

(1987) 12 KL CK 0004
In the High Court Of Kerala
Case No : W.A. No. 749 of 1986

N.C. Narayanan Nair and Another

APPELLANT

Vs

State of Kerala and Others

RESPONDENT

Date of Decision : 04-12-1987

Acts Referred:

Constitution of India, 1950 — Article 14, 226

Citation : (1988) 1 KLJ 589

Hon'ble Judges : V.S. Malimath, C.J;V. Bhaskaran Nambiar, J

Bench : Division Bench

Advocate : C.P. Sudhakara Prasad and K.V. Prakash, for the Appellant;

Final Decision : Allowed

Judgement

Bhaskaran Nambiar, J.—A Hospital Assistant Grade II faced with a possible reversion as part time Sweeper, and a part time Sweeper in a Hospital claiming to be promoted as Hospital Assistant Grade II joined together to challenge the amendment of Rule 5 of the Special Rules for the Last Grade Service made on 21st May, 1986 and published in the Gazette dated 24th June, 1986. The challenge did not meet with success in the Writ Petition filed under Article 226 of the Constitution and hence this appeal. We shall refer briefly to the facts, the relevant Government Orders, and the statutory provisions to understand the scope of the controversy. Both the appellants were appointed as Part-time Sweepers in two Government Hospitals in Kozhikode in 1984 under the Health Services Department. The Department had prepared a seniority list of the part-time contingent employees in that Department in the Kozhikode District as on 19-5-1984 where the first appellant is given rank 49 and the second appellant rank 71. Subsequently, the first appellant was promoted as Hospital Attendant Grade II on 14-7-1986 and it is admitted that he was so promoted in respect of a vacancy that arose before 24th June, 1986. According to the appellants when the Special Rules were amended in June, 1986, Part-time Sweepers could be promoted as Hospital Attendants Grade II, only on the basis of a common

seniority list of Part-time contingent employees of all Departments prepared on Revenue District wise basis, without reference to the seniority in the Health Services Department, where they were initially appointed. The first appellant apprehended reversion and the second appellant stated that he was denied promotion and they both challenged the amendment.

2. Part-time contingent Sweepers are governed by the Special Rules made in 1975. The appointing authority for these Sweepers in Kozhikode District was the highest officer of the District having jurisdiction over the office or the institution and it was the District Medical Officer, Kozhikode, who appointed the appellants as Part-time contingent Sweepers. They have to undergo a period of probation and become full members thereafter. The transfer and postings are to be made by the appointing authority and therefore limits his authority to transfer to units or institutions under his control. But a member of this Part-time contingent service may, on grounds of administrative necessity be transferred from the jurisdiction of one appointing authority to that of another authority. Such transfers shall be made by the authority to which the appointing authorities are, administratively subordinate. When, however, transfer is made on request, with the mutual consent of the appointing authorities, the person desiring transfer shall forego his earlier seniority.

3. It is sufficient for us to note that the Special Rules for the Kerala Part-time Contingent Service primarily preserved the seniority of the part-time contingent employee in the unit or institution where he was originally appointed, unless he lost it by his own conduct of a request transfer to any other unit of his choice.

4. As early as 1966, the Government had framed the Special Rules for the Kerala Last Grade Service. Rule 1 mentioned the categories of posts constituting the service. Hospital Attendant Grade II is include in category 4. The method of appointment was provided in rule 5 thus:-

Category 4:

(i) By promotion from Part-time Contingent Employees of the Department concerned;

or

(ii) In the absence of suitable hands under item (i) above, by promotion from the part-time Contingent Employees of other Departments;

or

(iii) In the absence of suitable persons under items (i) and (ii) above, by recruitment through Employment Exchange.

5. The appointing Authority was:

for (b) Offices and Institutions in the Districts

(b) The Highest Officer of the District having jurisdiction over the office or the

Institution concerned.

for (c) Institutions over which District Officers have no jurisdiction

(c) Head of the Institution concerned.

The qualification prescribed was:

Must be able to read and write Malayalam or Tamil or Kannada.

6. The method of appointment for Category 4 in rule 5 was amended in 1986 thus:-

Category 4 :

(i) By promotion of part-time contingent employees from the common seniority list prepared on Revenue District-wise basis;

or

(ii) In the absence of suitable hands under item (i) above by, recruitment through Employment Exchange.

Note-Promotion to this category attached to the under-mentioned Departments shall be made from part-time contingent employees of the Department concerned on the basis of seniority and in the absence of suitable hands for such promotion, appointment shall be made by recruitment through Employment Exchange.

(i) Department of Animal Husbandry.

(ii) Department of Museums and Zoos.

7. The Explanatory Note for this Amendment read thus:-

In G.O (MS) No. 71/82 GAD dated 18-3-1982, it has been ordered that appointment to the posts reserved in the Last Grade Service for the part-time contingent employees will be made by promotion of the part-time contingent employees based on a common seniority list of part-time contingent employees of all Departments prepared on Revenue District-wise basis by the District Collectors. It has also been ordered in the above G. O. that the part-time contingent posts as well as the posts in the Last Grade Service attached to the Departments of Animal Husbandry and Museums and Zoos will be excluded from the common seniority list because of the special nature of duties and responsibilities attached to the last grade posts in those Departments. The Special Rules for the Kerala Last Grade Service have to be amended suitably to give statutory validity to the executive orders issued in GO. (MS) No. 71/82/GAD dated 18-3-1982.

This notification is intended to achieve the above object."

G. O. (MS) No. 71/82/GAD. dated 18-3-1982 had stated thus:-

With a view to provide further avenues of promotion to the part-time contingent employees to regular posts under the Last Grade Service, Government have reserved certain posts in the regular service for being appointed by the part-time contingent employees. Necessary provision has also been incorporated in the special rules for the Kerala Last Grade Service to achieve the purpose. It has been brought to the notice of Government that in certain departments the part-time contingent employees with 2 or 3 years service get promotion to regular posts whereas in certain departments employees with a service of 20 years do not get promotion. With a view to avoid the existing disparities in the chances of promotion; of Part-time contingent employees to regular posts, the Kerala Part-time Contingency Employees Union represented to Government that a common seniority list of Part-time contingent employees of all the departments of each Revenue District may be prepared. After examining the above request in detail Government are pleased to issue the following orders:-

(1) Appointment to the posts reserved in the Last Grade Service for the part-time contingent employees will be made by promotion to the part-time contingent employees based on a common seniority list of part-time contingent employees of all departments prepared on Revenue District-wise basis.

(2) The work of preparation and maintenance of the common seniority list and making of promotion from the list, etc: in each District will be entrusted to the District Collector concerned."

8. The appellants contend that the amendment to rule 5 made in 1986 is unreasonable, unjust and unworkable and thus beyond the rule making power conferred under the Public Services Act and is violative of Article 14 of the Constitution as it draws Sweepers from other Departments to be promoted as Hospital Attendants without regard to the experience gained and without reference to the unaccustomed and unfamiliar tasks associated with Sweepers in hospitals. It is said that Sweepers in hospitals are, for all practical purposes, Hospital Assistants Grade II except that the Sweepers belong to the Part-time Contingent staff and the Hospital Attendants belong to the higher grade of Last Grade Servants.

9. Possibly, these contentions were not advanced in this form before the learned single Judge who rejected the contentions thus:-

It is contended that some of the posts in category 4 in the last grade service require some sort of expertise and experience (Dhobies, Hospital Attender Gr. II) and only part-time contingent employees in the Health Services Department would acquire such experience or skill and to appoint part-time contingent employees of other departments to such posts in the Health Services Department would be contrary to public policy.

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For the posts indicated by learned counsel for the petitioners no such experience

on qualification is prescribed. In these circumstances, the argument that promotion of part-time contingent employees from other departments would be against public policy cannot be accepted. Further, I am unable to see how a person attending to sweeping work in a hospital could acquire any skill or expertise in the work of Dhobie or Hospital Attender".

"There is no substance in the contention that only part-time contingent employees working in the Health Services Department would gain experience in the matter of duties attached to Hospital Attender Gr. II. Petitioners have not been able to place before me any order laying down the duties of part-time contingent employees. Considering the nature of duties and functions described in Ext. P6, it is difficult to accept that part-time contingent employees in the Health Services Department alone would gain experience in the matter and such employees in other Departments would be unfit to discharge the functions and duties attached to the post of Hospital Attender Gr. II.

10. Unreasonableness of a statutory rule, uncertain in its language and unworkable in its operation, leading to the reasonable conclusion that it is manifestly arbitrary, can invalidate the rule as beyond the powers conferred under the statute, for "no authority would have intended to give authority to make such rules". This is a question of competence of the authority apart from the violation of a fundamental right under Article 14. This principle is no longer in doubt especially after Lord Justice Diplock's statement of the law in *Mixam's Properties Ltd., v Chertsey Urban District Council* (1964) (1) Q B. 214) thus:-

Thus, the kind of unreasonableness which invalidates a bye-law is not the antonym of "reasonableness" in the sense of which that expression is used in the common law, but such manifest arbitrariness injustice or partiality that a court would say : "Parliament never intended to to give authority to make such rules; they are unreasonable and ultra vires.

and its affirmation by the Supreme Court in the *Indian Express* case (A.I.R. 1986 SC. 515) thus:-

A piece of subordinate legislation does not carry the same degree of immunity which is enjoyed by a statute passed by a competent legislature. Subordinate legislation may be questioned on any of the grounds on which plenary legislation is questioned"

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It may also be questioned on the ground that it is unreasonable, not in the sense of not being reasonable, but in the sense that it is manifestly arbitrary. In England, the Judges would say "Parliament never Intended authority to make such rules. They are unreasonable and ultra vires.

11. In a recent decision in *Pankajakshy v. George Mathew* (1987 (2) KLT. 723), after referring to the various decisions of the Supreme Court, it was stated thus:-

Thus, the rule made under a statute by an authority delegated for the purpose can be challenged on the ground (1) that it is ultra vires of the Act; (2) it is opposed to Fundamental Rights; (3) it is opposed to other plenary laws. To ascertain whether a rule is ultra vires of the Act, the Court can go into the question (a) whether it contravenes expressly or impliedly any of the provisions of the Statute; (b) whether it achieves the intent and object of the Act; and (c) whether it is "unreasonable" to be manifestly arbitrary, unjust or partial implying thereby want of authority to make such rules.

12. The rules as it stood prior to the amendment in 1986, provided that the posts in category 4 which included Hospital Assistant Grade II could be filled by promotion from Part-time Contingent Employees of the Department concerned. It was agreed before us by the Government Pleader and the counsel for the appellants, that promotion envisaged under this rule was only of Part-time Contingent staff borne on a District-wise basis in the same Department. To be more specific seniority of Part-time Sweepers in the Health Services Department in a particular District was the only criterion for promotion as Health Assistant Grade II in that District. It was also agreed on this basis that there was no state-wise seniority of Part-time Contingent staff in any Department or for all Departments put together.

13. The change that was intended to be effected after the amendment was that promotions to the Last Grade Service was to be made by promotion of the Part-time contingent employees based on a common seniority list of Part-time Contingent employees of all Departments in a Revenue District. Thus a Health Assistant Grade II in the Health Services Department has to be appointed by taking the seniority of all Part-time Contingent staff in all the Departments in that District. It is said that this amendment only enlarges the scope for promotion and includes a larger number of persons in the feeder category and that it does not, in any way, affect any principle or right that could be advanced or asserted. It is not the abstract principle so stated that arises for considerations; but the question is whether those principles can be applied within the frame work of the present rules.

14. We are of the view that the amendment now effected in 1986 in respect of category 4 in rule 5 is impracticable and unworkable and therefore unreasonable and thus beyond the powers conferred under the Public Services Act for, the Act never intended that such rules would be made by the Government. And we have our reasons.

15. Seniority is relevant at two stages; (a) when promotion is claimed and (b) when retrenchment is effected. It is reckoned for going up or coming down the service ladder. At both the stages where the seniority is relevant, the rule does not provide any machinery for the fixation of a combined seniority of the personnel in all Departments in a Revenue District. When there are units of several Departments in each District, and when there are Part-time Contingent staff in each of these independent units, the appointing authority or any higher

authority in each unit or institution, can prepare the seniority in those establishments. That authority cannot fix the seniority of other establishments or Departments. There is no common authority which has jurisdiction to fix the seniority in all the Departments. It is, therefore, impossible, as it is, to make appointments with reference to a combined seniority which is not correlated to any functional authority.

16. Considerable reliance is placed on an administrative instruction issued on 18-3-1982, (Ext. R1 (c), in which it is stated, "the work of preparation and maintenance of the common seniority and making any promotion from the list etc., in each District will be entrusted to the District Collector concerned." It is difficult to visualise an extra statutory authority wielding some sort of influence or control over all Departments in the District, at least in the preparation of the seniority list of the staff of those independent Departments. It is relevant to note that the District and Sessions Judge is the officer in the judicial Department empowered to appoint Part-time Contingent employees in the Judicial Department of the District. Similarly, the Advocate General makes those appointments in his office. The Secretary to the Governor makes appointments in the Governor's Secretariat at Trivandrum. Is it possible to conclude that the statute and the rules have empowered the Collector to make a seniority list of the employees in these offices, club them with their counter parts in other Departments in that District and fix a combined seniority? When the statutory rule prescribes the appointing authority and he is supreme in his Department for purposes of fixation of seniority, transfer etc., of his staff, the Government order enabling the District Collector to discharge these duties is plainly opposed to the rule itself; The executive instruction can have no independent existence apart from the rules. Ext. R1 (c) has thus to be ignored. The position, therefore, is that promotions have to be made on the basis of a seniority of the Part-time Contingent staff in several Departments, when modalities for fixation of combined seniority are not prescribed by rules. The District Collector cannot be administratively authorised to function as a higher authority over the appointing authorities in other independent and separate Departments-Thus for the purpose of this rule, the District Collector has no superior authority over District and Sessions Judge, District Medical Officer, Advocate General or Secretary to the Governor etc. An authority to fix a common seniority of the staff in several Departments conferred on the District Collector is clearly inconceivable and the rule thus expects the impossible when it directs promotion on the basis of a common seniority in several Departments, prepared by a District Collector on the strength of a defunct administrative order.

17. Disputes may arise when a common seniority is fixed. Disputes may also arise regarding inter se seniority in the same Department or regarding the over - all seniority in all the Departments. There is no authority to settle those disputes. The Collector cannot be expected to settle these disputes of seniority pertaining to all the Departments. The heads of institutions/units in a District are not administrative subordinates of the Collector and the Collector cannot, by virtue of

administrative instructions issued before the rules were amended, request or demand from these heads of institutions/units, particulars to enable the Collector to sit in judgment over the question of seniority raised by aggrieved parties. Nor is there any provision under which the Collector can summon the employees in other Departments for any hearing to settle the disputed seniority. Assuming that the District Collector has implied authority to settle seniority disputes in all the Departments in that District, there is no appellate or revisional authority competent to decide the legality or regularity of the decision taken or order made regarding seniority. A disputed question of seniority remains unsettled under the circumstances and a rule which prescribes promotion on the basis of seniority which is never settled is incapable of uniform enforcement.

18. When retrenchment is effected, the last come is the first to go. If the last of the Hospital Assistants Grade II has to be reverted, he may have to displace the juniormost Part-time Sweeper. That Sweeper may be working in some other Department and he may face retrenchment. In such case, reversion of the Hospital Assistant Grade II in the District Hospital will have to be made by the Collector, transferring him to another Department as Sweeper and the Collector may have to order retrenchment of the junior-most Sweeper in that Department and the reversion and retrenchment may result in a chain reaction in several Departments. Thus transfers, promotion, reversion etc., of the Last Grade Staff are sought to be conferred on the Collector under the administrative instructions when the rule provides that the authority for the purpose is the appointing authority in each institution. The defunct executive order of 1982 cannot breathe life to an impracticable and unreasonable rule made later.

19. Thus the impugned amendment of the rule is impossible of implementation. It is manifestly unworkable; it is plainly unreasonable. The Public Services Act never intended that an impracticable condition of service should be imposed on any member governed by the Last Grade Special Rules. The amendment is thus beyond the powers conferred on the rule making authority under the Kerala Public Services Act.

20. It is contended on behalf of the appellants that Part-time Sweepers in Hospitals are more suited to be promoted as Hospital Assistants Grade II and their qualification, experience and special equipment are not taken into consideration for the purposes of promotion and that Sweepers in other Departments cannot be promoted as Hospital Attendants as long as there are experienced Sweepers in the Hospitals. This is countered by the Government stating that Sweeper in Hospitals and in other Departments do the same work and there is nothing special for a Sweeper in the Hospital to claim any preferential treatment.

21. As early as 1975, the Government have specified the duties and functions of Hospital Attendants Grade II, Hospital Attendants Grade I etc. in Ext. P6. It is stated there that Hospital Attendants Grade II will consist of Cleaners, Sweepers, Thotti, Scavenger, etc., and their duties include removal of bed pans and urinals

after use and cleaning them, giving bed pans and urinals to patients, helping the Nursing Assistants or Nurse in giving the Enema, Bowel wash, clean the beds when soiled by motion or urine etc. It is, however, stated in the additional counter affidavit thus:-

It is submitted that in the Health Services Department part time contingent sweepers are posted also in offices like Directorate of Health Services, District Medical Offices, Public Health Training School, Family Welfare Training Centre, Government Analytical Laboratory and Public Health Laboratory. The duties of Part-time contingent sweepers posted in these offices are to sweep and clean the surroundings and rooms of these offices. There is no posts of Hospital Attendant in these offices. Hence the part-time contingent sweepers posted in these offices do not have even the remote chance of getting acquaintance with any of the duties of Hospital Attendant Grade II specified in Ext. p6.

Ext. p6 is sufficiently informative and clearly indicates the nature of the duties of the Hospital Attendant Grade II. He sweeps, cleans and attends to the urgent needs of the patients, of course in a restricted and specified sphere. It is difficult to accept that the part-time contingent staff attached to a hospital has no special trait, mark or feature and that they have not acquired any additional or extra experience which treat them as a distinct class, for promotion as Hospital Assistants. Relevant qualifications and experience have thus not been taken into consideration, when the rule enables Hospital Attendants to be appointed by promoting part-time contingent staff attached to other departments even where contingent staff who have gained experience and skill in hospitals is still available. The impugned amendment is discriminatory, arbitrary and violative of Article 14as well.

22. We have also bestowed our attention to the question whether, instead of striking down the amendment, it could not still be saved by reading it down. Even that may not solve the problem and we thought it better that the earlier rule is allowed to revive rather than maintain the new rule.

23. The new rule 5 (1) only states that the common seniority list has to be prepared on Revenue District basis. It does not state that it should be prepared in respect of all employees of all Departments in that District. It is, therefore, stated that the new rule also does not envisage a common seniority of all the employees and all Departments in a particular Revenue District. It is not possible to accept this interpretation for more than one reason. It is clearly opposed to the objects and reasons as is clear from the Explanatory Note. Secondly, if a common seniority of all the Departments in a District was not required, there was no necessity for an amendment as the same purpose was achieved by the unamended rule 5(1). Moreover, under the old rule, Part-time Contingent employees of other Departments were entitled to be promoted in the absence of Part-time Contingent employees of the Department concerned. It is nobody's case that the amendment was intended to take away that right. The author of the rule, the State also has no contention that the employees of other

Departments in the same District were not included for purposes of seniority in sub-rule (1) after amendment. Thus there is no scope for any restrictive interpretation to the amended rule.

24. It. was contended that we cannot sit in Judgment over the policy of the State. We do agree. It is not the policy that is in challenge. It is the provision which attempts to effectuate that policy that is in challenge. An unreasonable, arbitrary, discriminatory rule cannot have any constitutional protection on the ground that a Government policy supports its frame. Even a good policy cannot sustain a bad rule.

25. It was also said that the amendment was made as it was noticed that in some Departments Part-time Contingent employees with a service of two or three years get promotion, whereas in some other Departments Part-time Contingent employees with 20 years service did not get promotion. It was also stated that there are 9517 posts in category 4 in the Health services Department whereas there are only 178 posts in the Museum and Zoo Department. It may be asked whether the larger number in Hospital Sweepers were not entitled to a higher quota for promotion even on the facts stated in the counter affidavit. But it is unnecessary to consider these facts any more as they do not affect our reasoning and conclusion. In the result, we hold that the amendment inserted as per GO.(P) No. 163/86/GAD. dated 21st May, 1986 and published in the Gazette dated 24th June, 1986 in so far as it substituted Rule 5 for Category 4 in the Kerala Last Grade Service Special Rules is ultra vires of the Kerala Public Services Act and unconstitutional as offending Article 14 of the Constitution. We direct that the promotion to the post of Hospital Assistant Grad II in a Revenue District shall be made according to the unamended rule 5 regarding category 4 and the claims of the second appellant shall be considered on that basis for promotion as Hospital Assistant Grade II without reference to the amendment in 1986. No relief is now required to be granted to the first appellant as it is admitted that he did not face reversion either before or after the amendment of the rules in 1986. The Judgment of the learned Single Judge is set aside and the Writ Appeal is allowed and the O.P. is disposed of accordingly. No costs.