
(1980) 08 KL CK 0011

In the High Court Of Kerala

Case No : O.P. No's. 326 of 1980-E and 422 of 1980-A

N. Lakshmanan Vaidyan

APPELLANT

Vs

State of Kerala

RESPONDENT

Date of Decision : 18-08-1980

Acts Referred:

Constitution of India, 1950 — Article 226

Citation : AIR 1981 Ker 20 : (1980) 2 ILR (Ker) 708

Hon'ble Judges : K. Bhaskaran, J

Bench : Single Bench

Advocate : M.K. Chandrasekharan, for the Appellant; A.A.G., for the Respondent

Final Decision : Dismissed

Judgement

K. Bhaskaran, J.—These two writ petitions were heard together and are being disposed of by this common judgment inasmuch as the reliefs sought, the issues involved and the questions of law raised are practically identical. In the course of the judgment, wherever each "of the petitioners has to be referred to separately, the petitioner in O. P. No. 326 of 1980-E would be referred to as Sri Lakshmanan Vaidyan, and the petitioner in O. P. No. 422 of 1980-A as Sri Ramakrishnan for the sake of convenience.

2. It is averred in the writ petition by Sri Lakshmanan Vaidyan that by virtue of the power conferred u/s 4 of the Travancore-Cochin Hindu Religious Institutions Act, 1950, (Act 15 of 1950) (the Act) as amended by Act 20 of 1974, three Hindu Ministers out of six Ministers who constituted the Council of Ministers of the State of Kerala had nominated him to be one of the members of the Travancore Devaswom Board on 27-11-1979. It is also averred therein that one Smt. Saraswathi Kunjukrishnan, the elected member whose term was still current, was continuing in office; and that on 27-11-1979 itself one Sri. T. N. Uppendranatha Kurup was also nominated by the Hindus among the Council of Ministers to be a member of the Travancore Devaswom Board. His grievance is that while the said Sri Uppendranatha Kurup's nomination was published is the

Kerala Gazette, Extraordinary, on 1st December 1979 under G. O. Rt. No. 1814/79/RD-1, no such notification relating to his (Sri Lakshmanan Vaidyan's) nomination was published. Ext. P-1 is the copy of the notification relating to the nomination of Sri Upendranatha Kurup. On enquiry being made the petitioner came to know that the papers relating to the nomination of Sri Upendranatha Kurup were sent to the Special Secretary (Revenue) on 28-11-1979, whereas those relating to the nomination of the petitioner were sent to the Chief Secretary so as to be received only on 6-12-1979. According to Sri Lakshmanan Vaidyan the fact that he was nominated to be a member of the Board was made known to him on 27-11-1979 itself by the three Hindu Ministers among the Council of Ministers. He suspected that the delay in the transmission of the file relating to his nomination was as a result of some manipulation with a view to cause prejudice to him.

3. The averment of Sri Ramakrishnan (in O. P. No. 422 of 1980-A) is that by virtue of the power conferred u/s 63 of the Act, the Hindus among the Council of Ministers of the State of Kerala had nominated him on 27-11-1979 to be the member and President of the Cochin Devaswom Board in the vacancy of one Sri Ramankutty Achan who had been the President of the Board and who continued to be as such in accordance with the provisions contained in Section 70 (3) of the Act. He also feels aggrieved that his nomination had not been published in the Gazette, while that of Sri Upendranatha Kurup who also was nominated on the very same day, namely, 27-11-1979, was published in the Kerala Gazette dated 1-12-1979. The prayer in both the writ petitions is couched almost in the same words. Reliefs (a) and (b) read as follows:--

"(a) A writ of mandamus or any other appropriate writ, order or direction commanding the respondent not to unsettle the office of the petitioner as the duly nominated member of the Travancore Devaswom Board.

(b) A writ of mandamus or any other appropriate writ, order or direction commanding the respondent to notify the nomination of the petitioner as the member of the Travancore Devaswom Board and to allow the petitioner to function as such member."

4. We may, before proceeding further, notice the provisions of Sections 4 and 63 of the Act which read as follows :--

"4. Constitution of the Travancore Devaswom Board :

(i) The Board referred to in Section 3 shall consist of three Hindu members, two of whom shall be nominated by the Hindus among the Council of Ministers and one elected by the Hindus among the members in the Legislative Assembly of the State of Kerala."

"63. Constitution of the Cochin Devaswom Board -- The Board referred in Sub-section (1) of Section 62 shall consist of three Hindu members, one of whom shall be nominated by the Hindus among the Council of Ministers and one elected

by the Hindus among the members in the Legislative Assembly of the State of Kerala."

5. The argument advanced by Sri K. Chandrasekharan, the counsel for the petitioners, is that the petitioners having been nominated to be member/member and President (for the sake of convenience hereinafter referred to only as member), they also should have been allowed to hold the office of such members as was done in the case of Sri Upendranath Kurup by Ext. P-1 Gazette notification. He submitted that while the paper relating to Sri Upendranatha Kurup's nomination reached the Special Secretary to Board of Revenue promptly on 28-11-1979, and the publication took place on 1-12-1979, in the case of the pensioners the relevant papers reached the office of the Chief Secretary only on 6-12-1979. The delay in the transmission, according to the petitioners, of the papers relating to them was without any ostensible reason or justification, and was really motivated by mala fides.

6. In the common counter-affidavit filed by the respondent State it is stated inter alia that it was true that the three Ministers who were Hindus among the Council of Ministers as on the relevant date had signed a note to the effect that the Hindus among the Council of Ministers had decided to nominate the petitioners as members of the respective Boards; the file containing these notes were seen to have been returned to the Secretariat somewhere about the 6th December 1979 and by that time the Council of Ministers had resigned, the President's rule had been notified, and the Governor had taken over the administration. It is mentioned therein that thereafter no notification was issued actually nominating the petitioners to be the members; the notification was not issued as the Ministry, the Hindu members of which had decided to nominate the petitioners, had resigned before the nomination could be issued; the decisions to nominate the petitioners by the Hindus among the Council of Ministers on 27-11-1979, had not taken effect as no notifications to that effect had been published by the Government; moreover, the said decisions had not been communicated in any manner to either of the petitioners by the Government or any other person having authority to communicate such decisions; such nominations would not come into effect unless the nominations were notified in the official Gazette; the suspicion of the petitioners that there were manipulations to their prejudice by delaying the transmission of the file relating to the nomination was unfounded; by the time the file relating to the nominations of the petitioners were received in the Secretariat on 5-12-1979 and 6-12-1979 respectively the State had come under the Presidential rule; the Hindus among the Council of Ministers who assumed office on 25-1-1980 had not so far taken up the question of nominating the persons to the Boards; in the peculiar circumstances of the case arising out of the resignation of the Council of Ministers itself, the Hindu members of which had taken a decision to nominate the petitioners, the Governor had decided that the matter might be considered by the Hindu members among the Council of Ministers which was scheduled to assume office after the election to be held on 21-1-1980; and the petitioners had no locus standi to maintain the original

petitions.

7. It was submitted by Sri Chandra-sekharan that in the case of statutory functions like the nomination of persons to be members of the Devaswom Board under the provisions of Sections 4 and 63 of the Act, besides the act of making the nomination, -to be such members, nothing more requires to be done to make such action effective. He contended with reference to the averments in the writ petitions that the fact that the petitioners were nominated to be members of the respective Boards was communicated to them by the three Hindus, among the Council of Ministers, who made the nomination. He would also contend that as a matter of fact for an action in the nature of one taken by them (Hindus among the Council of Ministers) communication to the persons concerned or Gazette notification publishing the nomination was not a condition precedent to the action taking effect. In support of this stand he took, he cited the decision of the Andhra High Court in *D. K. Krishnan v. Secretary, Regional Transport Authority, Chittoor* AIR 1956 AP 129 wherein, speaking for the Bench, Subba Rao C. J., held as follows :--

"Where the statute makes the laying of the rules before Parliament a condition precedent or the resolution of the Parliament a condition subsequent, there is no difficulty as, in the former case, the rule has no legal force at all till the condition precedent is complied with and in the latter case, it ceased to have force from the date of non-compliance with the condition subsequent.

Nor can there be any difficulty in a case where the Parliament or the Legislature as the case may be, specifically prescribes the legal effect of non-compliance with that condition. But more important question arises when the Parliament directs the laying of the rules before the Parliament without providing for the consequences of non-compliance with the rules.

..... Though the statute says that the rules shall be laid before the Parliament as the provisions in the statute is conceived in public interests, the dereliction of the duty by the Minister or other Officer concerned in not following the procedure should not be made to affect the members of the public governed by the rules."

He had also cited two decisions of this Court : (1) *Muthuswamy Kounden v. State of Iterate* 1960 KLJ 1319 ; and (2) *Poulose v. Asst. Educational Officer* 1967 KLT 1021, which had followed the principles laid down by the Division Bench of the Andhra High Court already referred to. Sri. Chandra-sekharan has also drawn my attention to the decision of a Division Bench of this Court in *Kochusara v. Gracy C. T.* 1973 KLT 880 to which decision I myself was a party, wherein, speaking for the Bench, Raghavan C. J. has stated as follows on the question as to when Rule 6-F of Chapter XXIII of the Kerala Educational Rules came into force :--

"The result again is that, in a case like this, the mere making of the subordinate legislation is sufficient to give validity to it; publication is not necessary for bringing it into force or giving it validity. Of course, if the subordinate legislation itself or the statute under which the subordinate legislation is made lays down

that the subordinate legislation will take effect only from a notified date, certainly the subordinate legislation can have effect only from such notified date. (A legislation like the Statutory Instruments Act of the United Kingdom, we reiterate, is necessary, if a different result is required). If no such date is prescribed, then the principle pointed out by Allon and the other learned authors and also approved by Ayyangar J. in *State of Maharashtra Vs. Hans George*, must prevail, viz., the rule that the subordinate legislation comes into force on the date on which it is made."

8. Sri T. C. N. Menon, the Addl. Advocate General, who appeared for the State contended that the decisions referred to by Sri Chandrasekharan, in regard to the date on which the notification issued in exercise of the power of subordinate or delegated legislation comes into effect; could not be applied to facts of the present cases where the petitioners rely on a tentative decision to nominate them to be members of the Devas-wom Board taken by the Hindu members among the Council of Ministers before it was finally decided upon and the decision communicated to them. With respect to the contention of the Addl. Advocate-General that the petitioners had no enforceable legal right inasmuch as no final decision nominating them to be members of the respective Boards was communicated to them, Sri Chandrasekharan submitted that there was no merit whatsoever in it, for it was quite clear, from Ext. P-1 notification dated 1-12-1979 with respect to Sri Upendranath Kurup, that no further decision or communication was contemplated before making the Gazette notification in regard to the nomination. The Addl. Advocate-General sought to meet this point raised by Sri Chandrasekharan by pointing out that in the case of Sri Upendranath Kurup there was a Gazette notification which was for the information of the public, which also served the purpose of communication of the decision to Upendranath Kurup (assuming that there was no separate communication to him).

9. It is well settled by the decision of the Supreme Court in *State of Punjab Vs. Amar Singh Harika*, that the mere passing of an order of dismissal is not (effective unless it is published and communicated to the officer concerned. In paragraph 11 of the judgment at page 1316 of the report Gajendragadkar C. J. who spoke for the Bench has stated as follows :--

"We are, therefore, reluctant to hold that an order of dismissal passed by an appropriate authority and kept on its file without communicating it to the officer concerned or otherwise publishing it will take effect as from the date on which the order is actually written out by the said authority; such an order can only be effective after it is communicated to the officer concerned or is otherwise published."

This position is seen to have been further clarified by the Supreme Court in *State of Punjab Vs. Khemi Ram*, wherein Shelat J., has held that it is the communication of the order which is essential, not its actual receipt by the officer concerned. In paragraph 16 of the judgment, at page 219 of the report, it was

stated as follows :--

"It will be seen that in all the decisions cited before us it was the communication of the impugned order which was held to be essential and not its actual receipt by the officer concerned and such communication Was held to be necessary because till the order is issued and actually set out to the person concerned the authority making such order would be in a position to change its mind and modify it if it thought fit. But once such an order is sent out, it goes out of the control of such an authority, and therefore, there would be no chance whatsoever of its changing its mind or modifying it. In our view, once an order is issued and it is sent out to the concerned Government servant, it must be held to have been communicated to him, no matter when he actually received it."

Sri Chandrasekharan would contend that for two reasons the decisions of the Supreme Court cited have no application to the facts of the present cases. His submission is that firstly the decisions of the Supreme Court were rendered in cases arising out of disciplinary proceedings culminating in punishments to the concerned officers; while it might be true that to give effect to an order, which operates to the prejudice of the persons against whom such order is passed, communication is necessary, for the order to take effect in case it confers benefit on a person, such communication is not necessary; secondly, modification of the order as a result of the change of mind cannot arise in this case because as soon as the act of nomination is completed the Hindu members among the Council of Ministers, so far as that action is concerned, become functus officio.

10. Having given my careful and anxious consideration to the scope of the act of nomination to be a member of the Devaswom Board u/s 4 or 63 of the Act, I am of the view that such nomination would not take effect unless it was either communicated to the person who was nominated to that office or there was a gazette notification in that behalf, though those sections are silent on that aspect of the matter. In the absence of a communication direct to the petitioners or by public notification, the persons in the position of the present petitioners do not derive an enforceable legal right to claim themselves to be members of the Board, without which they have no locus standi to invoke Article 226 of the Constitution for the issue of a writ of mandamus as sought in the writ petitions. The allegation in the writ petition that the act of nomination was communicated to the petitioner has not been established. The decisions holding that it is the date of the notification, not the date of publication, that is the effective date so far as notification issued in exercise of the powers of the delegated or subordinate powers or that even if rules framed have not been placed before the Parliament or the legislature for the specified period, or within a specified period, in the absence of a mandatory statutory direction to that effect, would not affect the validity of the rules so framed would not by parity of reasoning be applicable to a case where an individual claims right to occupy a public office in pursuance to an action purported to have been taken by persons who are authorised by the statute to do so unless that fact is communicated to him. In the present cases

unless the order nominating the petitioners to be members of the Devaswom Board had at least been issued, even if not actually received by them, they cannot claim to have been duly nominated to be members, conferring on them the right to enter upon the office to which they were stated to have been nominated. The submission made by Sri Chandrasekharan that the moment the Hindu members of the Council of Ministers had minuted that the petitioners were nominated to be members of the Devaswom Board, they (the Hindu members among the Council of Ministers who had made the minutes) become functus officio, invites the further question as to how and why a writ of mandamus should or could be issued against the State which in terms of the provisions contained in the Act does not come into the picture at all. The position, therefore, would be that no writ of mandamus could be issued against the Hindu members among the Council of Ministers who had minuted that the petitioners were to be nominated to be members of the Devaswom Board, as, according to the petitioners themselves, they have become functus officio; and no writ could be issued against the State, which, in terms of the provisions contained in the Act has no role to play in the matter of nomination of members to the Boards.

The result, therefore, is that the writ petitions are found to be misconceived, and are dismissed; however, in the circumstances of the case without any order as to costs.