
(1964) 12 KL CK 0027

In the High Court Of Kerala

Case No : O.P. No's. 752, 1000, 1009 and 1022 of 1963

K. Gopala Pillai and Others

APPELLANT

Vs

State of Kerala and Others

RESPONDENT

Date of Decision : 17-12-1964

Acts Referred:

Constitution of India, 1950 — Article 16, 309, 311

Kerala State and Subordinate Services Rules, 1958 — Rule 28, 31

Citation : AIR 1966 Ker 262

Hon'ble Judges : P. Govindan Nair, J

Bench : Single Bench

Advocate : K. Velayudhan Nair, V.S. Moothathu, K.J. Joseph, M.C. Sen and V. Veludhan, in O.P. No. 725 of 1968, K. Chandrasekharan and T. Chandrasekhara Menon, in O.P. No. 1000 of 1963, T.S. Krishnamoorthy Iyer and P.C. Chacko, in O.P. No. 1009 of 1963, K. Velayudhan Nair, K.J. Joseph, V.S. Moothathu, T.K.M. Unnithan and M.V. Velayudhan, in O.P. No. 1022 of 1966, for the Appellant; Govt. Pleader in O.P. No. 725 of 1963, Govt. Pleader (for No. 1) and K. Kurien Joseph, (for Nos. 2 and 3) in O.P. No. 1000 of 1963 Govt. Pleader (for No. 1) and K. Kurien Joseph, (for No. 2) in O.P. No. 1009 of 1963 Govt. Pleader in O.P. No. 1022 of 1963, for the Respondent

Final Decision : Dismissed

Judgement

P. Govindan Nair, J.—These writ applications can be disposed of by a common judgment for the points raised are practically the same. These have been considered in a recent judgment of my learned brother Justice K.K. Mathew dated 16th November, 1964 in O.P. No. 1129 of 1963: K.N. Thankam Vs. State of Kerala and Others,

2. The writ applicant in O. P. No. 752 of 1963 is a Superintendent in the Government Secretariat, Trivandrum. He was promoted as Acting Superintendent on 26.2.1956 and was subsequently confirmed. The petitioner got a further promotion as Acting Assistant Secretary to Government from 12.12.1962. By an Order dated 23.3.1963 he has been reverted as Superintendent. This order is

produced as Ext. P1 in O.P. 752 of 1963. The petitioner complains that while he was reverted, a number of others, junior to the petitioner in the Secretariat have have been retained as Assistant Secretaries.

3. It must be mentioned here that the petitioner was promoted as Acting Assistant Secretary only provisionally pending selection by the Departmental promotion Committee. The petitioner seems to have been reverted because the Departmental Promotion Committee did not select the petitioner for the post of an Assistant Secretary; but selected some of his juniors.

4. The petitioner in O.P. No. 1000 of 1963 who was functioning as a Deputy Secretary by provisional appointment (under Rule 31 of the Kerala State and Subordinate Services Rules, 1958) was reverted as per Ext. P1 in O.P. 1000 of 1963. Here again the case is that the Departmental Promotion Committee which selected candidates for appointment as Deputy Secretaries did not select the petitioner; but selected some of his juniors who have been appointed.

5. The petitioner in O.P. No. 1009 of 1963 who was an Assistant Secretary in the Law Department was appointed in a short vacancy in the cadre of Deputy Secretary by order dated 2.2.1962. He had however to revert when the vacancy ceased. The petitioner functioned as Deputy Secretary from 2.2.1962 to 4.7.1962. Along with him his junior one Shri K. Vishwanathan Nair also acted temporarily as Deputy Secretary and was later reverted. But later by the order Ext. P5 dated 24-5-1963 in O. P. 1009 of 1963 Shri Vishwanathan Nair was appointed as Deputy Secretary. This appointment was on basis of the recommendations of the Departmental Promotion Committee.

6. The petitioner in O. P. No. 1022 of 1963 who was an Assistant Secretary in the Law Department was promoted as Deputy Secretary under Rule 31 of the Kerala State and Subordinate Services Rules, 1958. The petitioner continued as Deputy Secretary till 27-12-1962. On that day, the petitioner entered on earned leave, it is said, as Deputy Secretary. It is his case that he was allowed to join duty only as Assistant Secretary. This petitioner also complains that his junior Sri K. Vishwanathan Nair has been appointed as a Deputy Secretary in the vacancy that occurred over-looking his claims.

7. From what is stated above, it is seen that the claims of all the petitioners are against the appointment of their juniors as Assistant Secretaries or as Deputy Secretaries. Such appointments have been challenged on various grounds which may he formulated under four heads:

(a) Article 311 of the Constitution has been violated.

(b) The equality of opportunity guaranteed by Article 16 of the Constitution has been infringed.

(c) Rules framed under Article 309 of the Constitution regulating recruitment and the conditions of service of the petitioners have been disregarded and even sought to be altered by executive directions.

(d) That the grounds relied on by the Departmental Promotion Committee, viz., the entries in the confidential records of the petitioners, should not have been relied on, for, the petitioners have not been told about those adverse remarks. Even in cases where there have been communication and consideration of the explanation, the adverse remarks are of no use since they are quite indefinite and absolutely vague and are against the specific directions of Government contained in the two Government orders. Exts. P11 and P12 in O. P. 1000 of 1963.

8. Most of these questions have been considered by my learned brother Justice K. K. Mathew in his judgment in the O. P. referred to and I am in general agreement with the views expressed therein. I may however add a few words of my own.

9. Article 311 cannot have any application for, it cannot be gainsaid that the reversions of such of the petitioners as have been reverted had not been by way of penalty. If the Government decides on choosing the best persons for a particular post or service and consequently persons who have been provisionally promoted under Rule 31 of the Kerala State and Subordinate Services Rules, 1958 are reverted, Article 311 cannot be attracted.

10. It cannot also be said that there has been violation of the principles of equality guaranteed by Article 16 of the Constitution. The guarantee contained in Article 16 does not take away from the State their right to pick and choose. This has been ruled more than once by the Supreme Court. Reference may be made to Banarsi Das and Others Vs. The State of Uttar Pradesh and Others, . All that has been done in these cases is to choose, according to Government, the most suitable persons for appointment in higher cadres and with the assistance of the Departmental Promotion Committee, The contention raised under the second ground mentioned above must therefore also fail,

11. To understand the third contention it is necessary to refer to Clause (ii) of Sub-rule (b) of Rule 28 of the Kerala State and Subordinate Services Rules 1958 extracted below Rule 28(b);

"28. (b)(1) Promotion to Selection Category or Grade. Promotion in a service or class to a selection category or to a selection grade shall be made on grounds of merit and ability, seniority being considered only where merit and ability are approximately equal.

(ii) Promotion according to seniority. All other promotions shall, subject to the provisions of these rules, be made in accordance with seniority, unless the promotion of a member has been withheld as a penalty."

12. The argument is that by virtue of Rule 28(b)(ii) Promotions must be made in accordance with seniority, unless the promotion of the member has been withheld as penalty, and all the petitioners having been senior to those who have been promoted, Rule 28(b)(ii) has been violated. It is in this connection that it is

argued that the denial of promotion must also be treated as a penalty. On behalf of the State and on behalf of the contesting respondents, it has been urged that the posts of Assistant Secretaries and Deputy Secretaries had been declared as selection posts and if the above posts have been validly declared to be selection posts, Rule 28 (b) (ii) can have no application. The question therefore is whether the posts of Assistant Secretaries and Deputy Secretaries can be regarded as selection posts. They had been regarded as selection posts, there can be no doubt, for by the two orders dated 19-10-1959 and 6-11-1959 Government have declared the posts as selection posts and have also appointed a Departmental Promotion Committee for the selection of persons for appointment to such posts. These orders of Government, it is said are against Rule 28 of the Kerala State and Subordinate Services Rules, 1958. According to counsel appearing for the petitioners, the service condition is that promotion is to be made by seniority Rule 28(b)(ii). This is a condition of service and incorporated by a rule framed under Article 309 of the Constitution. If alteration is to be made to such service conditions laid down in a rule framed under Article 309, it can only be by way of another rule also framed under the same Article or by way of legislation. I am unable to accept this contention. The rules contemplate a different mode of appointment to selection post. It is not as though Rule 28 (b)(ii) must govern every appointment to every post. It can apply only to such posts which are not selection posts. I also feel that it is not necessary that the declaration of certain posts as selection posts must be by way of rules framed under Article 309 of the Constitution. Government must necessarily have, in the nature of things, the right to determine which posts are selection posts, This is inherent, I think, in the right to administer. Such determination need not be by way of a rule framed under Article 309 of the Constitution. As I said, the rule framed has indicated that the method of recruitment to selection posts will be different from promotion by seniority.

13. Coming to the final contention, the argument that the petitioners have not been informed about the adverse remarks cannot stand. The files have been made available to me and I find that the petitioners have been informed about the adverse record and that they had made representations. The only question is whether the remarks can be said to be so vague and indefinite that no conclusion is possible on the basis of those remarks. Though some of these remarks could have been more specific, I am not prepared to say that they can serve no useful purpose whatever. They have afforded some material and these have been relied on by the Departmental Promotion Committee consisting of very senior officers in the matter of selection. It cannot be said that the selections were made by them in a capricious or arbitrary manner.

14. I see no grounds to interfere. I dismiss these writ applications. I however, make no order as to costs.