
(2005) 02 KL CK 0042

In the High Court Of Kerala

Case No : Writ Petition No's. 37726/04 and 198 and 3279 of 2005

Jomon Puthenpurakal

APPELLANT

Vs

State of Kerala

RESPONDENT

Date of Decision : 28-02-2005

Acts Referred:

Constitution of India, 1950 — Article 226, 316, 316(1), 318
Government of India Act, 1935 — Section 265(1)

Citation : (2005) 2 KLT 1

Hon'ble Judges : B. Subhashan Reddy, C.J;A.K. Basheer, J

Bench : Division Bench

Advocate : K. Ramakumar, Saritha David Chunkath, Siby Mathew, A.A. Mohammed Nazif, Philip J. Vettickattu, V. Lakshmi, Shijimol, Rekha Vasudevan, S. Suraj, P.A. Kumaran, Vineetha B. and M.R. Hariraj and M.R. Rajendran Nair, for the Appellant; P.C. Sasidharan, N. Nandakumara Menon, T.R. Ramachandran Nair, Anil K. Narendran, K. Vinod Kumar, P.K. Manoj Kumar, P.G. Rajagopalan, M. Gopikrishnan Nambiar and T. Resmi Damodaran, M. Retna Singh, General, T.P. Kelu Nambiar, Sr.Adv. and Anil Thomas, Government Pleader, for the Respondent

Final Decision : Dismissed

Judgement

B. Subhashan Reddy, C.J.—These three Writ Petitions have been filed as pro bono publico assailing the appointments of 12 members of Kerala Public Service Commission which were made by G.O.(P) No. 370/2004/GAD dated 30.12.2004. While in W.P.(C) Nos. 37726/2004 and 3279/2005 all the 12 newly appointed members of Kerala Public Service Commission are made respondents, in W.P.(C) No. 198/2005, only one new appointee, namely, Mr. P.R. Devadas, has been made a party. We refer the respondents as arrayed in W.P.(C) No. 37726/2004. The first respondent is the Government of Kerala, second respondent the Kerala Public Service Commission, third respondent the Chairman of the second respondent-Commission, while respondents 4 to 15 are the newly appointed members of the second respondent-Commission. Respondent No. 16 was impleaded as per order dated 12.1.2005 in I.A.No. 596/2005. He is the Principal

Secretary to Government, General Administration Department and said to have handled files relating to appointments of respondents 4 to 15 and personal imputations have been made against him that he had helped his sister-in-law, the 6th respondent, to be ranked above the original ranking given by the Cabinet while taking decision.

2. Sri. K. Ramakumar, learned counsel, appeared for the petitioner in W.P.(C) No. 37726/2004 and advocates M/s. M.R. Rajendran Nair and Siby Mathew appeared for other petitioners. Sri. Retna Singh, learned Advocate General, appeared for the first respondent, Sri. P.C. Sasidharan, learned counsel, appeared for respondents 2 and 3, learned senior counsel Sri. T.P. Kelu Nambiar appeared for respondents 4 and 11, Sri. N. Nandakumara Menon, learned counsel, appeared for respondents 5 to 7, 14 and 15, Sri. Anil K. Narendran, learned counsel, appeared for respondents 8 and 12 and Sri. Ramachandran Nair, learned counsel appeared for respondents 9, 10 and 13.

3. As on the date of filing of W.P.(C) No. 37726/2004 on 28.12.2004, there was no appointment and the same was based on a news paper report that respondents 4 to 15 were sought to be appointed and the relief sought for was to declare the proposed appointments as unconstitutional, void and inoperative and in Clause D, the prayer was to issue a mandamus forbearing respondents 4 to 15 from functioning as Members of the Kerala Public Service Commission in the event the appointments are already announced or implemented pending disposal of the Writ Petition.

4. Respondents 4 to 15 were appointed as Members under G.O.No. 370 mentioned above issued on 30.12.2004 and they have taken charge of the same. The Writ Petition came up for admission on 31.12.2004 before the vacation Court and the said Court having been apprised of the appointment of respondents 4 to 15 and assumption of charges by them, passed an interim order restraining them from taking any policy decision without further orders of the Court, Thereafter, the petitioner in W.P.(C) No. 37726/2004 sought an amendment of the prayer in Clause D seeking issuance of a writ of quo warranto calling upon respondents 4 to 15 to show before this Court under what authority of law they are holding the post of Members of the Kerala Public Service Commission. There was a prayer for amendment of pleadings, which was also ordered.

5. On 12th January, 2005, when the interim application came up for hearing seeking vacation of the restraint orders passed on 31.12.2004, the same was vacated, but, it was made clear that appointment of respondents 4 to 15 shall be subject to the result of the Writ Petition. The hearing of the Writ Petition was expedited and, mean while, W.P.(C) Nos. 198 and 3279 of 2005 were filed and they were also tagged on and all the Writ Petitions were heard finally.

6. For sake of convenience, we refer the petitioners in different Writ Petitions as follows: W.P.(C) No. 37726/2004, first petitioner, W.P.(C) No. 198/2005, second petitioner and W.P.(C) 3279/2005, third petitioner.

7. Sri. K. Ramakumar, learned counsel appearing for the first petitioner, submits that appointments of respondents 4 to 15 are vitiated as the consideration for appointment was either political or monetary and, thus, unconstitutional. He submits that the decision to appoint respondents 4 to 15 was taken by the Government long prior to the increase in strength and, in fact, the increase in strength was unwarranted because of the financial crunch faced by the Government. He further submits that originally, there was Chairman +5, when the sanctioned composition was 14 and three members answered the description of employees under the Government, but, in the impugned appointments, the proportion of 50% of the persons from Government service is not maintained and that excepting the 4th respondent, there is no other person traceable to Government service among the newly appointed 12 Members, and, as such, the mandate in Article 316 of the Constitution of India is violated. His contention is that all the new appointees have got political affiliation to one party or the other in the present United Front Government, and that, excepting the 4th respondent, others cannot be called as fit persons to man the Kerala Public Service Commission. Specific imputations have been made against the 5th respondent on the ground that he was subjected to disciplinary proceeding while functioning as staff of the Calicut University and that the 11th respondent was convicted for offences u/s 138 of the Negotiable Instruments Act in C.C.No. 687/2002 on the file of the Chief Judicial Magistrate, Kottayam and was sentenced to undergo 5 months imprisonment, and that, on this specific ground also, the said respondents are not eligible to be appointed. Sri. Ramakumar further submits that there was tampering of ranking of 6th respondent as she was placed below the said ranking while taking decision by the Government and this has been made by the 16th respondent as he is an officer concerning with handling of the files and that he has manipulated the records by making unauthorized corrections. The other learned counsel appearing for petitioners 2 and 3 also addressed arguments on similar lines as that of Sri. K. Ramakumar.

8. Learned Advocate General learned senior counsel Sri. Kelu Nambiar and other learned counsel for the respective respondents mentioned above, submit that there was no prior decision taken to appoint respondents 4 to 15 as Members of the Kerala Public Service Commission and that, only after amending the Regulation increasing the strength of the Commission to 18 (Chairman + 17), appointments were made, that Regulation was made first and appointments later and rule of 50% of appointments from Government service as contained in the proviso to Article 316 of the Constitution is not mandatory but is only directory that the newly inducted Members are persons of learning and even if there were political affiliations before, that will not act as a disqualification and that there had been such appointments before and with the increase of workload in addition to the appointments to various departments of the State Government, 102 Corporations, 16 main Co-operative Societies and 8 local authorities and some other appointments to other authorities have also been brought under the purview of the Kerala Public Service Commission and in view of that, there was

necessity to increase the strength from Chairman + 14 to Chairman + 17 and that only after the increase in strength by amending the Regulation by G.O.(P) No. 369/2004/GAD dated 30.12.2004, the appointments of respondents 4 to 15 were made by a subsequent Government Order, G.O.(P) No. 370/2004/GAD dated 30.12.2004 and that respondents 4, 5, 6, 7, 9, 10 and 11 also answer the description under the proviso to Article 316 of the Constitution and that the requirement of 50% of the strength of Public Service Commission stated in the proviso to Article 316(1) is only directory and not mandatory and that there was no attempt to change the ranking of the 6th respondent and that the 11th respondent even though initially convicted by the Court of Magistrate, but, later on acquitted by the Additional Sessions Judge, Kottayam on appeal, by judgment dated 27.10.2004 and that the said appellate judgment became final and that the Writ Petitions are not in public interest but because of the personal rivalry and the amended regulations in G.O.369 stood unchallenged and that all the respondents 4 to 15 have been validly appointed and there being no infirmity, legal or otherwise in their appointments, the Writ Petitions are liable to be dismissed.

9. Governor is the competent authority to appoint the Chairman and Members of the Public Service Commission. Regulations are made to fix the strength of the Commission under Article 318 of the Constitution and appointments are made in accordance with the said strength under Article 316 of the Constitution. It is not disputed that as on 30.12.2004, the permitted strength of the Commission was Chairman + 14, but, that has been increased to Chairman + 17, that means, the strength was increased by three members. The petitioners cannot be heard to say that the Government was incompetent to take a decision to increase the strength because of the poor financial condition. As the workload of the Commission had increased considerably with inclusion of several other authorities for whom appointments have to be made to man them, the decision of Government to increase the strength cannot be said to be unjustifiable. It is the domain of the Government and the Court cannot enter into such aspects. Coming to the contention that the decision to appoint respondents 4 to 15 was taken first and then amendment of Regulation increasing the strength was only to suit the said prior decision and the Regulation being ex post facto is violative of both Articles 318 and 316 of the Indian Constitution, there is no such material to substantiate the said contention and, going by the presumption u/s 114 of the Indian Evidence Act, all official acts of the Government are presumed to have been done in accordance with law and the Government order increasing the strength being anterior to the Government Order appointing respondents 4 to 15, it shall be presumed that Regulations were amended first increasing the strength to Chairman + 17 and then only appointments of respondents 4 to 15 were made. With regard to the tampering of the ranking by respondent 16, there is no material and the contention in that regard is unsustainable. The newspaper report cannot form the basis for legal contention or acceptance thereof by the Court and there is no legally acceptable material placed before the Court to

accept the above contention. The judgment of the Supreme Court in *Dr. B. Singh Vs. Union of India (UOI) and Others*, , supports our finding. Similar is the reasoning regarding the allegations of either political clout or money power and also regarding the anterior decision said to have been taken on 22.12.2004 to appoint respondents 4 to 15. There was nothing wrong on the part of the Government to think of the candidates and the cabinet decision presided over by the Chief Minister said to have been taken on 22.12.2004 cannot be held to be unconstitutional as there was no order of appointment made in consonance with Article 166 of the Indian Constitution on the said date and only when the Government Order was issued and released, it has got the legal validity and all decisions taken prior to such stage had got no legal sanction. As such, only Government Order No. 370 dated 30.12.2004 is a valid document, which can be taken cognizance of by this Court. *State of Kerala Vs. Smt. A. Lakshmikutty and others*, , paragraph 40, is clear on this point.

10. Under Article 318 of the Constitution, regulations can be made only to determine the number of Members of Commission and their conditions of service and there is no other constitutional requirements regarding the eligibility of either the Chairman or the Members. The entire discretion regarding the other eligibility criteria is left to the Governor and the evaluation made by the Government in appointing either the Chairman or Members of the Public Service Commission is not guided or controlled by any regulation and in the absence of the same, it is riot permissible for this Court to enter that area and evaluate according to the expectations of the petitioners. Such consideration which led to the appointment of respondents 4 to 15 are beyond the purview of judicial review under Article 226 of the Constitution of India. In fact, when such an exercise was made by the Punjab & Haryana High Court, the Supreme Court did not approve the action of the High Court and set aside the judgment rendered in that regard. It was held by the Supreme Court:

"We may point out that even if the Chairman and member of the Haryana Public Service Commission were appointed on account of political and caste considerations, they could still be men of character, integrity and competence and the extraneous considerations which might have weighed with the appointing authority need not necessarily reflect upon their competence, character or fitness".

The Supreme Court even went into the power of the High Court to make such an exercise and record a finding. In paragraph 9, it was held:

".....It is difficult to see how the Division Bench of the High Court could possibly undertake an inquiry into the question whether the Chairman and members of the Haryana Public Service Commission were men of integrity, caliber and qualification or not. It was a totally irrelevant inquiry, because even if they were men lacking in integrity, caliber and qualification, it would not make their appointments invalid, so long as the constitutional and legal requirements in regard to appointment were fulfilled".

Commenting upon the requirements for appointment of either Chairman or members of the Public Service Commission, the Supreme Court in the above judgment held that except what is stated in Article 316 consisting of both clauses there are no other provisions in the Constitution bearing on the appointment of Chairman and members of the State Public Service Commission and if there was no breach of the said provision, there is no other constitutional provision which can be traced to annul the appointment of the Chairman and members of the Public Service Commission.

11. Then, we are left with only the other principal contention with regard to the compliance of requirement of 50% strength from among the persons served either in the Government of India or the State Government as contemplated by proviso to Article 316 of the Indian Constitution. It is apt to extract Article 316(1):

"316. Appointment and term of office of membership: (1) The Chairman and other members of the Public Service Commission shall be appointed, in the case of the Union Commission or a Joint Commission by the Parliament, and in the case of a State Commission, by the Governor of the State:

Provided that as nearly as may be one-half of the members of every Public Service Commission shall be persons who at the dates of their respective appointments have held office for at least ten years either under the Government of India or under the Government of a State, and in computing the said period of ten years any period before the commencement of this Constitution during which a person has held office under the Crown in India or under the Government of an Indian State shall be included".

Now the entire thing revolves around the above proviso. If the above proviso is read to be mandatory and that there should be per force 50% of the strength in the Public Service Commission of the personnel who had been in Government service for more than 10 years, then certainly the Writ Petitions are fit to be allowed. If on the other hand, it is directory then petitioner's contentions fail. There is a direct decision bearing on the above point. The Supreme Court in *Jai Shankar Prasad, Adv. Vs. State of Bihar and Others*, was dealing with the same proposition and interpreting the same it was held that requirement of 50% strength of the persons having been in Government service for more than 10 years is only directory and not mandatory. The similar proviso to Section 265(1) of the Government of India Act, 1935 was compared to the present proviso in Article 316(1) of the Constitution and it was authoritatively ruled by the Supreme Court that under the Government of India Act, the words used (atleast half) were emphatic and that it could not be less than half. But, coming to the proviso to Article 316(1) of the Constitution, the same is toned down and employed the words "as nearly as may be one-half and the said change in phraseology point towards the flexibility of compliance of such requirement and any breach thereof would not render the appointment invalid. In the instant case, three members before the impugned Government Order and three members newly appointed,

i.e., respondents 4, 9 and 11 are indisputably Government servants who had been in such service for more than 10 years and these six out of 18 make one third and even if it is one-third, going by the above decision of the Supreme Court, as the provision is directory, the impugned appointments cannot be set aside. Further there is another aspect to the matter. Respondent No. 5 had been the Joint Registrar of University of Calicut, 6 and 7 had been the Selection Grade Lecturers of colleges affiliated to recognized universities, 10 is a retired teacher of a Government aided school; 13 had been the Principal of a Government aided higher secondary school, 14 a retired professor of a college affiliated to a recognized university and 15 had been the Head of the Department of Philosophy of a college affiliated to a recognized university and all are educationists. Having regard to the kind of services placed at the disposal of the Public Service Commission for making selections, appointment of such educationists is necessary. Majority of the above respondents can be considered as Government servants in a wider concept. Dealing with similar proposition in *Hargovind Pant Vs. Dr. Raghukul Tilak and Others*, , the Supreme Court held that the employment can be said to be under the Government if the holder or incumbent of the employment is under the control of the Government and such conclusion can be inferred if the institution where a person is employed is amenable to the directions of the Government and is accountable to the Government for the manner in which such institution carries out its functions and duties. It cannot be denied that Government aided institutions are under the control of the Government and have to abide by the directions given by the Government as may be contemplated under the scheme under which the Government aid is granted.

In view of what is stated supra, we do not find any merit in these Writ Petitions and accordingly they are dismissed. No costs.