
(1996) 02 KL CK 0045

In the High Court Of Kerala

Case No : O.P. No's. 9757 of 1992

K.P.S.C. Reserve Conductors Rank Holders Assn. and Others

APPELLANT

Vs

State and Others

RESPONDENT

Date of Decision : 23-02-1996

Acts Referred:

Constitution of India, 1950 — Article 14, 16

Citation : (1996) 2 ILR (Ker) 730 : (1997) 1 LLJ 599

Hon'ble Judges : K. Sreedharan, J;J.B. Koshy, J

Bench : Division Bench

Advocate : M.R. Rajendran Nair, for the Appellant; James Koshy N. and M.K. Damodaran and P.K. Behanan, Govt. Pleader, for the Respondent

Judgement

1. Petitioners in the majority of the original petitions are candidates included in the ranked list prepared by the Public Service Commission for appointment to the post of Reserve Conductors under the Kerala State Road Transport Corporation. Petitioners in some of the cases are working as conductors on provisional basis on daily rated wages and they seek regularisation in the service under the Corporation. Since the issues raised in these original petitions are common, we consider it advantageous to dispose of all these petitions by this common judgment. Learned counsel appearing on either side agreed to this course of action as well.

2. Certain facts are admitted. They are - the Kerala State Road Transport Corporation is one constituted under the provisions of the Road Transport Corporations Act, 1950. As per Section 34 of that Act, Government have got the power to give general instructions to the Corporation, including directions relating to recruitment, conditions of service etc. of its employees. Such direction if given by the Government are binding on the Corporation. Kerala Legislature enacted the Kerala Public Service Commission (Additional Functions as Respects the Kerala State Road Transport Corporation) Act, 1970. That Act came into force with effect from February 9, 1970 when it was published in the Kerala Gazette

after the Governor's assent. Thereafter, all the posts under the Corporation except that of Chief Executive Officer or General Manager and the Chief Accounts Officer came within the purview of the Public Service Commission. In other words, vacancies in all categories of posts under the Corporation other than that of Chief Executive Officer or General Manager and the Chief Accounts Officer have to be filled up by candidates selected by the Public Service Commission. In 1989, Corporation requested the Public Service Commission to prepare a ranked list of candidates for appointment to the post of Reserve conductors, number of vacancies being not ascertained. Pursuant to this request, Public Service Commission issued notification dated May 19, 1989, published in Gazette dated June 6, 1989. 2,64,844 candidates applied for the post. After a due process of selection, Public Service Commission published a ranked list, which came into force on May 18, 1992. The main list consisted of 3299 candidates and the supplementary list contained names of 1634 candidates. Ordinarily the life of a list published by the Public Service Commission is three years from the date of notification. If none from the list is advised from the list during the said period of three years, the list will continue to have validity for one more year. Since no one from the ranked list published by the Public Service Commission was advised or appointed by the Corporation during the ordinary term of three years, the list still continues to be in force for a further period of one year or till one candidate is advised from the list, whichever is earlier. It is the admitted case of parties that till date no candidate has been advised by the Public Service Commission from the list on the requisition made by the Corporation.

3. In the instant case, no such direction as contemplated by Section 34 of the Road Transport Corporations Act, 1950 has been issued by the Government to the Corporation except those contained in letter No. 2976/AI/85/Tr-D dated June 24, 1995, G.O. (MS)157/86/PW & T dated December 6, 1986 and letter No. 53640/L2/91/ PW & T dated January 3, 1992. Reference was also made to letter No. 11059/L3/92/PW & T dated March 11, 1992. The first letter, stated to be a direction u/s 34 of the Road Transport Corporations Act, provides that no further recruitment of provisional or regular hands will be made except to the extent necessary to fill up Scheduled Caste/Scheduled Tribe vacancies and that the bus staff ratio should be progressively reduced to 9 and finally to 7.5 before the end of the 7th plan period. The other provisions mentioned therein are not relevant for the case on hand. In the second letter dated December 6, 1986, it was provided that recruitment will continue to be frozen until the situation is reviewed after two years and that no more Public Service Commission hands will be entertained except to the extent covered by the said orders, Letter dated January 3, 1992 relates to the workers in the mechanical division and it has nothing to do with the appointment of conductors. The last letter referred to, namely the one dated March 11, 1992, stated that no post vacant in the Corporation is to be filled up including drivers and conductors except ten women Conductors, who have to be recruited as per the Legislative Assembly assurance.

4. On the basis of the above-mentioned four letters, sent by the Government

purporting to be u/s 34 of the Road Transport Corporations Act, it was argued by the learned counsel representing the Corporation that corporation is not in a position to appoint any candidate selected by the Public Service Commission to the post of Reserve Conductor. The issue that arises for consideration in the original petitions filed at the instance of the candidates included in the ranked list is whether the said stand taken by the Corporation is sustainable or not.

5. Learned counsel representing the petitioners expressed an apprehension that in order to defeat the claims of the persons included in the list, the Corporation may report one vacancy before May 17, 1996 and get one candidate advised against that vacancy and thereby get the entire list expired. To avert that, especially taking into consideration the previous conduct of the Corporation, we specifically direct that the list, which was published on May 18, 1992, will continue to be in force for the whole period of four years, i.e. upto May 17, 1996, before which date we direct the Corporation to report all the existing vacancies in the cadre of conductors to the Public Service Commission. This direction, though would appear to be extraordinary, is issued only to see that the Corporation, which was trying to bypass the Public Service Commission, should not be allowed to resort to such a course of action. This we are doing it on the peculiar facts and circumstances of this case.

6. Learned counsel representing the Corporation stated that the Corporation was bent upon reducing the bus staff ratio from 1:11.5 to 1:7.5. Earlier, for each bus owned by the Corporation, there were 11.5 members in the staff. That ratio was causing loss to the Corporation. So, the Corporation wanted to reduce the ratio to 1:7.5. By reducing this ratio, we feel that the number of drivers and conductors required for the bus cannot be substantially reduced because without a driver and a conductor no schedule can be operated. For working the schedule, each bus must have a driver and conductor. So, the reduction in the staff ratio will not materially go to reduce the number of drivers and conductors. The reduction in the number of drivers and conductors will be minimal, compared to the other staff.

7. It is the stand taken by the Corporation that from 1989 no conductor has been appointed on regular basis through Public Service Commission. It is admitted that the Corporation have engaged "provisional" conductors and "empanelled" conductors. It has also come out that these provisional conductors and empanelled conductors had more than 240 days of work in a calendar year. If these provisional conductors and empanelled conductors could get 240 days of work in a calendar year, it must be taken that there exists regular vacancy. It is also the case of the Corporation that these empanelled conductors and provisional conductors continued under the Corporation for more than three years. The Supreme Court in *State of Haryana and others Vs. Piara Singh and others etc. etc.*, took the view that if a casual labourer is continued for a fairly long period say two or three years - a presumption may arise as to the existence of a regular need for his service. The said observation applies on all fours to the

facts on hand. When it is conceded that the provisional conductors and empanelled conductors were being engaged by the Corporation for more than 240 days during a calendar year and that too, for more number of calendar years, it can safely be concluded that there exists regular vacancy of conductors under the Corporation.

8. Against the regular vacancies of conductors that exist in the Corporation, no regular appointment has been made through Public Service Commission. The Corporation was resorting to ad hoc appointments by engaging empanelled conductors or by allowing the provisional conductors to continue in service. This practice resorted to by the Corporation in allowing the empanelled conductors and provisional conductors to continue in service is against the statutory provisions governing the service under the Corporation. This practice is being resorted to by the Corporation when it is seen that a proper list of selected candidates, selected by the Public Service Commission, is available. Can such a practice be allowed to be continued by the Corporation?

9. A learned Single Judge of this Court on October 14, 1992 issued the following direction:-

"The Corporation is directed to prepare the panel as per Ext.P6 (authorisation to empanel persons as conductors) by including sufficient number of hands from among those included in the rank list prepared by the Public Service Commission and to accord them priority in the matter of provisional appointment as conductors in the second respondent Corporation".

Purporting to be in compliance with the said direction, the Corporation issued notices to 500 persons included in the list. How they happened to restrict the number to 500 is not made clear. It is the Corporation's case that from among the 500 persons so notified, only 200 and odd turned up. They were empanelled. When it was found that the Corporation was not giving effect to the spirit of the order dated October 14, 1992, a learned Single Judge of this Court on June 24, 1993 directed the Corporation not to employ any person as Reserve Conductor unless such person has been selected by the Public Service Commission and his name finds a place in the ranked list submitted as early as on May 18, 1992. This direction has not been complied with by the Corporation. This direction is sought to be got over by virtue of the order passed by another learned Single Judge of this Court in C.M.P.25271/93 in C.M.P.21687/93 in O.P.9757/92. That order, dated October 12, 1993, allowed the Corporation to appoint any person in accordance with order Exhibit P6 (authorisation to empanel persons as conductors) as conductors on casual or badli basis. That was only to tide over a situation created when there was a general strike of the staff under the Corporation. That strike lasted for about fifteen days. Even after the strike was over, the Corporation, taking shelter under the order dated October 12, 1993, continued its practice of empanelling persons as conductors and appointing provisional hands. This method resorted to by the Corporation, to say the least, was an attempt to over-reach the orders passed by this Court on earlier

occasions. The Corporation, being a public authority, should not have resorted to such a course.

10. A question as to whether candidates who were included in a ranked list prepared by the Public Service Commission which expired, was to be operated on for filling up temporary vacancies came up for consideration in State of Haryana and others Vs. Mahabir Prasad Sharma and others, . Their Lordships took the view that if the appointing authority chooses to make appointments on ad hoc basis, then certainly the candidates in the waiting list, though it lapsed, must be considered for appointment de hors the Rules. Their Lordships also said that the said appointment may not confer any right to the appointees for future recruitment. If that be the law that is to apply, we find no justification on the part of the Corporation in engaging the provisional hands and empanelled hands to work as conductors when a proper ranked list published by the Public Service Commission is in force.

11. Public Service Commission was directed to prepare a ranked list for appointment to the post of Reserve Conductors. Notification was issued and a due process of selection was held by the Commission. Thereupon, a list was published on May 18, 1992. When that list was in force, the Corporation took it to its head not to appoint anyone from the ranked list, but to resort to the back door method of engaging provisional hands and empanelled hands. Resort to such a course has been condemned by the Supreme Court in many a number of cases. Reference may be made to J and K. Public Service Commission, etc. Vs. Dr. Narinder Mohan and others etc. etc., Their Lordships took the view that even though the executive power is co-extensive with the legislative power of the State, the State can create civil posts and fill them up in consonance with the provisions contained in Articles 14 and 16 of the Constitution only. According to Their Lordships, it is settled law that once statutory Rules have been made, appointments shall be only in accordance with the rules. After having made the rules by enacting the Kerala Public Service Commission (Additional Functions as Respects the Kerala State Road Transport Corporation) Act, 1970, the Corporation should not have resorted to the ad hoc appointments. To tide over unforeseen exigencies, they could have resorted to such provisional appointments. But, that power cannot be used to defeat the statutory provision and to make the ad hoc appointments the rule. In the decision referred to, their Lordships went on to state that ad hoc employees should be replaced as expeditiously as possible by direct recruits. The ad hoc appointees cannot be clothed with the right to get regularisation in the post. Their Lordships observed:

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"Back door ad hoc appointments at the behest of power source or otherwise and recruitment according to rules are mutually antagonistic and strange bed partners. They cannot co-exist in the same sheath. The former is in negation of fair play. The latter are the products of order and regularity".

From the practice adopted by the Corporation, we are of the view that the above

observation made by the Supreme Court is apposite and the Corporation should not have resorted to such a course of action.

12. Establishment of independent body, like Public Service Commission, for selection to the posts under the Corporation was to avoid arbitrariness and nepotism in the matter of appointment. Corporation should not have resorted to appoint any person as conductor whose name does not appear in the list prepared by the Public Service Commission. In the decision referred to earlier J and K. Public Service Commission, etc. Vs. Dr. Narinder Mohan and others etc. etc., Their Lordships observed at page 786:-

"When the Rules prescribe direct recruitment, every eligible candidate is entitled to be considered and recruitment by open advertisement which is one of the well accepted modes of recruitment. Inviting applications for recruitment to fill in notified vacancies is consistent with the right to apply for by qualified and eligible persons and consideration of their claim to an office or post under the State is a guaranteed right given under Articles 4, 14 and 16 of the Constitution".

Their Lordships further observed that all efforts should be made to replace the ad hoc or temporary employees by regularly selected employees as early as possible. Appointment of regularly selected candidates, it was observed, cannot be withheld or kept in abeyance for the sake of ad hoc or temporary employee. An ad hoc or temporary employee should not be re-placed by another temporary or ad hoc employee. He must be replaced only by a regularly selected employee. The ad hoc appointment should not be a device to circumvent the rule of reservation. Kerala State Road Transport Corporation has no case that while making appointments of temporary conductors or empanelled conductors any principle of reservation was followed by them. Their appointments, on the materials now placed before Court, were resorted to in flagrant violation of the principles contained in Articles 14 and 16 of the Constitution. No rhyme or reason is discernible to support the action resorted to by the Corporation.

13. In view of what has been stated above, we are clear in our mind that the practice adopted by the Corporation in engaging provisional conductors and empanelled conductors in the service was arbitrary and in violation of all canons of service rules. The Corporation is, therefore, directed to report the existing vacancies of conductors to the Public Service Commission within two weeks from today. On getting the vacancies so reported, Public Service Commission must advise candidates from the list that was published on May 18, 1992, in accordance with Rules 14 to 17 of Kerala State and Subordinate Services Rules to the Corporation within one month from the date of receipt of the letter from the Corporation. As and when the candidates report for duty on the advice of the Public Service Commission, the ad hoc appointees, namely the provisional employees and empanelled employees, must be sent out of employment. After reporting the vacancies as directed above, we direct the Corporation not to have any empanelled conductor or provisional conductor in its service while persons included in the ranked list are being kept out. If the candidates included in the

ranked list are not adjusted against the regular vacancies or substantive vacancies and they are being engaged in the place of the provisional conductors or empanelled conductors, such candidates, who are so engaged, will not be having the right of regularisation by the mere fact that they are so engaged because of the fact that once they were included in the ranked list and were provisionally engaged. The orders relating to empanelment will stand quashed in view of the specific direction given above. If after exhausting the candidates included in the ranked list published by the Public Service Commission there still remain any vacancies, to those vacancies the Corporation will be at liberty to appoint temporary hands as per the provisions contained in Rule 9 of Kerala State and Subordinate Services Rules. The provisions contained in the KS & SSR are applicable to the service under the Corporation.

14. Another question that arises for consideration is whether the provisional employees are having any right for regularisation in the service of the Corporation. Identical question came up before this Court in *C.Sadasivan Pilial v. State* 1992 (1) KLJ 529. The Bench observed:-

"In our view, the petitioners cannot seek a writ of mandamus from this Court under Article 226 of the Constitution of India directing the Corporation to regularise the services of the petitioners, without reference to the Public Service Commission. The contention that there are sufficient number of posts, which could accommodate not only candidates advised by the Public Service Commission, but also petitioners, cannot be accepted inasmuch as the only mode of regular recruitment is through the Public Service Commission. If the contention of the petitioners is to be accepted, it will result in the denial of appointment to several other eligible candidates who are below the maximum age for recruitment, and who will pass the relevant test to be conducted by the Public Service Commission. In the statutory rules, there is a particular mode for recruitment of conductors on a regular basis. It will not be permissible for this Court to by-pass the said procedure, and direct the Corporation to regularise the services of the petitioners".

We are in respectful agreement with the said observation. Identical view has been expressed by the Supreme Court in many a number of cases. In *Surendra Kumar Gyani Vs. State of Rajasthan and Another*, the Supreme Court has categorically taken the view that services of the provisional employees are to be terminated on the availability of properly recruited persons. Availability of properly recruited persons, in this case, is beyond doubt. The ranked list of successful candidates published by the Public Service Commission is still in force. So there are persons chosen by the Public Service Commission for being recruited to the post of conductor on regular basis. When such candidates are available, the provisional employees and empanelled conductors have to vacate their posts for giving room to accommodate regular hands, in *Dr. M.A. Haque v. Union of India* 1993 1 LLJ 1139 Their Lordships observed at page 1143:-

"We are also conscious of the fact that candidates in service have a disadvantage

as against the fresh candidates in the tests particularly when they face the tests after a long lapse of time. As against this, however, we cannot lose sight of the fact that the recruitment rules made under Article 309 of the Constitution have to be followed strictly and not in breach. If a disregard of the rules and the bypassing of the Public Service Commissions are permitted, it will open a backdoor for illegal recruitment without limit. In fact this Court has, of late, been witnessing a constant violation of the recruitment rules and a scant respect for the constitutional provisions requiring recruitment to the services through the Public Service Commission. It appears that since this Court has in some cases permitted regularisation of the irregularly recruited employees, some Governments and authorities have been increasingly resorting to irregular recruitments. The result has been that the recruitment rules and the Public Service Commissions have been kept in cold storage and candidates dictated by various considerations are being recruited as a matter of course".

According to us, these observations made by Their Lordships apply to the procedure resorted to by the Kerala State Road Transport Corporation (vide *Asha Kaul (Mrs) and Another Vs. State of Jammu and Kashmir and Others*,). The following observation made by the Constitution Bench of the Supreme Court in *Shankar Balwant Lokhande (dead) by L.Rs. Vs. Chandrakant Shankar Lokhande and Another*, at page 20:-

"Unless the relevant recruitment rules so indicate, the State is under no legal duty to fill up all or any of the vacancies. However, it does not mean that the State has the licence of acting in an arbitrary manner. The decision not to fill up the vacancies has to be taken bonafide for appropriate reasons. And if the vacancies or any of them are filled up, the State is bound to respect the comparative merit of the candidates, as reflected at the recruitment test, and no discrimination can be permitted" has been followed in the subsequent decisions, like *Asha Kaul v. State of J & K*, (Supra).

15. In the above circumstances, Corporation should do well in getting the candidates included in the ranked list advised by the Public Service Commission appointed as Reserve Conductors. Learned counsel representing the Corporation voiced an apprehension that the conductors so appointed through Public Service Commission may swindle the money collected by them as conductors and so they must be asked to furnish security, as is being received from the empanelled conductors. We have not been told about any rule of law which requires a candidate advised by the Public Service Commission to furnish security for the post. But, to obviate the apprehension, we direct the candidates advised by the Public Service Commission to furnish Fidelity Guarantee Insurance for Rs. 3,000/- (Rupees three thousand only) or third party security. Original Petitions are disposed of as indicated hereinbefore and we close our judgment by quoting the following observations made by the Supreme Court in *A.K.Bhatnagar v. Union of India* 1991 1 SCC 545:-

"On more than one occasion this Court has indicated to the Union and the State

Governments that once they frame rules, their action in respect of matters covered by rules should be regulated by the rules. The rules framed in exercise of powers conferred under the proviso to Article 309 of the Constitution are solemn rules having binding effect. Acting in a manner contrary to the rules does not (sic.) create problem and dislocation. Very often Government themselves get trapped on account of their own mistakes or actions in excess of what is provided in the rules. We take serious view of these lapses and hope and trust that the Government both at the Centre and in the States would take note of this position and refrain from acting in a manner not contemplated by their own rules".

We also hope that the Corporation will act within the powers conferred on them by Rules and Act in a legal and proper manner. All petitions filed by provisional or empanelled conductors working under the Corporation for continuance as such and for regularisation in service under the Corporation are dismissed. Petitions filed by candidates who have been included in the ranked list published by the Public Service Commission are disposed of in the manner indicated earlier in this judgment. Taking into consideration the entire facts and circumstances of this case, we direct the parties to suffer their costs in these proceedings.