

(2010) 11 SC CK 0086

In the Supreme Court Of India

Case No : Civil Appeal No"s. 10098 and 10102 of 2010 (Arising out of S.L.P. (C) No"s. 1500-1504 of 2008)

R. Jayarama and Others

APPELLANT

Vs

State of Kerala and Others

RESPONDENT

Date of Decision : 29-11-2010

Acts Referred:

Andhra Pradesh State and Subordinate Service Rules, 1996 — Rule 47
Kerala State and Subordinate Services Rules, 1958 — Rule 17(A), 39

Citation : (2011) 128 FLR 538 : (2010) 12 SCALE 563

Hon'ble Judges : P. Sathasivam, J;B. S. Chauhan, J

Bench : Division Bench

Advocate : Jaideep Gupta, R. Venkataramani, C.S. Rajan, M. Girish Kumar, Aljo K. Joseph, Vijay Kumar, A. Raghunath, G. Prakash, Beena Prakash, V. Senthil, Radha Shyam Jena, B.V. Deepak, Dilip Pillai and T.T.K. Deepak and Co, for the Appellant;

Final Decision : Disposed Of

Judgement

P. Sathasivam, J.—Leave granted.

2. These appeals are directed against the common final judgment and orders passed by the High Court of Kerala at Ernakulam in O.P. No. 5818 of 2002 and O.P. No. 31240 of 2001 dated 29.08.2006 and in R.P. Nos. 1163, 1164 and 1165 of 2006 dated 07.02.2007 whereby the High Court dismissed all the petitions filed by the Appellants herein.

3. Brief facts:

(a) By Government Order dated 18.11.1974, the Government of Kerala prescribed that 50% of the posts of Sub Inspectors in the District Armed Reserve will be filled up by direct recruitment as in the case of Sub Inspectors of the Local Police. The Appellants are the Sub Inspectors of Police in the District Armed Reserve. A notification for appointment to the post of Sub Inspectors of Police by

direct recruitment in the District Armed Reserve was issued by the Public Service Commission (hereinafter referred to as "PSC") in the Gazette dated 24.09.1985.

(b) Pursuant to the said notification, the Appellants herein applied for the said post. After the written test, physical test and interview, a rank list was prepared for direct recruitment to the post of Sub Inspector of Police in the District Armed Reserve on 05.06.1990. The Appellants were also included in the rank list. At the time, when the said rank list came into force, except special recruits, no one was appointed by direct recruitment for the post of Sub Inspector in the District Armed Reserve as prescribed in the notification dated 24.09.1985 issued by the PSC.

(c) On 05.06.1990, there were 207 posts of Sub Inspectors in the District Armed Reserve. Out of the said posts, 11 posts were occupied by persons appointed under Rule 17A of the Kerala State and Subordinate Services Rules, 1958 (hereinafter referred to as "KS & SSR") from among the Scheduled Castes and Scheduled Tribes. The remaining 196 posts were occupied by the promotees from the feeder category. The promotees occupied the posts in excess of the ratio purely on a provisional basis. On 09.08.1990, after the rank list came into force, only 40 persons from that list were advised for appointment since only 40 vacancies were reported to the PSC at that time.

(d) Since the rank holders were not advised by the PSC, the candidates including the Appellants filed O.P. No. 2062 of 1991 and similar other petitions before the High Court for directing the authority to report the vacancies and also to direct the PSC to advice for the vacancies available in the direct recruitment quota. On 30.05.1991, the High Court passed an interim order in CMP No. 3685 of 1991 in O.P. No. 2062 of 1991 directing the first Respondent therein to report all the vacancies available to the PSC before 03.06.1991. In the counter affidavit dated 25.09.1990, filed in O.P. No. 8188 of 1990, the Government had stated that there were 207 posts and only 11 posts were occupied by directly recruited Sub Inspectors in the District Armed Reserve.

(e) On the basis of the interim order, instead of reporting 58 vacancies only 20 vacancies were reported to the PSC and they were advised on 26.02.1992. There were 207 sanctioned posts of reserved Sub Inspectors in the District Armed Reserve and 50% has to be given to direct recruits and only after giving appointment to them, promotees could put forward any claim which was made clear by the Director General of Police, Police Headquarters, Thiruvananthapuram to the Deputy Inspector General, Northern Range, Calicut, by communication dated 14.01.1992.

(f) Since on the basis of the interim order dated 30.05.1991, passed by the High Court in C.M.P. No. 3685 of 1991 in O.P. No. 2062 of 1991, the vacancies legitimately available to direct recruits were not reported to the PSC, another petition being C.M.P. No. 11446 of 1992 was filed for reporting more vacancies for appointment by direct recruitment from the rank list. In the said petition, on

29.06.1992, the High Court issued an order to report 28 vacancies to the PSC for being advised. Thereafter, the High Court issued an order on 27.11.1992 in the same petition to advise 28 persons including the Appellants from rank list to 28 vacancies reported to the PSC. In that petition, it was made clear that the advise given on the basis of the order, will be provisional and the candidates advised would be entitled to get regular appointment only if it was ultimately found that the vacancies for which advise was made arose during the currency of the rank list.

(g) Though 40 persons were advised on 09.08.1990, 6 persons did not join duty. For the 6 non-joining duty vacancies, candidates were advised on 05.03.1991. Thereafter, for 20 vacancies reported on the basis of the interim order, 20 candidates from the rank list were advised on 04.01.1993. Among the 28 candidates advised on the basis of the order issued by the High Court, one non-joining duty vacancy arose. For that vacancy, one more candidate was advised from the rank list on 03.03.1993. Under the first proviso to Rule 13 of the PSC Rules of Procedure, the validity of the rank list was till 15.04.1993. Since under the said proviso, in cases, where candidates were included in the rank list was for admission to Training Course that leads to automatic appointment, the validity of the rank list shall be one year from the date of finalization of the rank list or after one month from the date of commencement of the course in respect of the last batch selected from the list within a period of one year from the date of finalization of the rank list, whichever is later. The Appellants were advised for vacancies available for direct recruits even at the time when the rank list came into force on 05.06.1990. It is the claim of the Appellants that on the basis of Ex. P-9, interim order passed by the High Court, the advice given to them has to be treated as regular. However, O.P. No. 2062 of 1991 and other connected petitions were dismissed by the High Court by judgment dated 20.07.1995 relying on the judgment in O.P. No. 5676 of 1988.

(h) After the advise of the Appellants, by order dated 26.12.1995, a provisional seniority list of reserved Sub Inspectors, as on 01.01.1991, was published by the Inspector General of Police (Admn.) in the District Armed Reserve. Since the case of 28 persons including the Appellants who were advised on 04.01.1993 were not dealt with in a just and equitable manner, the Government having realized that 28 vacancies for which direct recruitment should have been made existed during the currency of rank list, issued Government Order dated 17.06.1999 invoking the power under Rule 39 of the KS & SSR for continuing 28 persons in service based on the advise given by the PSC.

(i) In the seniority list, the names of only 111 persons were included whereas, at that time, there were 207 vacancies of Sub Inspectors in the District Armed Reserve filled up on provisional basis and by direct recruitment. While in the seniority list, only 34 persons, who were directly recruited were included, all the provisional promotees were not included in the seniority list. It is because of this reason, the list contained only 111 persons instead of 207 persons.

(j) On 01.08.2001, a final seniority list of reserved Sub Inspectors as on 01.01.1996 was prepared and published by the Director General of Police, Police Headquarters, Thiruvananthapuram in the District Armed Reserve. It is the claim of the Appellants that in the order dated 01.08.2001, if the facts stated in the communication of Director General of Police was correctly followed, direct recruits should have been placed above the promotees. Hence, all the direct recruits including the 6 persons advised in the non-joining duty vacancies on 05.03.1991, 20 persons advised on 26.02.1992 and 28 persons advised on 04.01.1993 should have been shown consecutively from S. No. 1 onwards in the seniority list. It is highlighted that when that is done, necessarily the Appellants will be placed above all the provisional promotees shown in the seniority list.

(k) Some of the promotees filed O.P. No. 31240 of 2001 before the High Court on 15.10.2001 challenging the seniority list and sought for a direction to exclude 29 persons including the Appellants who got retention through the order dated 17.06.1999 from the seniority list and promote them from reserve Sub Inspectors to reserve Inspectors. One of the Appellants, namely, Mr. A.A. Jolly, who was not a party in O.P. Nos. 4352, 9024 and 2062 of 1991 which were disposed of by the High Court by its judgment dated 20.07.1995 filed Writ Appeal Nos. 2191, 2189 and 2190 of 2002 before the High Court seeking a declaration that he was validly advised and appointed as Sub Inspector in the District Armed Reserve for direct recruitment from the rank list which came into force on 05.06.1990 and based on that list he is entitled to get all consequential benefits.

(l) The third Respondent herein, namely, Mr. P.B. Suresh Kumar, was appointed as Assistant Sub Inspector by direct recruitment in 1989. He continued as Assistant Sub Inspector till 1995 and was promoted as Sub Inspector of Police only in 1995. While the Appellants were working as Sub Inspectors, he was working under them as Assistant Sub Inspector but he was placed above the Appellants and shown at S. No. 17 in the seniority list. At the same time, the Appellants are shown at S. Nos. 45, 47, 49, 51, 59, 61 and 67 respectively. The 3rd Respondent, who is to be placed below the Appellants and who was, in fact, promoted as Sub Inspector long after the advise of the Appellants as Sub Inspectors is placed above them violating the 50:50 ratio for direct recruitment and promotion. Similarly, a number of promotees were also placed above the Appellants violating the service rules. Therefore, the Appellants filed O.P. No. 5818 of 2002 seeking a writ of mandamus directing Respondent Nos. 1 & 2, namely, the State of Kerala and Director General of Police, Police Headquarters, to give seniority to direct recruits including themselves based on the advise and appointment made from Ex. P-2, rank list dated 05.06.1990, by pushing down the promotees including Respondent No. 3 herein below the Appellants working out the ratio prescribed in the Government Order dated 18.11.1974. The Appellants also sought a writ of mandamus declaring that they were entitled to be assigned in the seniority list of Sub Inspectors strictly working out the ratio of 50:50 for direct recruits and promotees as prescribed in the said Government

Order.

(m) By a common order dated 29.08.2006, the High Court disposed of Writ Appeal Nos. 2189, 2190 and 2191 of 2002 and O.P. Nos. 3596 of 1999, 31240 of 2001 and 5818 of 2002. However, the High Court dismissed all the writ appeals and O.P. No. 3596 of 1999 and allowed O.P. No. 5818 of 2002 to the extent holding that the seniority of Respondent No. 3 above the Appellants is illegal and partly allowed O.P. No. 31240 of 2001 holding that the order dated 17.06.1999 retaining the persons including the Appellants in service cannot operate retrospectively to adversely affect the seniority of persons, who were already promoted before the date of its issue. The High Court further held that it can at best take effect only from the date of its issue to save their appointments and, consequently, such persons except the 7 persons advised earlier can take seniority only from the date of the order i.e. 17.06.1999.

(n) Against the dismissal of the writ appeals, Mr. A.A. Jolly filed Review Petition Nos. 1163, 1164 and 1165 of 2006 before the High Court. By a common order dated 07.02.2007, the High Court dismissed all the review petitions holding that even if there is a wrong finding, the remedy open to the Petitioner is to file an appeal.

(o) In those circumstances, the above appeals by way of special leave petitions have been preferred by the Appellants herein.

4. Heard Mr. R. Venkataramani, learned senior counsel for the Appellants, Mr. C.S. Rajan, learned senior counsel for the promotees and Mr. Jaideep Gupta, learned senior counsel for the State of Kerala.

5. Questions for consideration:

The questions which arise for consideration in these appeals are:

(i) Whether the High Court committed an error in holding that the seniority of the Appellants will take effect from the date of the Government Order i.e. 17.06.1999 and in not calculating the seniority of the Appellants from the date of their advise by the PSC?

(ii) Whether the High Court was justified in upsetting the seniority of the Appellants by partly allowing O.P. No. 31240 of 2001 without considering the facts and circumstances of the case in a perspective manner?

6. It is not in dispute that all the Appellants were appointed as Reserve Sub Inspectors in the District Armed Reserve of the Kerala Police as per the advise of the Kerala State Public Service Commission and commenced their training on 15.03.1993. They are now working as Reserve Inspectors in the District Armed Reserve. As per G.O.(MS) No. 171/74/Home dated 18.11.1974, 50% of the posts of Sub Inspectors in the District Armed Reserve (Reserve Sub Inspectors) will have to be filled up by direct recruitment. The Kerala State Public Service Commission invited applications for the direct recruitment of Reserve Sub

Inspectors vide Notification dated 24.09.1985 and the rank list came into force with effect from 05.06.1990. The particulars furnished show that from the list 40 candidates were advised on 09.08.1990 and out of which 6 candidates did not join and hence 6 other candidates were advised on 05.03.1991. Subsequently, 20 candidates were advised on 26.02.1992. In the meantime, 11 candidates in the rank list filed O.P. No. 2062 of 1991 before the High Court and the High Court by order dated 29.06.1992 directed the Director General of Police to report 28 vacancies to the PSC and issued another interim order on 27.11.1992 to the PSC to advise candidates for the 28 vacancies. Accordingly, the Kerala State Public Service Commission advised 28 candidates on 04.01.1993 and one candidate on 03.03.1993 against one among the 28 who did not join. Training of the candidates advised on 26.02.1992, 04.01.1993 and 03.03.1993 commenced on 15.03.1993 and completed on 15.12.1993.

7. It is also not in dispute that the High Court ultimately dismissed O.P. No. 2062 of 1991 and other related petitions on 20.07.1995. In view of the same, the Secretary, Kerala Public Service Commission by a letter dated 09.11.1995, informed the Government for discharging the candidates advised on 04.01.1993 and 03.03.1993. The Government, vide G.O.(Rt.) No. 3241/99/Home dated 17.06.1999, issued orders to retain them in service by invoking Rule 39 of the KS & SSR, 1958. Accordingly, they were assigned seniority as Reserve Sub Inspectors with effect from their date of advise and included their names in the finalized seniority list of Reserve Sub Inspectors as on 01.01.1996. However, some of the promotees filed O.P. No. 5818 of 2002 before the High Court with a prayer to revise the seniority assigned to the directly recruited Assistant Sub Inspector promoted as Reserve Sub Inspector before completing five years of service. O.P. No. 31240 of 2001 was filed against the seniority given to directly recruited Reserve Sub Inspectors alleging that they were appointed in excess of the 50 % quota for direct recruits. It is further seen that in the common judgment dated 29.08.2006, the High Court found that only 7 candidates against the candidates advised and appointed as per the interim orders dated 29.06.1992 and 27.11.1992 (candidates advised on 04.01.1993 and 03.03.1993) are to be placed in the 50; quota for direct recruits and the remaining persons are eligible for seniority with effect from 17.06.1999, i.e., the date of the Government order.

8. Mr. R. Venkataramani, learned senior counsel for the Appellants, by drawing our attention to the decision of this Court in Government of Andhra Pradesh and Others Vs. Sri D. Janardhana Rao and Another, , submitted that having exercised the power under Rule 39 of KS & SSR, in the interest of justice and equity, the relevant date for the Appellants to retain them in service is as on the date of advise i.e. 04.01.1993 and not the date of the Government Order, i.e. 17.06.1999. No doubt, in that decision, it was held that the power under Rule 47 of the A.P. State and Subordinate Services Rules (which is similar to Rule 39 of the KS & SS Rules) is to be exercised in the interest of justice and equity and it was further held that the occasion for acting under Rule 47 may well arise after

the attention of the Government is drawn to a case where there is a failure of justice. It is further held that in such cases, justice can be done only by exercising the power under Rule 47 with retrospective effect, otherwise the object and purpose of the rule will be largely frustrated. Considering the admitted factual position, the Appellants were appointed on 04.01.1993 based on the interim order passed by the High Court and ultimately their petitions came to be dismissed and in view of the peculiar position and by showing sympathetic attitude, the Government exercising power under Rule 39, passed a Government Order dated 17.06.1999, to retain them in the service. Hence, the decision relied on by Mr. R. Venkataramani is not helpful to the cases on hand.

9. By basing reliance on the judgment of this Court in *Balwant Singh Narwal and Others Vs. State of Haryana and Others*, , Mr. Venkataramani submitted that the Appellants, who were selected against earlier vacancies but could not be appointed along with others of the same batch due to certain technical difficulties, when appointed subsequently, will have to be placed above those who were appointed against the subsequent vacancies. The said claim is also liable to be rejected since it is settled law that selection by the PSC is merely recommendatory and does not imply automatic appointment and that the appointing authorities should not give notional seniority without valid reason, from a retrospective date, which would affect the seniority of those who have already entered into service.

10. In *Surinder Singh and Others Vs. State of Punjab and Another*, , this Court, in categorical terms, held that it is improper exercise of power to make appointments over and above those advertised. The Court further held that it is only in rare and exceptional circumstances and in emergent situations that this rule can be deviated from. It was further held that before any advertisement is issued, it would be incumbent upon the authorities to take into account the existing vacancies and anticipated vacancies. It was clarified that it is not as a matter of course that the authority can fill up more posts than advertised even if the vacancies had not been worked out properly. The same view has been reiterated by a Bench of three Judges in a subsequent decision in *Rakhi Ray and Others Vs. The High Court of Delhi and Others*, .

11. As mentioned earlier, it is not in dispute that the advise was made on 04.01.1993 by the Government to the PSC on the basis of interim order passed by the High Court. Based on the said interim direction, the claim of the Appellants was duly considered. Further, it is not in dispute that ultimately their writ petitions came to be dismissed on 20.07.1995. In such circumstances, as rightly pointed out by Mr. C.S. Rajan, learned senior counsel for the promotees that after dismissal of the main petition, interim order also gets vacated and the Appellants cannot claim any benefit based on the interim order dated 04.01.1993. In this regard, it is useful to refer the judgments of this Court in (i) *Employees State Insurance Corporation Vs. All India I.T.D.C. Employees Union and Others*, (ii) *Amarjeet Singh and Others Vs. Devi Ratan and Others*, and (iii)

K. Thulaseedharan Vs. The Kerala State Public Service Commission, Trivandrum and Others, . In the first two decisions, it was held that once the main writ petition is dismissed, all the interim orders granted earlier gets merged with the final order. In other words, if the writ petition is dismissed, interim order stands nullified automatically. In the third decision, this Court has held that once the rank list expired, the PSC has no power to extend the validity of that list. This Court has reiterated that the PSC, being a constitutional body, must act in accordance with law and cannot issue order or notification extending the term of a dead list for which it has no authority.

12. Mr. Jaideep Gupta, learned senior counsel for the State of Kerala has also clarified that 40 vacancies had already been reported to the PSC and the candidates advised against those vacancies started training on 15.02.1991. Based on the interim order, 7 vacancies alone could have been reported and those candidates alone would have been advised and appointed going by the quota rule worked out as on the date of direct recruitment.

13. According to the Appellants, the main basis of their claim is that the rank list remained in force till 15.04.1993 and the Appellants were advised for appointment on 04.01.1993 when the rank list was alive. In other words, according to them, the rank list was alive when the Appellants were advised by the PSC. Therefore, according to the Appellants, the advice and appointment were validly made and the Appellants are entitled to have their advice and appointment treated as regular. It is their claim that based on the advice and appointment of the Appellants, they are entitled to have the seniority and all consequential benefits from the date of their advise i.e. on 04.01.1993 and not from the date of the Government Order i.e. 17.06.1999 as held by the High Court. The above claim of the Appellants cannot be sustained since the direct recruits did not have any right whatever to the seniority in respect of 40 posts. Only 27 vacancies were initially reported. If 27 posts are reckoned, direct recruitment should have been confined to 50% of the notified vacancies. The specific documentary evidence which is a letter dated 22.08.1984 of the Home Department which clearly shows the number of posts mentioned is 187. The 50% quota in favour of the direct recruits will come to 93. From the records, it is seen that the factual position was that 119 promotees were functioning as Sub Inspectors. The number of direct recruits comes to 41. The special recruitment for Scheduled Castes and Scheduled Tribes took in 11 posts. The quota has to be worked after deducting the aforementioned 11 posts. As per the Division Bench, though the Appellants had claimed that all the posts should be reckoned for working of the ratio, if 11 posts earmarked for special recruits is deducted, the balance will work out to 176. Consequently, 50% posts due for direct recruits will come to $176 \times \frac{50}{100} =$ i.e. 88. There were already 41 direct recruits occupying the post. Consequently, the further posts available for direct recruits were 47 posts i.e. $88 - 41 = 47$. On the basis of this simple arithmetic work out the ratio and number of vacancies reckoned on the basis of official communication of the Home Department, the Division Bench found that only 40 persons from the rank

list prepared by the PSC could be accommodated in the available quota. 7 posts lay outside their allotment entitlements. The seniority had to be reckoned on the basis of such actual availability of post. In fact, to avert the discharge of the Appellants, the Government brought an order safeguarding their interest and the same was upheld by the Division Bench by retaining the services of the Appellant w.e.f. 17.06.1999.

14. In view of the above factual position and in terms of the rules, as rightly observed by the High Court, the first 7 candidates advised after the interim order dated 30.05.1991 alone were thus legally eligible for the vacancies against the 50% quota of direct recruitment. Others, in excess of that 7, are not so eligible as per law. If the Appellants are accommodated, necessarily, it will adversely affect the rights of the promotees to occupy their eligible quota as per the method of appointment.

15. As observed by the High Court, inasmuch as the exemption and relaxation was ordered by the Government without giving any opportunity to anyone, particularly, the promotees, at best, the Government order operates prospectively and if it is to be applied retrospectively it would adversely affect the seniority of persons who were already promoted before the date of issue.

Conclusion:

16. Under these circumstances, we are satisfied that the High Court has considered all aspects in accordance with the Rules applicable and we are in entire agreement with the said conclusion, consequently the claim of the Appellants is to be rejected. Accordingly, all the appeals fail and are dismissed with no order as to costs.