

(1988) 08 KL CK 0010

In the High Court Of Kerala

Case No : O.P. No"s. 5987 of 6136 and 6181 of 1988

K.V. Divakaran and Others

APPELLANT

Vs

State of Kerala and Others

RESPONDENT

Date of Decision : 05-08-1988

Acts Referred:

Constitution of India, 1950 — Article 166, 166(1), 166(2), 166(3)
Kerala Government Law Officers (Appointment and Conditions of Service) and Conduct of Cases Rules, 1978 — Rule 10, 12, 14, 17, 7

Citation : (1988) 08 KL CK 0010

Hon'ble Judges : Sivaraman Nair, J

Bench : Single Bench

Advocate : P.V. Narayanan Nambiar, in O.P. No. 5987/88, V. Chitambaresh, in O.P. No. 6136/88 and N. Raghavan Kurup, in O.P. No. 6181/88, for the Appellant; K.R.B. Kaimal, Government Pleader, for the Respondent

Final Decision : Dismissed

Judgement

Sivaraman Nair, J.—Petitioners were appointed as Additional Government Pleaders and Additional Public Prosecutors of Tellicherry, Palghat and Kottayam under Rule 8 of the Kerala Government Law Officers (Appointment and Conditions of Service) and Conduct of Cases Rules, 1978 (for short "the Rules"). The term of appointment in each case was three years. That term has not expired in any of these cases. The Law Secretary issued notices under Rule 17 of the Rules informing the Petitioners that the Government consider that the services of the Petitioners are no more necessary and have therefore decided that their appointment should be terminated immediately. The appointments were terminable on the expiry of one month of the date of receipt of the notices. Petitioners challenge those notices.

2. The competence of the Government to terminate their appointment is not disputed by the Petitioners. Nor have they any case that the notices under Rule 17 of the Rules are defective in any manner except that they does not comply

with Article 166(1) of the Constitution. According to them, there is no order of the Government. They urge three reasons, in support of this submission, viz. (1) only a decision of the Council of Ministers and which is finally, drawn up and communicated as an order of Government can effectively terminate their appointments; (2) the decision of the individual minister is not an order of the Government; and (3) no such order of the Minister or Council of Ministers can be constitutionally valid without the approval of the Governor. Reliance is placed on three decisions in support of these propositions, viz. *Bachhittar Singh Vs. The State of Punjab*, ; *Ram Chandra Chaudhuri Vs. Secretary to Govt. of West Bengal and Others*,

3. The Supreme Court had repeatedly held that the formal requirements of an order under Article 166(1) of the Constitution are only directory and that non-compliance will not invalidate the order. The only consequence of such non-compliance will be that the order may not be immune from challenge. It will be open to the State, by production of the files, to show that Government had actually passed the order in compliance with the Rules of Business framed by the Governor under Article 166(3) of the Constitution of India. (Vide 1952 S.C. 181 : 1955 S.C. 160). I requested the Government Pleader to produce the files. They disclose that the Minister for Law had passed orders on 22nd June 1988, 29th June 1988 and 25th June 1988 respectively terminating the appointment of the Petitioners and required the Law Secretary to communicate the decision by issuing notices under Rule 17 of the Rules. Petitioners have no case that the Law Secretary is not competent to authenticate an order of the State Government. As a matter of fact, Rule 12 of the Rules of Business provides that:

12. Every order or instrument of the Government of the State shall be signed by a Secretary, an Additional Secretary, a Joint Secretary, a Deputy Secretary, an Under Secretary or by such other officer as may be specially empowered in, that behalf and such signature shall be deemed to be the proper authentication of such order or instrument.

The position obtaining in this case, therefore, is that the Minister did pass, orders in the files and they were communicated by the Secretary of the Law Department in formal notices drawn up under Rule 17 of the Rules. The absence of the magic incantation of the set formula "by order of the Governor" notwithstanding, I am satisfied that the order was validly made by the Government. I draw support from *State of Bombay v. Purushotham Joy* AIR 1958 S.C. 317

4. The next question to be considered is whether the individual Minister was not competent and whether the Council of Ministers ought to have taken that decision. The Government Pleader produced before me the Rules of Business and the order regarding allocation of business issued under Article 166(3) of the Constitution of India. Rules 7 to 9 of those Rules are important. They read as follows.

7. The Council shall be collectively responsible for all executive orders issued in

the name of the Governor in accordance with these rules, whether such orders are authorised by an individual Minister on a matter appertaining to his portfolio or as the result of discussion at a meeting of the Council, or otherwise.

8. Subject to the orders of the Chief Minister under Rule 14, all cases referred to in the Second Schedule shall be brought before the Council in accordance with the provisions of the Rules contained in Part II:

Provided that no case in regard to which the Finance Department is required to be consulted under Rule 10 shall, save in exceptional circumstances under the directions of the Chief Minister, be discussed by the Council unless the finance Minister has had an opportunity to consider it.

9. Without prejudice to the provisions of Rule 7 the Minister in charge of a Department shall be primarily responsible for the disposal of the business appertaining to that Department.

Government Pleader submits that these rules apply with equal force not only to an order made and authenticated in the manner prescribed by Article 166(1) and (2) but also to an order deemed or have been so made, or proved to have been passed by the Government.

5. Counsel for the Petitioners submit that item 41 of the Second Schedule, viz. "Proposal for appointment of Law Officers not below the rank of Public Prosecutors" is a matter which is exclusively within the purview of the Council, and therefore, termination of such appointment should also be ordered by the Council. The individual Minister could not have taken a decision in the matter. I do not agree. What is within the contemplation of item 41 is a proposal for appointment of Law Officers not below the rank of Public Prosecutors. Proposal for appointment of Additional Government Pleaders and Additional Public Prosecutors" do not seem to fall within that entry. Government Pleader is right in his submission that the Petitioners were appointed on the orders of the then Minister for Law. The Council of Ministers did not decide upon their appointments. I perused the files relating to their original appointments which the Government Pleader produced. They bear out this fact. The Petitioners cannot legitimately urge that only the Council was competent to decide to terminate their appointments.

6. Part II of the Rules of Business approving the listing of Departments also lends support to this view. Entry A5 in the Home Department is "Director of Prosecution, Assistant Public Prosecutors and Special Public Prosecutors". Obviously, the Minister in charge of the Department may deal with, the appointment of Assistant Public Prosecutors because Cabinet decision may be necessary for the other two in view of entry 41 referred to above. Likewise, entry C3 in the Law Department is "papers connected with the appointment etc. of Advocate General, Government Pleaders, Standing Counsels in the Supreme Court, Administrator General and Official Trustees and Staff." Of these, the appointment of the Advocate General and other Law Officers not below the rank

of Public Prosecutor will require decision of the Council of Ministers. Other appointments may be decided by the Minister in charge of the Department. It is obvious that any such order or decision of the individual Minister will be a decision of the Cabinet. If that be so, he may as well decide to terminate such appointments.

7. Counsel submitted that only a decision issued in the name of the Governor shall be deemed to be a Cabinet decision and can be treated as an order of the Government. This fiction applies also to decisions which are shown to be competently made by the Minister in charge of the department, though it was not recited to be made or authenticated in the name of the Governor.

8. Has such a decision to be placed before and approved by the Governor to obtain validity as a decision of the Government? Article 166 of the Constitutionals a complete answer. The Governor cannot be expected to peruse every file and approve every decision of the Council of Ministers. The Governor has to act on the aid and advice of the Council of Ministers, except in respect of matters in which the Constitution requires him to act in his discretion. Such matters on which he has to act on the aid and advice of the Council of Ministers are covered by the Rules of Business. All such actions taken or deemed to be taken under the Rules of Business are deemed to be action taken by the Governor. There are some matters on which he can and has to act in his discretion. Those areas are clearly demarcated in the decision reported in *Samsher Singh Vs. State of Punjab and Another*, The Governor has no appellate or revisional power over the decisions of the Council of Ministers. He can act only with the aid and advice of the Council of Ministers in all executive matters except areas which are separately demarcated. Action taken or orders passed by the Council of Ministers in accordance with the Rules of Business are deemed to be taken or passed by the Governor. Except in matters which the Constitution of India requires to be reserved for the assent or approval of the Governor like legislation etc. every other executive action is deemed to have emanated from the Governor. I am therefore not persuaded to hold that the State Government is bound to show in every case where an executive action is challenged, that the file was reserved for the approval of the Governor and he did give such approval to the proposed action. The Council of ministers or individual minister or even a designated official may take the decision in accordance with the Rules of Business made by the Governor. To hold otherwise would be to constitute the Governor as the repository of ultimate decision making in all matters and reduce the Council of Ministers only to an advisory and recommendatory body. That will run counter to the Cabinet form of Government that we have.

9. A Constitution Bench of the Supreme Court had occasion to consider the validity of decisions of an individual Minister in respect of matters on which the statute provided for a decision by the Government. Hegde, J. speaking for the unanimous Court held in the decision reported in *A. Sanjeevi Naidu, etc. Vs. State of Madras and Another*, as follows:

...Under our Constitution, the Governor is essentially a constitutional head, the administration of State is run by the Council of Ministers. But in the very nature of things, it is impossible for the Council of Ministers to deal with each and every matter that comes before the Government. In order to obviate that difficulty the Constitution has authorised the Governor under Sub-article (3) of Article 166 to make rules for the more convenient transaction of business of the Government of the State and for the allocation amongst its Ministers, the business of the Government. All matters excepting those in which Governor is required to act in his discretion have to be allocated to one or the other of the Ministers on the advice of the Chief Minister. Apart from allocating business among the Ministers, the Governor can also make rules on the advice of his Council of Ministers for more convenient transaction of business. He can, not only allocate the various subjects amongst the Ministers but may go further and designate a particular official to discharge any particular function. But this again he can do only on the advice of the Council of Ministers.

12. The cabinet is responsible to the legislature for every action taken in any of the ministries. That is the essence of joint responsibility. That does not mean that each and every decision must be taken by the cabinet....

* * * * It is always open to a Minister to call for any file in his ministry and pass orders. He may also issue directions to the officers in his ministry regarding the disposal of Government business either generally or as regards any specific case. Subject to that over all power, the officers designated by the "Rules" or the standing orders, can take decisions on behalf of the Government.

10. This seems to be a sufficient answer to the submission that an individual Minister is not competent to decide questions which are allocated to the Department which is entrusted with him. It is also a sufficient answer to the submission that the Law Secretary is not competent to issue notices terminating the appointment of the Petitioners pursuant to the decision taken by the Minister in charge of the Department.

11. A Division Bench of this Court had occasion to consider in *Ramankutty Menon v. State of Kerala* 1985 KLT 585 as to whether a communication of the Law Secretary to the effect that "I am directed to inform you...etc." was an order of the State Government. The question was answered affirmatively by the Division Bench. The recital contained in the notices impugned in these Original Petitions are at least equally, if not more, efficacious than that recital. I should also add that the validity of premature termination of appointment of a Senior Government Pleader of the High Court by issue of a similar notice under Rule 17 of the Rules of Business was upheld by this Court in W.A. 497/84.

12. My conclusions therefore, on the three points raised by the Petitioners are: (1) The appointment of the Petitioners which were ordered by the Minister for Law, are liable to be terminated on orders of the present incumbent in that office. No decision of the Council of Ministers is necessary. The decision of the

Minister for Law is a decision of the Council under Rule 7 of the Rules of Business. It necessarily is an order of the Government when formally communicated by an officer competent to authenticate that order. (2) Orders signed by the Law Secretary without being formally drawn up as provided in Article 166(1) of the Constitution of India has been shown to be an order of the Government. (3) Such orders are deemed to be approved by the Governor. It necessarily follows that the notices terminating the appointment of the Petitioners are valid orders competently passed by the State Government.

13. I do not find anything in the three decisions cited by Counsel for the Petitioners which militate against these formulations. The first and last decisions lay stress on the formal recitals and authentication in the order as also its communication. The absence of recitals is made good by production of the files. The Law Secretary is authorised by Rule 12 of the Rules of Business to authenticate orders of Government. He has communicated the decision of the Government by specific recitals in the notices. None of the decisions has so far gone to the extent of stating that the State should show that the Governor has approved each and every order of appointment.

14. For all the above reasons, I am of the opinion, that the reliefs sought by the Petitioners cannot be granted. The Original Petitions are therefore dismissed.