
(2013) 04 KL CK 0027
In the High Court Of Kerala
Case No : W.A. No. 2055 of 2012

Kerala Public Service Commission

APPELLANT

Vs

R. Anilkumar and Kerala State Road Transport Corporation

RESPONDENT

Date of Decision : 02-04-2013

Acts Referred:

Constitution of India, 1950 — Article 226

Citation : (2013) 4 KLJ 729 : (2013) LabIC 2434 : (2013) 3 LLJ 604

Hon'ble Judges : Manjula Chellur, C.J;K. Vinod Chandran, J

Bench : Division Bench

Advocate : P.C. Sasidharan, for the Appellant; K. Siju, for R1 and Sri. Babu Joseph Kuruvathazha for R2, for the Respondent

Final Decision : Allowed

Judgement

K. Vinod Chandran, J.—The appeals are against the common judgment in six writ petitions, wherein the petitioners were all empanelled drivers claiming relaxation of age in the recruitment of Reserve Drivers called for by Exhibit P1 notification. Exhibit P1 notification was issued by the Kerala Public Service Commission (hereinafter referred to as "Commission") and the direct recruitment of Reserve Drivers to be made in the Kerala State Road Transport Corporation (hereinafter referred to as "the Corporation") called for candidates within the age group of 21 to 40. The benefit of usual relaxation to SC/ST/OBC were applicable. A further concession to provisional hands working in the Corporation to the extent of their provisional service, subject to a maximum of five years, from the upper age limit to those provisional employees who were within the prescribed age limit on the date of first appointment, is the bone of contention in all these cases. There was some controversy with respect to the user of the terms "provisional" and "temporary". While the Commission maintained that the relaxation was only with respect to temporary appointments made under Rule 9(a)(i) of the Kerala State and Subordinate Services Rules, 1958 (for short "KS & SSR") the writ petitioners contended that the words used in Exhibit P1 notification is not "temporary", nor

does exhibit P1 specifically speak of Rule 9(a)(i) of KS & SSR and their empanelment as drivers in the various units of the Corporation would qualify as "provisional" service, entitled to be granted relaxation as per Exhibit P1 notification. The Commission also attempted to draw a distinction between an "appointment" and a "casual engagement". According to the Commission, a temporary appointment would mean a recruitment made from an Employment Exchange or through the Commission itself, without following the regular mode of recruitment, but nevertheless from a valid source to tide over exigencies caused by the delay of a regular recruitment process. The empanelment of the writ petitioners was not even to tide over such exigencies, but only to get over the absence of regular hands on a given day, to man all the services. The drivers empanelled at the various units are called upon to take on the duties on a daily basis in the event of absence of regular drivers or other drivers also. The linchpin of the contention raised by the Commission is that those who are eligible for relaxation are persons who are appointed from a valid source and who are continued albeit with artificial breaks for a long period and not intermittent engagements to which the petitioners in the writ petition were subjected to.

2. The learned Single Judge found that the word "provisional hands" used in the notification is indicative of persons appointed on temporary basis and empanelment of drivers on daily wage basis cannot be contended to be distinct from other temporary appointments. We are also of the opinion that nothing much turns on the words "provisional" and "temporary", since they have been loosely used by the Corporation as also the Government. The contention of the Commission is that the provisional employees referred to in Exhibit P1 notification is with reference to Rule 9(a)(i) of the KS & SSR. KS & SSR is admittedly a statutory rule applicable to the State and Subordinate services; which service does not include the services under the Corporation. The Corporation might have adopted the KS & SSR, 1958, but such adoption does not make the rule statutory and they are only in the nature of administrative rules having no statutory force [vide Jacob M. Puthuparambil and others Vs. Kerala Water Authority and others,]. Before we delve into the legal aspects raised in the above case, we have to notice the facts in each of the appeals.

3. The Commission is the appellant in all these appeals and the petitioners before the learned Single Judge are the respondents along with the State and the Corporation. The petitioners are referred to herein as respondent(s). In W.A. No. 2120 of 2012, the respondent claims to have been engaged for the last eight years at Kozhikode Depot as an empanelled driver on daily wages as per the certificate Exhibit P3 issued by the District Transport Officer, Kozhikode. In W.A. No. 2121 of 2012, the certificate is issued by Assistant Transport Officer, Poovar, to similar effect with effect from 6.1.2005, that too on daily wages. W.A. No. 2071 of 2012 evidences, by Exhibit P2 series of certificates, the empanelment of respondents 1 to 4 in various units as certified by the Assistant Transport Officer or District Transport Officer. The 5th respondent does not produce any such certificate. W.A. No. 2073 of 2012 and 2055 of 2012 also indicates similar

empanelment for various periods. The source from which the empanelment was made in none of these cases are discernible. Nonetheless it is undisputed that the appointment was not from the Employment Exchange or any other valid source as indicated above. There were no appointment orders nor were the specific dates on which the said persons were engaged, evident from the records produced.

4. W.A. No. 2072 of 2012 stands on a different footing, according to counsel, since according to him Annexure R1(a) indicates his appointment from Employment Exchange. We deal with this appeal separately, since we find some conflicting certificates produced herein and due to the nature of appointment disclosed from such conflicting certificates. Along with the writ petition, the respondent produced Exhibit P10 certificate, wherein the respondent's engagement was said to be commencing from 14.10.1996 and he having performed 4 years and 11 months duty; is, stated to be continuing. Subsequent to the counter affidavit filed by the Commission, Exhibit P13 certificate was produced, wherein it was stated that between 14.10.1996 and 26.09.2003 the respondent had worked for 6 years 10 months and 16 days. A further certificate has been produced by Annexure R1(a) dated 22.2.2013 wherein though the period as stated in Exhibit P13 is repeated, the words "employment driver", has been extended to "driver employed through employment exchange...". We notice that Exhibit P13 and Annexure R1(a) are not certificates based on which the respondent had applied for, against Exhibit P1 notification.

5. We are surprised and dismayed with the conduct of the officers of the Corporation in issuing certificates for the asking and that too to suit the needs of the person to whom the certificate is issued. There is of course no requirement for issuance of such certificates other than production of the same before this Court. We refuse to look into the same since they are not relevant for consideration of the claim of the petitioner to be considered under Exhibit P-1 notification. They are issued subsequently and were never before the Commission. It is time the Corporation made some introspection on the conduct of its officers who issue certificates like Exhibit P13 and Annexure R1(a). The very fact that Exhibit P10, certificate, originally, produced before the Commission, shows that in a period of 15 years, between 1996 and 2011, the respondent is said to have worked for 4 years and 11 months itself would demonstrate that the same was not continuous employment. The later certificates produced also show his employment only till 2003. Hence, the statement that he is continuing evidently cannot be believed.

6. Statutory or otherwise, we have to understand that KS & SSR has been adopted to the service of the Corporation and Rule 9 of Part II enables in public interest, on an emergency, to fill immediately a vacancy in a post borne on the cadre of a service, to which there would be undue delay in making an appointment. The appointing authority then may appoint a person otherwise than in accordance with the rules, temporarily. Hence, an appointment to come under

Rule 9, should be to the vacancy in a sanctioned post, and the same should be done by the appointing authority; of course, in an exigency. Going by the facts disclosed in the above appeals, the empanelled drivers were engaged in the absence of regular hands, who were continuing in sanctioned posts. Such appointment cannot be said to be to a vacancy in a sanctioned post, since admittedly there is no vacancy and the engagement was only for reason of the absence of a regular hand or anyone else; to merely ensure the non-cancellation of services in regular routes. In the context of the special nature of the services carried on by the Corporation, such engagement cannot be faulted. But, that does not make such engagement a provisional or temporary appointment, that too to a vacancy in a sanctioned post. It is to be further noticed that the appointing authority in the Corporation is the Managing Director and admittedly all the respondents were empanelled in the units by the ATO/DTO for purpose of intermittent engagement as specified above.

7. The certificates issued to the respondents and produced along with the writ petitions are also not similar. To further understand the scope and nature of the engagement, we look at Exhibit P1 certificate issued in W.A. No. 2073 of 2012, which is extracted hereunder:

KERALA STATE ROAD TRANSPORT CORPORATION

No.EL/878/11/PLR.

office of the Assistant Transport Officer, Punalur, Dtd: 03/03/2011.

CERTIFICATE

This is to certify that Sri. S. Vijaya Kumar, Vidya Bhavan, Villumala PO, Kulathupuzha, Kollam is included in the panel of empanel driver for covering the exigency arising due to the abrupt shortage of permanent employees of corporation. He is engaged for operating service in such exigency only. Such engagement in KSRT Corporation is purely on provisional basis and eligible only for remuneration per duty. His engagement commenced from 11/08/1997 and is continuing at Kulathupuzha Operating Centre.

This certificate is issued to be produced before the P.S.C. Office, Kollam.

Sd/- Assistant Transport Officer.

This puts the matter in a clear perspective, as we have noticed above. Though the engagement is defined as provisional, nothing turns on the usage of that term. The eligibility is only for remuneration for duty, and not for a period.

8. Looking at the various certificates produced by the respondents in the above batch of cases, we have to notice that it does not indicate any such continuous service and discloses a conscious attempt on the part of the authority issuing the certificates, to somehow aid the respondents in getting such relaxation, but, however, without jeopardizing the issuing officer's position in so far as it indicates as to the "daily wage engagements".

9. We directed the Corporation to file an affidavit explaining the circumstances and they did so by an affidavit dated 23.02.2013, wherein it has been stated that from 2006-07, it has been directed that daily wage employees should be engaged only through Employment Exchanges (though the affidavit shows the year as 2001-02, the learned Standing Counsel submits that it is 2006-07). Annexure R2(a) dated 19/05/2012 has been produced (in W.A. No. 2121 of 2012), which we are compelled to notice, does not apply to the respondents herein. Hence, we directed a further affidavit to be filed, by order dated 25.02.2013, directing the Corporation to furnish the appointment orders or any similar orders issued to the so-called empanelled drivers like the writ petitioners. We also directed the Corporation to put on record the duration of the engagement, nature of salary; whether daily wage, consolidated or monthly payments were made, and the service conditions of the empanelled drivers in the Corporation. A further affidavit has been placed on record dated 12.3.2013. Annexures R2(b) to (e) have been produced to show the appointments made from the candidates sponsored by the Employment Exchange. Annexures R2(f) and R2(g) are produced to indicate how empanelment is done. Both the said circulars are of the year 2005, which indicate that the empanel merit is made unit-wise. Annexure R2(f) is relevant in so far as it directs the attendance details of empanelled employees to be recorded in a separate attendance register on the next day itself. This indicates that the engagement of empanelled employees is need based and their attendance is marked after the duty to which they are engaged is over. The continuous service of empanelled drivers cannot, hence, be found from the records available in the Corporation also. The respondents were also not appointed initially from a valid source, as is the case disclosed in Annexures R2(b) to R2(e).

10. In that background of the exact nature and scope of the engagement of the respondents, we have to decipher as to which category or employees were granted relaxation of age in Exhibit P1 notification. In considering the same, we have to look at the context of the Commission having introduced such relaxations as explained by the learned Standing Counsel. When employees in the State of Kerala as also public sector corporations serving for past few years were sought to be terminated, they claimed to be "workmen" coming within the meaning of Industrial Disputes Act, 1947. The controversy having reached the Supreme Court by the decision reported in *Narayani v. State of Kerala* [1984 KLT 17], the Hon'ble Judges, to put a quietus to the controversy, directed that such employees be permitted to appear for the next examination conducted by the State Public Service Commission with relaxation of the age limits, provided that they have been in continuous employment. This principle is also seen incorporated in the general conditions applicable to the Commission as under:

2. Special Concessions in Upper age limits.

Note:- The following concessions in upper age limits are available subject to the conditions that the maximum age limit shall in no case exceed 50 (fifty) years.

(v) Relaxation of age will be allowed to all provisional employees of the Kerala Government (whether they continue in service or relieved from service) who have been appointed under Rule 9(a)(i) of Part II of the Kerala State and Subordinate Service Rules, 1958 to the extent of their provisional service provided they possess a minimum service of one year in the provisional appointment. "This concession will be extended to the provisional employees appointed to Work Establishment posts and Part-time posts. Once they get appointment on regular basis, the concession will not be available to further appointment to any other post". This concession will also be extended to the members of the staff appointed provisionally in the Census Department, Kerala, 191, 1981 and 1991 and subsequently thrown out on account of retrenchment. They will have to produce a certificate from the Director of Census Operations, Kerala showing the length of provisional service and the fact that they are retrenched persons, as and when required by the Commission. The maximum period of relaxation allowed to such retrenched persons of the Census Department will be five years.

The above decision of the Supreme Court was quoted with approval in Jacob M. Puthuparambil (*supra*). What comes to fore from the discussion above is that what was intended to be given as relaxation is the continuous service of a person with or without artificial break. The mere terminology used, in qualifying an employment as "temporary" or "provisional"; pales into insignificance.

11. The learned counsel for the 1st respondent in W.A. No. 2121 of 2012 also placed before us a Government Order and a Circular Memorandum to better understand the use of the terms "provisional" and "temporary". G.O.(MS). No. 389 dated 4.10.1966 relates to age relaxation to provisional employees and states that such relaxation is ordered, in consultation with the Commission, without any discrimination as between persons whose provisional appointments were terminated for want of vacancies and persons whose provisional appointments were not so terminated, for the purpose of admission to the competitive tests to be conducted by the Commission. This Government Order, of the year 1966, also contemplates a situation where the provisional services were terminated or not terminated. With respect to empanelled drivers, there is no question of termination, since there is no appointment as such given to the empanelled drivers. Circular Memorandum No.41859/SD5/74/PD dated 25.05.1974 cautions the appointing authorities in using the term "provisional" and "temporary" in an interchangeable manner. It is stated that the term "provisional" is to be used when the appointments and promotions are liable to be reviewed later. The use of the term "temporary" was stated to be proper when appointments and promotions are made under Rule 9 and 31 respectively of the General Rules. The above Circular also would only demonstrate that the empanelment of drivers in units of the Corporation and engagement for intermittent duties does not qualify as a "provisional employment" or "temporary

employment".

12. One other contention raised by the respondents was with respect to the order of the Government produced as Exhibit P10 dated 3.7.2012 in W.A. No. 2121 of 2012. The respondents would contend that this is in accordance with Kerala Public Service Commission (Additional Functions as respects the KSRTC) Act, 1970 and the Rules framed thereunder. The contention is that the Government being the ultimate authority under the said Act and the Rules, the Commission could not have made any deviation with respect to the mandate in Exhibit P10; to consider empanelled drivers in the Corporation for appointment as reserve drivers after giving relaxation in upper age limit.

13. We notice that there is a full-fledged procedure prescribed under the Rules of 1969. Rule 3 prescribes that the General Manager of the Corporation shall address all references to the Secretary to the Commission, in the form of an official letter, with which, shall be forwarded all papers or copies of papers relevant to the matter referred. The conclusion of the Commission is to be communicated to the General Manager of the Corporation and if again it is proposed by the Corporation not to accept the advice of the Commission for any reasons not before the Commission at the time of making such advice, it is stipulated by sub-clause (iv) that the Commission shall be consulted again.

14. By Rule 4, if again the advice tendered by the Commission is rejected or deviated from, the Corporation shall communicate the reasons for such rejection or deviation, to the Commission. Rule 5 also stipulates that such decision to reject or deviate from the advice of the Commission shall be placed in a meeting of the Corporation and orders taken. It is also mandated that the Corporation shall then refer the matter to the Government and the decision of the Government thereon shall be final. The proviso to Rule 5 further mandates that before a decision is taken by the Government; the matter shall be referred to the Commission. We see that a perfect procedure with respect to deviation from the decision of the Commission is contemplated by the Rules. It provides the checks and balances, by which the opinion of the Corporation and the Commission is placed before the Government before an order is taken. We are convinced that such procedure has not been followed and Exhibit P10 is not an order passed under Rule 5; which is stated to be final.

15. What is relevant is the Note to Rule 3, which is as under:-

Note:- Special care should be taken to ensure that until the Commission's advice has been obtained and a decision has been reached by the Corporation in the light of it, no language is used in any communication issued in connection with the case which is capable of being interpreted as implying that the Corporation has formed a settled opinion on the merits of any part of the case.

The Note to sub-clause (iv) also stipulates that there shall be no settled opinion on the merits of the case communicated by the Corporation to the Commission. Exhibit P8 is not a communication as stipulated in Rule 3 for more than one

reason. Exhibit P8 is not accompanied by any documents with respect to the controversy. For that matter it is not even a reference of an issue in controversy. Exhibit P8 clearly communicates the settled opinion on merits of the case; if not on merits, at least on indulgence with respect to the case of the respondents. For the Government to form an opinion under Rule 5, it is for the Corporation to place the issue in a meeting of the Corporation and then refer the matter to the Government. The action of the Corporation by Exhibit P8 and even that of the Commission by Exhibit P9 is not in accordance with the Act or the Rules. Exhibit P10, laconic order, is without any consultation with the Commission and is not one under the Act or Rules and cannot be said to be binding on the Commission as per the Act and Rules.

On the basis of the discussion above, we are of the definite opinion that the age relaxation to the provisional employees in the Corporation refers to appointments made from the valid source, on an exigency, as stipulated in Rule 9 of KS & SSR or similar situations and postulates a continuing service with or without artificial breaks. None of the certificates produced by the respondents inspire in us the confidence to hold that the respondents were thus appointed and continued. The facts reveal only intermittent appointments and the certificates too merely show that, there is a veiled attempt to somehow give relaxation to the respondents herein. Indulgence as displayed in the certificates and benevolence of the Corporation, disclosed in Exhibit P9 cannot govern public employment. We are not for a moment oblivious to the hardship caused to the respondents herein for reason of their being overaged; but an age relaxation offered in an employment notification can only enure to those persons who are eligible for such relaxation. The Court cannot shut its eyes to the fact that any indulgence or benevolence shown in the matter of public employment would thwart the chances of another candidate who is eminently eligible for consideration. The Court cannot miss the woods for the tree and the individual right of every citizen has to be protected especially when those who would be affected are not parties to the litigation. The task of the Court, in deciding a case under the extraordinary remedy of Article 226, especially when the subject in issue is recruitment to public employment; is not resolving an ordinary lis inter-parties. The Court cannot shut its eyes to the prejudice caused to the unascertainable mass in the public who await due consideration and who expect to compete with persons coming within the four walls of the notification. In that view of the matter, we are unable to sustain the impugned judgment and reverse the same, dismissing the writ petitions.

Writ Appeals are, accordingly, allowed. No costs.