counsel, at the material time when the petitioner is stated to have committed a violation of the rules in question, viz., 3-1-1960, the provisions which were in force were those contained in the Government Servants' Conduct Rules, 1950, issued by the Travancore-Cochin Government on 22nd February 1950.

2. According to Mr. P. Subramonian Potti, learned counsel for the petitioner, that the Government servants have got fundamental rights, has been declared by the Supreme Court in the recent decision reported in Kameshwar Prasad and Others Vs. The State of Bihar and Another, . The question as to whether the restrictions mentioned in the rules are reasonable or not, will arise and will have to be considered only if the provisions of the Government Servants' Conduct Rules, 1950, issued by the Travancore-Cochin Government are either made by virtue of the legislative power, or statutory rules, or framed by the Governor under the proviso to Article 309 of the Constitution. According to the learned counsel, the Government Servants' Conduct Rules of 1950 issued by the Travancore-Cochin Government, do not satisfy any of these conditions and, therefore, the proceedings initiated as against the petitioner for acts stated to have been committed by him long before the Kerala Government Servants' Conduct Rules, 1960 framed by the Government under the proviso to Article 309 of the Constitution came into force, are absolutely illegal, and therefore the entire proceedings will have to be quashed.

3. When this writ petition came on for hearing before me on 6-2-1963, I passed an order directing a counter-affidavit being filed on behalf of the State, regarding the source of the power under which the 1950 rules had been framed. The learned Government Pleader has now represented to this Court that he is not able to take the stand that the 1950 rules, though issued after the Constitution came into force, have been framed under Article 309. The learned Govt. Pleader has also accepted the position that the 1960 rules issued by the Governor under the proviso to Article 309 have come into force only on 12th January 1960. The proviso to Article 309, as it stood in 1950, when the 1950 rules were issued, also provided that the Rajapramukh of a State, or such person as he may direct, may make rules. In view of the representation made by the learned Government Pleader, it follows that the 1950 rules have not been made either by the Rajapramukh or by such other person as he has directed. The State in this case has not certainly claimed that the rules of 1950 is an "Act of the appropriate Legislature". That these rules purport to regulate the conditions of service of persons appointed to public services and posts in connection with the affairs of the State, is not also challenged by the learned Government Pleader. The position under Article 309, therefore, in my view, is that the rules, of 1950 is neither an "Act of the appropriate Legislature", nor a rule made by the Rajapramukh or a person directed by him.

4. It will be seen that the petitioner was at the material time Laboratory Attender, in the Ayurvedic College, Trivandrum. The Principal of the said College issued a communication to the petitioner on 8-1-1960, evidenced by Ext. P. 1. Therein the principal states that a complaint has been received that the petitioner has actively participated with his wife, in a Jatha organized by a political party for election campaign on 3-1-1960. It is also stated that such conduct of the petitioner is a violation of the Government Servants' Conduct Rule; and the petitioner was asked to give his explanation for his conduct within two days of receipt of the memo. At this stage it may be mentioned that the rules referred to in Ext. P. 1 can only be the 1950 rules. The petitioner appears to have sent an explanation to the Principal on 19-1-1960 controverting the allegations contained in Ext. P. 1. There was another communication evidenced by Ext. P. 2 dated 30-1-1960, issued by the Principal to the petitioner, wherein the Principal has stated that the allegation as against the petitioner that he has taken part in election activities, has been prima facie proved and therefore the petitioner is suspended with effect from 30-1-1960, pending inquiry as against him.

5. It is seen that on 8-2-1960, the Principal appears to have framed two charges as against the petitioner, evidenced by Ext. P. 7. Those two charges were to the effect: (1) that the petitioner while working as Laboratory Attender in the Ayurveda College, Trivandrum took an active part in a jatha organized by a political party on 3-1-1960, and (2) that he went with a candidate for election work, canvassing votes for him on 9-1-1960 and canvassed votes. It will be seen that the subject-matter or the charges was that the petitioner took an active part in a jatha organized by a political party on 3-1-1960, and that he went with a candidate for election work on 9-1-1960 and canvassed votes for the candidate. Both these dates, it will be seen, are dates prior to the coming into force of the Kerala Government Servants Conduct Rules, 1960, issued by the Governor under the proviso to article 309 of the Constitution, which took effect only from 12-1-1960. Under Ext. P. 7, the Principal further states that the conduct of the petitioner amounts to gross misconduct and is deliberate violation of the Government Servants' Conduct Rules. The petitioner is also called upon to show cause as to why disciplinary action as contemplated in the Kerala Civil Services (Classification, Control and Appeal) Rules, 1960, should not be taken against him. The petitioner was also asked to state whether he desires an oral inquiry or only to be heard in person; and if he desires to examine any witnesses, a list of such witnesses was also directed to be put in. Finally there is a statement in Ext. P. 7 to the effect that a statement of allegations, on which the charges were framed, is also enclosed. Ext. P. 8 seems to be the Statement of allegations on which the charges were framed as against the petitioner, and which was enclosed along with Ext. P. 7. Ext. P. 8 again refers to the petitioner's activities on 3-1-1960 and 9-1-1960.

6. Under Ext. P. 9 dated 8-2-1960 again, the Principal sends a communication to the petitioner, who was then under suspension, indicating to him the statement

of allegations made as against him, On which charges were framed, as well as the actual charges that were framed against him, after an inquiry by the X Branch Police. The petitioner was asked under Ext. 9 to submit his written statement as required in the charges framed against him, within ten days. The petitioner then sent his explanation, evidenced by Ext. P. 10, wherein again he controverted the various allegations made against him under Ext. P. 7. Curiously the Govt. state that they are not aware of these communications sent by the Principal.

7. It will be seen that by Order dated 17-5-1960, the State Govt. referred for inquiry, the conduct of the petitioner, to the Tribunal for Disciplinary Proceedings, under the provisions of the Kerala Civil Services (Disciplinary Proceedings Tribunal) Rules, 1960. The Tribunal framed the following charge against the petitioner:

That you, Shri V. Gopinathan, while working as Attender in the Ayurveda College, Trivandrum, in Government service, in January 1960 took part in a Jatha organized by the Communist Party on 3-1-1960 and 9-1-1960 at Oruvathikotta and canvassed votes for the Communist candidate, Shri Veli Krishnan Nair, in the general elections held on February 1960; thereby you had acted in contravention of rules 67 and 69 of the Kerala Government Servants' Conduct Rules, 1960. Your actions described above amount to gross misconduct and serious irregularity on your part.

The above charge also refers to the petitioner's activities on 3-1-1960 and 9-1-1960. But it must be noted that it states that he has violated rules 67 and 69 of the Kerala Government Servants' Conduct Rules, 1960, which had certainly come into force when the Government referred the case of the petitioner for inquiry.

8. This is a convenient stage to refer to rules 67 and 69 of the 1960 rules, which are as follows:

67. Taking part in politics and elections:

(1) No Government servant shall be a member of, or be otherwise associated with, any political party or any organization which takes part in politics nor shall he take part in, subscribe in aid of, or assist in any other manner, any political movement or activity,

(2) It shall be the duty of every Government servant to endeavor to prevent any member of his family from taking part in, subscribing in aid of or assisting in any other manner any movement or activity which is, or tends directly or indirectly to be, subversive of the Government, as by law established, and where a Government servant is unable to prevent a member of his family from taking part in or subscribing in aid of, or assisting in any other manner, any such movement or activity, he shall make a report to that effect to the Government.

(3) If any question arises whether any movement or activity falls within the

scope of this rule, the decision of the Government thereon shall be final.

69. Save as otherwise provided by or under any law for the time being in force, no Government servant shall canvass or otherwise interfere or use his influence in connection with or take part, in any election to a legislative body, whether in the Kerala State or elsewhere;

(1) Provided that a Government Servant who is qualified to vote as such election may exercise his right of vote; but if he does so he shall give no indication of the manner in which he proposes to vote or has voted.

(2) A Government servant shall not be deemed to have contravened the provisions of this rule by reason only that he assists in the conduct of an election in the due performance of a duty imposed on him by or under any Jaw for the time being in force.

(3) The Government may permit a Government servant to offer himself as a candidate for election to a local authority and the Government servant so permitted shall not be deemed to have contravened the provision of this rule.

Explanation. The display by a Government servant on his person, vehicle or residence of any electoral symbol shall amount to using his influence in connection with an election within the meaning of this sub-rule.

The corresponding provisions in the 1950 rules, were rules 70 and 72, which are as follows:

70. Taking part in politics and elections: No Government servant shall take part in, subscribe in aid of, or assist in any way, any political movement in the Travancore-Cochin State or in any other Part of India."

72. Save as provided by or under any law for the time being in force, no Government servant shall canvass or otherwise interfere or use his influence in connection with, or take part, in any election to a legislative body, whether in Travancore-Cochin State or elsewhere:

Provided that a Government servant who is qualified to vote at such election may exercise his right to vote, but if he does so shall give no indication of the manner in which he proposes to vote or has voted.

9. The Tribunal for Disciplinary Proceedings, after an inquiry conducted as against the petitioner, in which the petitioner admittedly took part, sent up its report Ext. P. 4 dated 5-8-1960. In the report the Tribunal takes note of the charge that had been framed as against the petitioner. It is ultimately of the view, that so far as the allegation contained as against the petitioner that he actively took part in a jatha organized by a political party on 3-1-1960 is concerned, that is borne out by the evidence on record. But so far as the allegation against the petitioner of his having taken part in the jatha on 9-1-1960, the Tribunal's view is that there is absolutely no material on record from which that allegation can be considered to have been proved. No doubt, the

petitioner appears to have controverted all the allegations in the charge and also let in evidence independently) to establish that he was not at all anywhere near the jatha either on 3-1-1960 or 9-1-1960, and that he did not take part in any political activities, nor canvass votes in the election for any candidate. The evidence so let in by him, was apart from his cross-examination of the various witnesses who gave evidence on behalf of the prosecution. But the petitioner's plea of alibi, which was sought to be supported by the other evidence let in by him, was not accepted by the Tribunal.

10. As I mentioned earlier, so far as the petitioner's conduct in taking part in the jatha on 3-1-1960 is concerned, that was accepted by the Tribunal. But so far as the petitioner's activities on 9-1-1960 are concerned, the Tribunal holds in favor of the petitioner. But it is not very clear—one must say in fairness to the petitioner—as to whether the Tribunal's view is that the petitioner must be considered to have Canvassed votes or taken part in any election campaign even after 3-1-1960. There seems to be a mixing up of various ideas, because apart from categorically holding as against the petitioner in respect of taking part in the jatha on 3-1-1960, and holding in favor of the petitioner in respect of his activities on 9-1-1960, and generally holding that the petitioner has taken part in the matter of canvassing votes on behalf of a political party in the elections that were held in 1960, the Tribunal has not clearly stated that the canvassing of votes was also after 3-1-1960. Because, if the Tribunal had held that the petitioner was canvassing votes for a candidate, even on or after 12-1-1960, then the petitioner could be held to have violated the 1960 rules, as those rules had come into force from 12-1-1960. So far as I could see, no evidence appears to have been let in regarding the petitioner's participation if any, in any election campaign even after 9-1-1960.

11. But anyhow, the findings as they now stand are that the petitioner did take a leading part in the jatha on 3-1-1960. Even assuming that there is a finding regarding the canvassing of votes, that will only take in the period upto and inclusive of 9-1-1960, the position will not be different, as I will presently show, because the Kerala Govt Servants' Conduct Rules framed by the Governor under the proviso to Article 309 came into force only on 12-1-1960.

12. The charge itself, it will be seen, appears to have been framed on the basis of the new rules, 1960, that is, under rules 67 and 69. The corresponding rules in the Travancore-Cochin Government Servants' Conduct Rules, 1950, were rules 70 and 72. I have extracted earlier both the sets of rules. The petitioner was asked under Ext. P. 3 to show cause why the penalty of dismissal from service proposed, should, not be inflicted on him. The petitioner no doubt pleaded his innocence. But ultimately the Govt. was not satisfied with the explanation given by the petitioner; and the result was that the order of dismissal was passed by the State Government, evidenced by Ext. P. 5 dated 3-5-1961.

13. Though, no doubt, Mr. P. Subramonian Potti, learned counsel for the petitioner, has urged that the findings on facts recorded by the Tribunal as

against the petitioner are not borne out by the evidence and materials on record, I am not inclined to accept that contention of the learned counsel. The appreciation of evidence and the quantum of evidence for coming to a particular conclusion one way or the other, are all entirely within the absolute discretion and jurisdiction of the disciplinary authority. This Court cannot constitute itself into a court of appeal to assess the value of the evidence let in before the disciplinary tribunal. But, nevertheless in this case, the petitioner will have to succeed on a legal point, however technical it may be.

14. The petitioner has been taking up the position that the acts alleged as against him, even according to the prosecution, took place on 3-1-1960 and 9-1-1960; in which case, the proceedings should be considered to have been initiated only under the Travancore-Cochin Government Servants' Conduct Rules, 1950 issued on 22-2-1950. But what actually happened was that the charge was framed under rules 67 and 69 of the new rules, viz., the Kerala Government Servants' Conduct Rules, 1960, promulgated by the Governor under the proviso to Article 309 of the Constitution and published in the State Gazette on 12th January 1960. According to the learned counsel for the petitioner, the position is that even in the counter-affidavit filed in these proceedings, the State Government has proceeded on the basis that action taken as against the petitioner must be really for acts done prior to the promulgation of the Kerala Government Servants' Conduct Rules, 1960 on 12th January 1960. In particular, Mr. Subramonian Potti, learned counsel for the petitioner, drew my attention to the averments contained in paragraph 8 of the State's counter-affidavit, wherein it is stated that the charge against the petitioner was that he had violated rules 67 and 69 of the Kerala Government Servants' Conduct Rules, 1960, but that, in view of the fact that there were identical provisions viz., rules 70 and 72 in the rules of 1950, the State submits that a mistaken reference to the later rules of 1960 will not in any way vitiate the inquiry conducted as against the petitioner especially as no prejudice has been caused to the petitioner thereby. Therefore, according to the learned counsel for the petitioner, even according to the State, the proceedings taken as against the petitioner must be held to be for violation of rules 70 and 72 of the Travancore-Cochin Government Servants' Conduct Rules 1950. Rules 70 and 72 of the 1950 rules, the learned counsel urged, do restrict the fundamental rights guaranteed under Article 19 of the Constitution. It can so restrict, provided (a) the restriction is a reasonable restriction and (b) the reasonable restriction is one imposed by "law." The rules of 1950, not being law, cannot restrict fundamental rights, and therefore, even on the ground that the petitioner has violated rules 70 and 72 of the 1950 rules, no disciplinary proceedings can be taken, because the petitioner has only exercised his fundamental right of participating in the election campaign.

15. No doubt, there were originally doubts entertained as to whether Government servants while in Government service, were entitled to fundamental rights. But now the position that they have fundamental rights, is well-established by the recent decision of the Supreme Court reported in Kameshwar

Prasad and Others Vs. The State of Bihar and Another, . Rule 4 A, which was admittedly a rule forming part of the Bihar Government Servants' Conduct Rules, 1956, and promulgated by the Governor of Bihar under the proviso to Article 309, came up for attack before the High Court in the first instance, and later before the Supreme Court. That rule was to the effect that "No Government Servant shall participate in any demonstration or resort to any form of strike in connection with any matter pertaining to his conditions of service." After this rule was framed, an attack was made as against the rule by certain officers, before the State High Court, that it contravened Article 19(1)(a),(b) and(c). The High Court held that freedom guaranteed under Article 19 (1) (a) and 19 (1)(c) did not include the right to strike, or the right to demonstrate, so far as Government servants are concerned. Even on the assumption that the freedoms guaranteed under Art. 19 (1) (c) did include such rights, the High Court held that Rule 4A was saved as being reasonable restriction on those guaranteed freedoms.

16. The matter came before the Supreme Court. Their Lordships of the Supreme Court refer to the provisions of Article 309 of the Constitution, and say that the source of power for framing the rule in question, was the proviso to Article 309. Their Lordships also observe that the rule-making power under the proviso to Article 309 being subject to the provisions of the Constitution, the validity of such rules will have to be tested by the same criteria as are applicable to all laws and subordinate legislation. Their Lordships put it in another way, viz., that if there are any constitutional limitations upon law-making, such of them as are appropriate to the subject dealt with by the rule, would be applicable to them. Therefore, the position is that even in respect of a rule framed under the proviso to Article 309 the validity of the said rule will have to be tested in accordance with the provisions of the Constitution; and it is needless to state that the fundamental rights guaranteed under Part III of the Constitution are very valuable rights. The Supreme Court also held that the validity of rule 4A of the Bihar rules, in so far as it prohibits strike, is no longer open to charge, because of its earlier decision in All India Bank Employees' Association Vs. National Industrial Tribunal and Others, . So they dealt with the attack on the rule prohibiting demonstrations and that attack was accepted.

17. Before the Supreme Court, on behalf of the Government of Bihar it appears to have been urged that as a person voluntarily entered Government service, he must, by that very act, be deemed to have consented to enter that service on such reasonable conditions as might be framed for ensuring the working of the administrative machinery of the government and for the proper maintenance of discipline in the service itself. Reference was also made to Article 310, under which every office is held, subject to the provisions of the Constitution, at the pleasure of the President or of the Governor, as the case may be and therefore it was urged that, provided a rule regulating the conditions of service was reasonable and was calculated to ensure the purposes above-named, its reasonableness and validity could not be tested solely by reference to the criteria laid down in Article 19 (2), (3) or (4).

18. On behalf of the Government servants, it was urged that fundamental rights are guaranteed to all citizens, and a rule framed under Article 309 is a "law" within the definition of Article 13(3) of the Constitution. In order to be considered to be a valid law, it must satisfy the limitation of the guaranteed rights contained in Articles 19(2) and 19(3) of the Constitution. It was also urged that by the mere fact that a person enters Government service, he does not cease to be a citizen of India, nor does that disentitle him to claim the freedoms guaranteed to every citizen. In that connection the notable departure made by Article 33 of the Constitution was also adverted to.

19. His Lordship, Rajagopala Ayyangar J. speaking for the Court, if I may say so with respect, after an elaborate consideration of all the aspects, ultimately holds:

We find ourselves unable to accept the argument advanced on behalf of the State Government that the Constitution excludes Government servants as a class from the protection of the several rights guaranteed by the several Articles in part III, save in those cases where such persons were specifically named.

After referring to Article 33 and noting that it selects two of the services under the State, the Court observes at page 1170 as follows :

The Article having thus selected the services, members of which might be deprived of the benefits of the fundamental rights guaranteed to other persons and citizens and also having prescribed the limits within which such restrictions or abrogation might take place, we consider that other classes of servants of Government in common with other persons and other citizens of the country cannot be excluded from the protection of the rights guaranteed by Part III by reason merely of their being Government servants and the nature and incidents of the duties which they have to discharge in that capacity might necessarily involve restrictions of certain freedoms as we have pointed out in relation to Article 19(1) (c) and (g).

The above observations of the Supreme Court now clearly establish that by the mere fact that a person has entered Government service does not mean that he is denied the fundamental rights guaranteed to every citizen. On the other hand, the position has been made very clear by the Supreme Court that all Government Servants except those coming under Art. 33, in common with other persons and other citizens of the Country, cannot be excluded from the protection of the rights guaranteed by Part III of the Constitution. The position is further made clear that reasonable restrictions within the permissible limits can be imposed, but it must be "law".

20. The matters provided for by rules 67 and 69 of the Kerala Govt. Servants' Conduct Rules, promulgated by the Governor under the proviso to Article 309 of the Constitution, do not now arise for consideration in this case, because I am not concerned with those rules for the present. In fairness to the learned counsel for the petitioner, I did not understand him to take the stand that if the 1950 rules are "Law" then the restrictions imposed by rules 70 and 72 cannot be

considered to be other than reasonable restrictions. The position then will be the same even with respect to rules 67 and 69 of the 1960 rules. In this case, unless the State is able to establish that the Travancore-Cochin Govt. Servants' Conduct Rules, 1950, is a "law" that is, in the sense that it is a statute enacted by the legislature, or statutory rules framed by the appropriate authority, or rules framed under the proviso to Article 309, it will be very difficult for the State to sustain the proceedings initiated as against the petitioner. That the matters provided for by rules 70 and 72 of the 1950 rules, or by rules 67 and 69 of the 1960 rules operate as restrictions was not also seriously challenged by the learned Govt. pleader. No doubt, there was a feeble argument advanced by the learned Govt. pleader that when the disciplinary proceedings were initiated as against the petitioner, admittedly the Kerala Govt. Servants Conduct Rules, 1960 had come into force and therefore the proceedings are legal and punishment imposed is valid. I am not inclined to accept this contention of the learned Govt. pleader because, apart from the general Principle that a rule cannot be considered to have retrospective effect, there is nothing in the Kerala Govt. Servants' Conduct Rules, 1960 to show that any conduct on the part of a Govt. Servant, prior to the promulgation of the said rules, can be investigated on the basis of the new rules. That is why I said that the objection, however technical it may be, raised by the learned counsel for the petitioner will have to be sustained.

21. It is regrettable that notwithstanding the finding recorded by the Tribunal against the petitioner about his having participated in political activity by way of taking part in a political jatha on 3-1-1960 and canvassing votes for a candidate, the proceedings will have to be quashed on the short ground that on the material dates, the Government Servants' Conduct Rules, 1960 were not in force and the Government Servants' Conduct Rules, 1950, which was in force was not "law" and as such not competent to impose restrictions on fundamental rights. Therefore the contention of the learned counsel for the petitioner that the proceedings initiated as against the petitioner cannot be sustained, will have to be accepted. Then it follows that the entire proceedings initiated by the State Government as against the petitioner and which ultimately resulted in the order of the State Government evidenced by Ext. P. 5, will have to be set aside and quashed. In the result the writ petition is allowed, and parties will bear their own costs.