
(1960) 08 KL CK 0044

In the High Court Of Kerala

Case No : O.P. No's. 267 and 345 of 1958

Madhusudanan Nair

APPELLANT

Vs

State of Kerala and Others

RESPONDENT

Date of Decision : 05-08-1960

Acts Referred:

Constitution of India, 1950 — Article 16(1), 309, 310, 311

Citation : AIR 1961 Ker 203

Hon'ble Judges : M.A. Ansari, C.J;M. Madhavan Nair, J

Bench : Division Bench

Advocate : T.N. Subramania Iyer and N. Venkitarama Iyer, in O.P. 267/58, P. Govindan Nair, P.K. Kurien and K. Sukumaran, in O.P. 345/58, for the Appellant; Government Pleader, T.K. Narayana Pilla and D. Narayanan Potti for 6th Respondent, for the Respondent

Final Decision : Allowed

Judgement

Ansari, C.J.—The petitioners in both the writ petitions challenge the constitutionality of G. O. (HS) 259 dated March 11, 1958, which has fixed their places in the seniority list. The relevant facts, giving rise to the complaint, may be shortly stated.

2. The petitioner as well as the respondents, other than the State, in each writ petition, were members of the Travancore-Cochin State Forces, prior to the inauguration of the Constitution. When the integration of the State Forces with the Indian Army took place, they were rejected by the Indian Army Selection Board, on the ground of not being suitable.

The policy of the then Government was to provide such persons, as far as practicable, with alternative employments in the State services; and both the writ petitioners as well as the respondents were employed, some in what was called the Palace Guards, and some in the Police Force. They were, therefore, separated into two groups; six officers being absorbed in the Palace Guards, and four in, the Police Force. The names of those taken in the former are:-

1. P. Viswanatha Pillai Major
2. C. V. Mathews Captain
3. M. V. M. Menon do
4. T. N. Madhusoodhanan Nair Ag. Captain
6. T. K. Sreedharan Nair Lieutenant
6. S. Kesavan Nair do.

This group contains one Major, three Captains and, two Lieutenants; and four of the aforesaid officers, i.e. the Major and the three Captains, were allowed the ranks and the scale of pay they had enjoyed before, whereas the other two were given posts carrying lower scales of pay. The four officers, who went to the Armed Police, also got lower scales of pay, and their names are as follows:-

1. V. Padmanabhan Nair A. S. P.
2. P. Viswanathan Nair Circle Inspector
3. Edwin Percy Bhanu do
4. A. R. Sivasankaran Nair do

At this stage, it may be mentioned that the position of the writ petitioner in O. P. No. 267/58 is No. 4, and that of the petitioner in O. P. No. 345/58 No. 5, in the list of those who had been transferred to the Palace Guards. The seniorities of the petitioners with those of the officers allotted to the Palace Guards were by G. P. H-7-28524/51/CS dated October 25, 1952 fixed on the basis of the ranks given to them at the time of their selection; and it was further made clear that the rank or pay in that unit would not entitle them for promotion in the General Police or Armed Reserve.

Some time later, the Government again considered the seniorities of these officers, and fixed the order through S. 9.2071/53/CS of July 8, 1954. Thereby the writ petitioner in O. P. 267/58 was given the second place, whereas the petitioner in O. P. 345/58 continued in the fifth position he held earlier. After the aforesaid list was published, representations are alleged to have been received by the then Government; and another list of seniority was published in 1955. The positions of the four out of the six Officers of the Palace Guards thereafter became as follows :

1. Viswanatha Pillai
2. Mathews
3. Menon
4. Madhusoodhanan Nair

It is common ground that both the petitioners were thereby assigned ranks

below those, who were their juniors in the entrance into the Army; but (they took no steps to challenge what were then given to them. Thereafter, the situation was that the Officers of the two groups continued to serve with their seniorities so separately grouped, till another order was passed. This is G. O. No. (MS) 259 dated March 11, 1958, and is challenged by both the writ petitioners. It is marked as Ext. P6 in O. P. 267/58, and A. in O. P. 345/58. The Officers of the Palace Guards were thereby integrated with those of the Armed Reserve, and their respective positions were fixed as follows:

Sl. No. Name Rank

1 P. Viswanatha Pillai Deputy Superintendent of Police

2 V. Padmanabhan Nair do

3 P. Viswanathan Nair Circle Inspector of Police

4 E. P. Bhanu do

5 A. R. Sivasankaran Nair do

6 Cheeran V. Mathews do

7 M. V. M. Menon do

8 T. N. Madhusoodhanan Nair do

9 T. K. Sreedharan Nair do

10 S. Kesavan Nair Sub-Inspector. First Grade.

The Government has assigned the aforesaid positions in pursuance of paragraph 2 of the G. O. which paragraph reads as follows:-

"The Government have considered this question further in the light of the representations received with reference to the above order. After considering all aspects of the question, the Government are pleased to direct that the relative seniority of the Ex-Army Officers of the Palace Guards and their counter-parts in the Armed Reserve Unit of the Police Force shall be fixed with reference to the date of their commission, subject, however, to the inter se seniority of the Palace Guards Officers already fixed by the Selection Committee. The date of entry of all these Officers in the Police Department will be treated as 1-4-1952."

The complaint made in the writ petitions is that the positions given in the list to the petitioners, are not in compliance with the rule of fixing seniority with reference to the date of the commission, stated in paragraph 2 of the G. O. For properly appreciating the complaint, we would first state the positions the respondents to each petition been given in the List. Out of the six respondents to O. P. 267/58, the second, third, fourth, fifth and sixth are Nos. 3, 4, 5, 6 and 7 of the list, and the petitioner has been assigned the eighth place in the list.

Coming to the next petition, out of its eight respondents, the seventh is the

petitioner in O. P. 267/58, and leaving him, the second, third, fourth, fifth, sixth and eighth respondents are Nos. 3, 4, 5, 6, 7 and 10 of the list. The petitioner of this writ petition has been given the ninth place. We would now give in a chart from the dates these Officers got their commissions in the Army and the positions they were assigned when selected in 1951:

Name Date of Commission Rank in the Army Post to which selected and scale of pay

- 1 P. Viswanatha Pillai 1-11-41 Ag. Major Major, Palace Guards [RS. 350-450]
- 2 V. Padmanabhan Nair 27-2-43 Captain A.S.P., Police Department [Rs. 225-275]
- 3 T. N. Madhusoodanan Nair [7th respt. & petitioner] 24-7-43 Ag. Captain Captain, Palace Guards [Rs. 275-325]
- 4 T. K. Sreedharan Nair (Petitioner) 24-7-43 Ag. Captain Lieutenant, Palace Guards [Rs. 175-225]
- 5 P. Viswanathan Nair [2nd respondent] 1-7-44 do Circle Inspector, Police Department [RS. 175-225]
- 6 Edwin Percy Bhanu [3rd respondent] 1-10-44 do do
- 7 A. R. Sivasankaran Nair [4th respondent] 6-1-45 do do
- 8 S. Kesavan Nair [8th respondent in O. P. 345] 6-1-45 do Lieutenant, Palace Guards [RS. 175-225]
- 9 C. V. Mathews [5th respondent] 7-1-45 Captain Captain, Palace Guards [RS. 275-325]
- 10 M. V. M. Menon [6th respondent.] 6-6-48 do do.

3. It will be seen that the petitioner in each petition complains of the position assigned to him in the list not being what paragraph 2 of the G. O. states to be the guiding rule. It is further clear that Nos. 2, 3, 4 and 5, of the list, are the four Officers, who were taken in the Police Force, and the high positions assigned to them are not according to the dates of their commissions.

We, therefore, asked the learned Government Pleader to explain the reason, and the explanation he had to offer is that the impugned G. O. had not disturbed the seniority of those, who formed the Palace Guards group, which was fixed by the publication in the Gazette of March 15, 1955; and the senior-most of this group, having entered the Army on date much later to those on which Officers in the Armed Police group had entered, the position assigned to him would be lower and he has thus dragged down those, who were his juniors.

In other words, this fact would bring the senior-most of the Palace Guards Group below the last in the Police Armed Force, and the list; has accordingly fixed the positions, The order so fixed is challenged on several grounds, one is that it

infringes Article 16; and the next is that earlier fixation of the seniority among those, who formed the Palace Guards group, would not extend when the two groups were being amalgamated. In support of the last argument it was urged that fixing the earlier seniority, was intended for the purpose of the Palace Guards, and cannot be treated as one intended for all purposes, and for the final integration under the G. O. as well,

4. The writ petitioner's learned Advocate in O. P. 345/58 has further pressed before us the objection that in the integration of two groups, the seniority must be fixed on rational basis, that such rational basis is the dates of the entrance into the Armed Forces, which the G. O. has also adopted, but its application to the writ petitioner, has been improperly withheld and thereby he has been discriminated against.

5. Before deciding the objections, we would first adjudicate on the argument of the learned Government Pleader that the fundamental rights in Part III of the Constitution do not extend to those employed by the State and dismissal of the public servants, as Arts. 309 and 310 especially declare such tenures to be at the pleasures of the President and the Governor. He has urged that, assuming the positions in the list challenged by the writ petitioners to be discriminatory, "that would not be justiciable, nor attract exercise of powers under Article 226, In support of his argument, he has relied on *Raj Kishore Vs. State of Uttar Pradesh and Another*, wherein Agarwala, J., has observed thus:--

"Article 310 is a constitutional provision and is not included within the term "law" or laws" as mentioned in Article 14. The entire Constitution must be read as one whole and every part of it must be given full effect. If Article 310 were to be limited or controlled by Article 14, it can hardly be said that the Government can terminate the services of its servants "at pleasure". In my opinion, Rule 465 is not rendered void by reason of Article 14."

The Government Pleader has further relied on *S. Framji Vs. Union of India*, where the learned Chief Justice has explained what the civil servant's holding the post at the pleasure of the President, means. He has also relied on *Balbir Singh v. State of M. P.*, (S) AIR 1955 Nag. 289 where *Raj Kishore Vs. State of Uttar Pradesh and Another*, has been referred and where the learned Judges have observed that Article 16 should be limited to the initial stages of the employment, and not the terminal end of the service, so that the subsequent retention of the public servant would be at the pleasure of the Governor.

The learned Judges have further held that the selection and gradation of persons for purposes of retrenchment or discharge, cannot amount to discrimination, as - provided by Article 16. We feel doubtful about the correctness of the public servant's being excluded from enjoyment of the fundamental rights while serving as public servant, on the ground of his tenure being at the pleasure of the State.

It is clear that the words "at the pleasure" do not exclude Article 16; and if the

employment by the State at its initial stages be controlled by Article 16; we do not see how its operation at later stages can be excluded. The petitioner's learned Advocate has relied in support of his argument on *P. K. More v. Union of India* AIR 1939 Bom 134 wherein the learned Judges have differed from other cases, and have agreed with the observation of Ahmad, J., in *Sukhnandan v. State of Bihar (S)* AIR 1957 Pat 617. We express respectful agreement with the learned Judges when they observed as follows:

"This concept of equality, in matters of employment, is no more than a corollary of the fundamental right to equal justice in all matters. Its positive aspect demands equable treatment in equal circumstances. Its negative aspect forbids any impediment or unfair burden being laid upon one than upon others in the same engagement and condition and also forbids any special privilege being conferred in favour of any individual. This equality forbids any class legislation or governmental action based on similar considerations, but does not forbid classification or distinction, which is reasonable, and not an arbitrary selection. What is enjoined is that all citizens in matters of service under the State, shall be treated alike under like circumstances, and conditions both in the privileges conferred and the liabilities and obligations imposed. The primary aim is to prevent any person or class of persons from being singled out as a special subject for purposeful or invidious discrimination or hostile treatment. What is insisted upon is not hypothetical equality or equality in matters of minor importance or matters of detail or routine. The purpose is to ensure similarity and equable treatment, and not identity of treatment in matters relating to initial engagement, during continuance of that engagement and at the terminal end of that engagement. The guarantee of equality embraces all matters of employment--the Article in terms, clear and ample, speaks of all "matters relating to employment"--and it is impossible to accede to the suggestion that what is contemplated by Art. 16 is only the initial stage when the citizen is employed to serve the State. Nothing so unfair and startling could have been within the contemplation of the framers of the Constitution. The guarantee in our judgment, was intended to endure, and not to be illusory".

That view is further strengthened by the observation in *All India Station Masters' and Assistant Station Masters' Association, Delhi and Others Vs. General Manager, Central Railway and Others*, where Das Gupta, J., has observed as follows:

"Such equality of opportunity in matters of promotion, must mean equality as between members of the same class of employees, and not equality between members of separate, independent classes",

6. It is clear that the learned Judge has not rejected the plea that matters of promotion, are matters of employment, and would thereby be governed by Article 16(1). Moreover, the principle is well settled that words in the ruling instrument, should be given wide meaning. Therefore, we hold that the direction for equality of opportunity in Article 16(1), covers all the periods during which

the public servant is employed, and thereby excludes such servants being treated arbitrarily. It is clear that rational classification is not excluded; but it is equally well settled that purposeful or invidious discrimination is barred. It must, therefore, be ascertained in these cases, how far fixing: the ranks is arbitrary, or whether the list rests on rational classification.

7. It is clear that both the writ petitioners have long delayed their complaints against the ranks assigned to them in the Palace Guards group for their positions had been fixed in 1955, and they have invoked the jurisdiction of this court in 1958. They must, therefore, bear the consequences of not being diligent, and we would, for purposes of this decision hold the several ranks they had then been given as not open to any challenge before us.

It would follow that this judgment would assume the petitioners being juniors to Mathews and Menon. But that should not preclude them from claiming that the list under the G. O. No. (M.S.) 259 of March 11, 1958, had been prepared without rational basis and without regard to the dates of the commissions; for, the form, in which the direction to preserve the inter se seniority of those in the Palace Guards, had been enforced, is without precedent or reason; and has resulted in lower positions in the list being assigned to Mathews and Menon.

In this connection, our attention has been drawn to what has been known as the "KLM formula", which had been evolved when the combined seniority list for the Travancore-Cochin personnel was being proposed. Thereunder, the seniormost of a group gets assigned the earliest date of the entrance into the service held by any one in his group, and his position in the combined list is to be determined on the basis of such assigned date.

The learned Government Pleader has not been able to satisfy us of the reasons, which have excluded the formula being applied to the list before us; for, had it been applied, the positions assigned to Mathews and Menon, would not be so low. It is argued that their improved positions would confer no benefit on the writ petitioners; but the argument overlooks that if Mathews be no longer in the Force, -- and we are told about his getting transferred elsewhere--his exclusion from, the new list, would benefit the petitioners and would vest them with interest in the complaint of the earlier list being void.

Both the petitioners had entered the Army on July 24, 1943, and, with only Menon, under the-aforesaid formula, being entitled to an assignee date, this would improve the position of one of the petitioners. In any Case, the high positions assigned in the list to the Officers employed in the Armed Police, are admittedly contrary to the general practice followed when integrating the personnel or two groups and apparently discriminatory. We do not say, seniority cannot otherwise be fixed but there must be justification for discarding the old rule, or cogent reasons for adopting the new practice.

In the present case, we are satisfied about neither being established. Therefore, the list, which without reasonable grounds had lowered the positions of two

officers and had conferred special benefits on others, is arbitrary; and the petitioners are sufficiently interested in having it set aside. It is further obvious that the aforesaid ground is not against the G.O. but against the exercise of the power under the G. O. i.e., the list,

8. The learned Advocate of one of the writ petitioners has argued that, inasmuch as the ranks of the writ petitioners had been reduced, their right under Article 311 has been infringed. We think there is no force in the argument, because Article 311 is attracted only when the reduction be as punishment. In this connection, the learned Government pleader has relied on *N. Devasahayam Vs. The State of Madras and Others*, , and we respectfully agree with the observations made therein;

It follows that the writ petitions are allowed on the short ground that the assignment of ranks in the seniority list challenged, does not appear to be on any rational basis, and contrary to the practice usually followed in the State when persons in different groups are being integrated, which practice is not excluded by the G. O. The writ petitions are, therefore, allowed, with liberty to the State to assign ranks to the petitioners on a rational basis.

9. It was argued before us that the seniority in the Palace Guards group was limited during the Officer's employment therein, and would cease thereafter. That is an inference to be drawn from several documents, and is a question of fact, which cannot be decided in these proceedings. Such arguments may well be decided when fresh list is being drawn. The prayer to quash Ext. D, is not allowed, as it was made considerably long after the order was passed; but we vacate the lists Exts. A3 and P9 on the ground of their not having been prepared on any rational ground, to be discriminatory, and against Article 16(1). Having regard to the circumstances of the case, the parties will bear their costs.