
(1969) 03 KL CK 0013
In the High Court Of Kerala
Case No : O.P. No. 549 of 1964

K. Prabhakaran Nair

APPELLANT

Vs

State of Kerala and Others

RESPONDENT

Date of Decision : 31-03-1969

Acts Referred:

Constitution of India, 1950 — Article 226

Citation : AIR 1970 Ker 27 : (1970) 1 LLJ 522

Hon'ble Judges : V. Balakrishna Eradi, J; T.S. Krishnamoorthy Iyer, J; K.K. Mathew, J

Bench : Full Bench

Advocate : T.N. Subramania Iyer and K.S. Paripoornan, for the Appellant; V. Sankara Menon, K.K.K. Kurup and Govt. Pleader, for the Respondent

Judgement

Krishnamoorthy Iyer, J.—The petitioner in the original petition apart from seeking to quash Ext. P3 passed by the second respondent rejecting the petitioner's representation Ext. P2 which questioned the promotion of the persons referred to therein as Sheristadar, District Court in the Travancore-Cochin area, has also prayed for being promoted as Sheristadar. District Court in the Travancore-Cochin area earlier than respondents 3 to 8 in view of his alleged preferential claim based upon law qualification. The petitioner entered service in the Judicial Department of the erstwhile Travancore State on 25-12-1118. He passed the Travancore Account Test in 1119 M. E., graduated in 1959 and took the B. L. Degree in April 1962. By seniority he was appointed Sheristadar of the Sub-Court in the Travancore-Cochin area in March 1963. The petitioner's case is that according to the rule in force in the Travancore State and subsequently in the Travancore-Cochin State and also followed in the State of Kerala with reference to the Travancore-Cochin personnel the minimum qualification prescribed for the post of the Sheristadar District Court in the Travancore Cochin area is Account Test and B. L. degree. According to him, even after the formation of the Kerala State only persons who have passed the account test and taken the B. L. Degree were promoted as Sheristadar of District Court in the Travancore-Cochin area

and that this was the practice till 20-12-1962.

2. When there was no law graduation the second respondent promoted temporarily four persons who did not possess law qualifications but who were seniors to the petitioner and their appointments were regularised on 20-12-1962. The petitioner therefore filed Ext. P2 on 31-5-1963 to review the order of 20-12-1962 and promote him as Sheristadar in the District Court in the Travancore-Cochin area. Ext. P2 was rejected by Ext. P3 on the sole ground that "the rule which prescribed the law qualification as the minimum qualification for appointment to the post of Sheristadar, District Court, in the Travancore-Cochin area, is no longer in force and hence the petitioner cannot challenge the appointment made by the High Court. No counter-affidavit has been filed on behalf of the first respondent. But on behalf of the second respondent the Registrar of the High Court has filed a counter.

3. No doubt the petitioner has founded his petition under Article 226 of the Constitution on the ground that the provision fixing the qualification for the post of the Sheristadar, District Court, in the erstwhile Travancore State is in the Travancore Civil Court's Guide which came into force on 1-1-1120 (16-8-1944). The relevant rules are Rules 314 and 320 (iv) in Chapter I, Part II of the Guide. Even in the counter-affidavit filed by the second respondent the ground justifying the rejection of Ext. P2 is based on Rule 3 of the Travancore-Cochin Civil Rules of Practice, 1956. It is admitted that during the period from 1955 to 20-12-1962 the High Court has been promoting only law graduates as District Court Sheristadars in the Travancore-Cochin area. The reason given by the second respondent is that Rule 3 of the Travancore-Cochin Civil Rules of Practice, 1956 was overlooked.

4. In the course of the discussion at the Bar a doubt arose whether the prescription of the qualification for the post of the Sheristadar, District Court, in the Travancore State was by the Travancore High Court or by the Travancore Government and only embodied in the Civil Courts' Guide, 1120, for reference. The particular notifications prescribing the qualifications for Sheristadar's post have not been produced. Rule 40 in Part II of the Travancore Service Regulations corrected up to 1959 reads:

"No person who is not a subject of His Highness the Maharaja and who has not the requisite academic qualification, as per the Public Service Notification (vide Appendix No. 1A) may be appointed to the Public Service in the State without the special sanction of Government, nor may any person be appointed to the Public Service without a certificate in the following form (with suitable modifications when necessary) from a Medical Officer in the Government Service, who must be a Licentiate or a Graduate in Medicine, or from the Director of Ayurveda."

Appendix No. 1A of the Travancore Service Regulations prescribes the qualifications for the posts in the several departments in the State including the Judicial Department. It includes the qualifications for the post of the Sheristadar.

District Court, or Head Clerk, Munsiffs Court. The Government Orders forming the basis for the entry are given in the third column in Appendix No. 1A against the entry Sheristadar, District Court, or Head Clerk, Munsiffs Court, shown in the second column. They are G. O. No. J. 10024, dated the 9th December 1913 and G. O. R. Dis. No. 2872/37/Judl. dated 11-10-1937. The learned counsel for the petitioner therefore submitted that the prescription of the qualification for the post of the Sheristadar, District Court, is not by the High Court in its rule making power under the CPC of Travancore, but by the Government and what is embodied in the Travancore Civil Courts" Guide is only based on the Government Orders. In this connection the learned counsel for the petitioner referred to an order of the Government of Kerala dated 24-7-1958 issued "by order of the Governor". This Order came to be passed in the following circumstances. Three persons who were working in the Judicial Department of the erstwhile Cochin State and who had no law qualification and acted as Sheristadars in the Cochin State were promoted as Sheristadars in the District Courts in the Travancore-Cochin State on the basis of the exemption from law qualification granted to them by the Government. Persons on the Travancore wing having no law qualification made representations to the Government for exempting them also on the analogy of the three persons of the Cochin branch. That representation was refused by the Government Order cited above stating thus:

"The Registrar, High Court, has reported that the persons who are granted exemption are Sarvashree M. Kochunny Menon, A. R. Narayana Iyer and K. L. Chummar. As per the rule in force in the erstwhile Cochin State, Law qualification was not required for promotion as Sheristatiar of District Courts. The petitioners belonged to the erstwhile Travancore State Service and according to the rules in force, in Travancore, law Graduates alone were appointed as District Court Sheristadars. To adopt a uniform rule the High Court decided that only law graduates should be posted as Sheristadars of the District Courts. But in doing So, claim of the above 3 persons (Sri Kochunny Menon and two others) came in for special consideration and the High Court granted them exemption from Law qualification to hold the post of District Court Sheristadar by reason of the fact that they had also acted as Sheristadars.

Government have examined the claims of the petitioners with reference to the relevant rules in the matter and are convinced that the cases of exemption given to Sri. Kochunny Menon, Narayana Iyer and Chummar who belonged to the Cochin area and who had already acted as Sheristadars even before the adoption of the unified rules cannot be treated as analogous to the case of the petitioners." The above Government Order is also stressed by the learned counsel for the petitioner as an item of evidence to prove the existence of a rule in force on the relevant date. The questions whether the prescription of qualification for the post of the Sheristadar, District Court in the erstwhile Travancore State was by the Government or by the Travancore High Court and if it was framed by the latter only in exercise of the rule-making power under the Travancore CPC the adoption of the same by the Travancore State in the

Travancore Service Regulations and the acceptance of the same as amounting to a rule in force even after the formation of the Travancore-Cochin State and the Kerala State are matters which are relevant to a proper consideration of Ext. P2. Even if Rule 3 of the Travancore Cochin Civil Rules of Practice, 1956 repeals the rule in the Travancore Civil Courts Guide prescribing the minimum qualification for the post of the Sheristadar, the said rule cannot in any way affect the Travancore Service Regulations which have been recognised in Rule 2 (1) of the Kerala State and Subordinate Services Rules, 1958.

It does not appear from the materials-placed before us that the 2nd defendant had this aspect in view when passing Ext P3 order. Though in the counter-affidavit filed by the second respondent it is asserted that the G. O. of 24-7-1958 already referred to proceeded on a wrong impression, there is no counter-affidavit filed by the State to that effect. It is not possible to discern either from Ext. P3 or from the counter-affidavit filed by the second respondent that any ground other than the one stated in Ext. P3 was responsible for the rejection of Ext. P2. We are therefore satisfied that there was no proper consideration of Ext. P2 by the second respondent in the light of the very relevant materials to be taken into account. Subsequent to Ext. P2, the 2nd respondent appointed respondents 3 to 8 having no law qualification as Sheristadars, District Court in the Travancore-Cochin area overlooking the alleged claim of the petitioner. Ext. P-2 has therefore to be considered afresh in the light of the claims of respondents 3 to 8 also.

5. The learned counsel for the respondent pleaded that this writ petition is not maintainable as the prayer is for issuing a writ to the High Court itself. It is well settled that the High Court acting in its judicial capacity cannot be said to be an authority subject to the jurisdiction of the High Court itself under Article 226 of the Constitution for the issue of a writ of certiorari. In *Goonesinha v. De Kretser* AIR 1945 PC 83 Lord Goddard observed:

"It is well settled, and counsel did not seek to argue to the contrary, that a Court having jurisdiction to issue a writ of certiorari will not and cannot issue it to bring up an order made by a Judge of that Court. Now will a Superior Court issue the writ directed to another Superior Court(1883) 11 Q. B. D. 479--and if the Election Judge is to be regarded as a special or independent tribunal his Court would, in their Lordships' opinion, be a Superior Court. Considering that the Court is held before a Judge of the Supreme Court from whose decision there is no appeal, it could not be otherwise. But their Lordships are of opinion that the true view is that cognisance of these petitions is an extension of, or addition to, the ordinary jurisdiction of the Supreme Court and consequently certiorari cannot be granted to bring up any order made in the exercise of that jurisdiction,"

6. The above principle has application only to orders passed by courts in exercise of judicial functions. The order in question was passed by the High Court in exercise of its administrative authority in view of the control over the subordinate courts vested in it. In these circumstances we are not prepared to hold that the

petition is not maintainable. We see nothing in the wording of Article 226 of the Constitution which warrants the imposition of a limitation that the jurisdiction of the High Court under the said Article cannot be invoked for the purpose of calling in question orders passed by the Chief Justice or by the High Court itself on the administrative side. The decision in *In re. In Re: Babul Chandra Mitra, and Saina Bhai v. State* 1955 Ker LT 813 : AIR 1957 Trav 176 were relied on by the learned Government Pleader to support his contention that there is no such power in the High Court. But then the Supreme Court pointed out in *Pradyat Kumar Bose Vs. The Hon'ble The Chief Justice of Calcutta High Court*, at p. 294, thus:

"This would be enough, to dispose of the case against the appellant. The learned Judges of the High Court have also dealt at some length with the question as to the maintainability of an application for a writ in a case of this kind and of the availability, of any remedy by way of a writ against the action of the Chief Justice, whether administrative or judicial.

Arguments in this behalf have also been strongly urged before us by the learned Advocate-General of West Bengal. In the view, however, that we have taken as to the contentions raised before us regarding the validity of the order of dismissal, we do not feel called upon to enter into the discussion relating to the availability of the writ. We express no opinion on the question so raised.

We consider it, however, desirable to say that our view that the exercise of power of dismissal of a civil servant is the exercise of administrative power may not necessarily preclude the availability of remedy under Article 226 of the Constitution in an appropriate case. That is a question on which we express no opinion one way or the other in this case."

7. Even though the Supreme Court has not expressed any final opinion on the matter, the above passage seems to suggest that an order passed by a Chief Justice on the administrative side can in an appropriate case be the subject matter of a proceeding under Article 226 of the Constitution in the same High Court. The decision of the Supreme Court was in an appeal filed against the decision of the Calcutta High Court where a Special Bench of that Court took the view that no petition under Article 226 of the Constitution would lie in a High Court to quash the order of the Chief Justice of that Court passed on the administrative side. It is at any rate clear from the decision in *Pradyat Kumar Bose Vs. The Hon'ble The Chief Justice of Calcutta High Court*, that their Lordships of the Supreme Court were not prepared to accept the extreme view of the Calcutta High Court. The subsequent decision of the Supreme Court in *Jyoti Prokash Mitter Vs. Hon'ble Mr. Justice Himansu Kumar Bose, Chief Justice, High Court, Calcutta and Another*, , also, by implication, tends to support this view. |

The result of adopting a contrary view would lead to the anomalous position that while all other civil servants who may feel aggrieved by orders passed against them by other heads of Departments of Government, can in appropriate cases

challenge such orders before the High Court under Article 226, the benefit of such opportunity is denied to the personnel belonging to the staff of the High Court and the subordinate courts, and they will be left without the benefit of the efficacious and comparatively cheap remedy provided for by Article 226 even if the ground of challenge against the, order be a violation of Article 311 of the Constitution or of the statutory rules framed under Article 309. We do not think that the framers of the Constitution while enacting Article 226 intended to restrict its scope so as to lead to such hardship and anomaly. We therefore overrule the preliminary objection and hold that the petition is maintainable.

8. We accordingly quash Ext P3 and direct that the petitioner's representation evidenced by Ext. P2 should be considered and disposed of afresh in the light of the observations contained in this judgment. We make it clear that we are not expressing any opinion on the question whether the provisions of the Travancore Service Regulation are only in the nature of executive directions. In the circumstances of the case we make no order as to costs.