

(1990) 02 KL CK 0053
In the High Court Of Kerala
Case No : O.P. No. 6619 of 1988 K

Santhosh Babu and Another

APPELLANT

Vs

State of Kerala and Others

RESPONDENT

Date of Decision : 07-02-1990

Acts Referred:

Constitution of India, 1950 — Article 14, 16, 226
Kerala State and Subordinate Services Rules, 1958 — Rule 9

Citation : (1990) 02 KL CK 0053

Hon'ble Judges : V.S. Malimath, C.J.; Viswanath Iyer, J

Bench : Division Bench

Advocate : Mathai M. Paikaday, for the Appellant; Seemandini, Government Pleader, for the Respondent

Final Decision : Dismissed

Judgement

V.S. Malimath, C.J.—The two Petitioners in this writ petition were appointed as Tutors by the Principal of the Medical College, Kottayam on a provisional basis for a period of one year or until the P.S.C. hands become available for appointment, whichever is earlier, as is clear from Exts. P-8 and P-9, dated 18th February 1988 and 21st May 1988 respectively. When they were thus holding the posts of Tutors on a purely provisional basis, applications were invited for the M.D. course for the year 1987-88. Though certain percentage of seats were reserved for Tutors under the prospectus Ext. P-1. the Petitioners did not claim admission to the seats reserved for Tutors but claimed seats on general merit, obviously realising that they are not qualified to claim seats reserved for Tutors, in the select list of candidates, the Petitioners' names were not included. It is in this background that the Petitioners approached this Court in this writ petition praying for the issue of a writ in the nature of mandamus directing the Respondents to admit them in the reserved quota for Tutors for M.D. general medicine, shown as remaining vacant as per Ext. P-2 rank list of Tutors. They have also prayed for quashing Clause 3(f) of the prospectus which prescribes that only Tutors in regular service are eligible for selection to postgraduate degree/diploma courses

reserved for Tutors, as being illegal and unsustainable in law. They have also prayed for a direction commanding the Respondents to regularise their services as Tutors in the Medical College, Kottayam and also for a direction to forebear from terminating their services. After the presentation of the writ petition, the Petitioners' services were terminated by order Ext. P-7 dated 16th September 1988 on the ground that ratification of the provisional appointment of the Petitioners has been refused by the higher authorities, and that their appointment is not consistent with the provisions of the Employment Exchange Compulsory Notification of Vacancies Act. Though the Petitioners have not amended their writ petition challenging the order of termination Ext. P-7 we see no good reason why we should not examine the case of the Petitioners in this behalf, the necessary facts and contentions in that behalf having been pleaded in C.M.P. No. 22679/88 filed in this case producing Exts. P-7 and other relevant documents.

2. We shall first examine the case of the Petitioners regarding admission to the M.D. course for the year 1987-88. The prospectus Ext. P-1 expressly stipulates that it is only the Tutors in regular service that are eligible for selection in the 30 per cent of seats reserved for Tutors. The Petitioners' qualifications have to be determined with reference to the last date for receipt of applications as consistently held by this Court. Admittedly the Petitioners are not Tutors in regular service as their appointment is only provisional in character. The Petitioners are therefore ineligible for being considered for admission for the seats reserved for Tutors in regular service.

3. It was submitted that for want of adequate number of qualified Tutors in regular service, all the seats reserved for that category could not be filled up. The Petitioners pray that the seats that have remained unfilled from the quota reserved for the Tutors should be made available to them. The stand taken by the Respondents is that those seats were added to the general merit seats and that candidates on the basis of general merit have been accorded admission to those seats. The action taken by the Respondents in filling up the remaining seats reserved for the Tutors' quota on the basis of general merit is consistent with the law laid down by this Court in 1986 KLT 736 between Dr. P.M. Mansoor and Anr. v. State of Kerala and Anr. On the basis of merit if the Petitioners could not secure any of those seats, they cannot have any legitimate grievance to make.

4. Another prayer of the Petitioners is to quash Clause 3(f) of the prospectus which prescribes that it is only the Tutors in regular service that are eligible for the 30 per cent seats reserved for Tutors. At the outset it has to be pointed out that the Petitioners have precluded themselves by their conduct in putting forward such a claim in this writ petition. The Petitioners have on the basis of the prospectus submitted their applications for admission. They were fully aware of the stipulation contained in Clause 3(f) of the prospectus. If the Petitioners felt aggrieved by the said clause, they could have approached this Court for relief

immediately. But what the Petitioners have done is to present their applications in accordance with Ext. P-1 and to wait until the selection process is complete and then to approach this Court contending that Clause 3(f) of the prospectus is invalid. Obviously the Petitioners were sitting on the fence and were not interested in questioning Clause 3(f) if they could get admission in accordance with the terms of Ext. P-1. It is only after they realised that they did not get admission that they have chosen to attack the said clause. The Petitioners have thus by their conduct; precluded themselves from challenging Clause 3(f) of the prospectus, Ext. P-1. Besides, as the Petitioners have not claimed seat reserved for the Tutors, the question of considering as to whether provisionally appointed Tutors also could be considered for the seats reserved for Tutors will not arise. They cannot therefore make a legitimate complaint that there was discrimination against the Tutors appointed on a provisional basis, there being no justification for the same. Besides, it is necessary to point out that what we are concerned in this case is about the question of admission for the academic year 1987-88. At this length of time it is now too late to consider the claim of the Petitioners for admission for that year.

5. The next prayer of the Petitioner is for regularation of their services as tutors in the Medical College, Kottayam. The case of the first Petitioner is that he was initially appointed as a tutor on 16th July 1984 and is continuing as a tutor in the Medical College being placed from one department to another during a period of four years. He says that he has worked in Orthopedics, thoracic surgery, community medicine, blood bank and in infectious diseases unit. The second Petitioner says that he was originally appointed provisionally on 15th May 1987 and joined the bio-chemistry department. Thereafter he has been working in the department of radio therapy and that on the date of the presentation of the writ petition he was under orders of transfer to anesthesiology department. They say that there are regular vacancies and that they are fully qualified and efficient in their work. Their case is that there is need for their services and that the only effect of termination of their services is to appoint others in their places. They say that their services should be regularized, as otherwise they would be put to great hardships. They also say that in several cases regularization has been made and that therefore similar treatment should be meted out to them as well. No particulars about the same have been furnished. The Respondents, on the other hand have taken the stand that the Petitioners were appointed purely on a provisional basis under Rule 9(a)(i) of the K.S. and S.S.R. and that therefore they are not entitled to claim any relief contrary to the said statutory provision. They contend that the Petitioners have no legal right to seek regularisation of their services. As regards the termination of their services during the pendency of the writ petition, they have stated that the Petitioners' appointments have been made without referring the vacancies to the Employment Exchange, ratification of appointment of the Petitioners on a provisional basis having been refused by the higher authorities there was no other alternative but to terminate their services. They further state that there is no ready rank list prepared by the

P.S.C. in existence and that there are several P.S.C. appointees in the Medical Education services who have availed of extension of time for joining their appointments and are expected to join the vacant posts at any time. They have also stated that some of the vacancies would be filled up by transfer from other colleges. In this background it is submitted that the termination of the services of the provisional appointees cannot be faulted.

6. That the appointment of the Petitioners is only on a provisional basis under Rule 9(a)(i) of the K.S. and S.S.R. is not and cannot be disputed. Provisional appointments of the Petitioners being thus regulated by the statutory provisions, they cannot claim any rights higher than the one which the statute has prescribed nor can they claim any rights inconsistent with the statutory provisions. This Court has pointed out in 1987 (2) KLT 425 between Sini P. Kuriakose and State of Kerala construing Rule 9(a)(i) that when appointments are made under this statutory provision for a definite statutory period it is not possible to spell out any right to the effect that contrary to the said statute the appointee is entitled to continue in service beyond the period for which he was appointed in accordance with the statute. We have held that the power of this Court is to keep within bounds of law and not to issue directions contrary to law. It has been held that provisional employees have no right to continue in service beyond the statutory period and they cannot be allowed to remain in service against the statutory rules. The said decision was taken up in appeal to the Supreme Court in SLP No. 12345/87 and the said petition was dismissed by the Supreme Court on 9th November 1987, thus affirming the view taken by this Court. As there is a direct decision bearing on the issue that has arisen for consideration in this case, it is unnecessary for us to examine other decisions. As the Petitioners were appointed purely on a provisional basis their rights stand regulated by Rule 9 of the K.S. and S.S.R. The clauses of Rule 9, relevant for our purpose may be extracted as follows:

9(a)(i) Where it is necessary in the public interest, owing to an emergency which has arisen to fill immediately a vacancy in a post borne on the cadre of a service, class or category and there would be undue delay in making such appointment in accordance with these rules and the special rules, the appointing authority may appoint a person, otherwise than in accordance with the said rules, temporarily:

Provided also that a person appointed under this clause by direct recruitment to a teaching post shall be allowed to continue, subject to availability of vacancy-

(a) in case the institution is one to which regular annual vacations are allowed, till the closing date of the institution for the annual vacation or till a candidate advised by the Public Service Commission joins duty, whichever is earlier:

(b) in case the institution is one to which regular annual vacation is not allowed, for a period not exceeding one year or till a candidate advised by the Public Service Commission joins duty whichever is earlier.

Explanation.-For the purposes of this proviso, the institutions specified below

shall be deemed to be institutions to which regular annual vacations are not allowed namely:

Name of the Heads of Departments institutions in respect of the institutions
(1) (2)

1. Medical College, Principal Trivandrun, Kottayarn, Calicut and Trichur

....

Provided also that a person appointed under this clause by direct recruitment to a post and discharged from service after the admissible period shall not be re-appointed to the same post by the same appointing authority, except when fresh candidates are not available for appointment through Employment Exchange, and such re-appointment shall be made only with the prior concurrence of the commission....

(iv) A person appointed under Clause (i) or (ii) shall not be regarded as a probationer in such service, class or category or be entitled by reason only of such appointment to any preferential claim to future appointment to such service, class or category....

What becomes clear from a bare reading of Rule 9 is that temporary or provisional appointments can be made when there is likelihood of undue delay in making regular appointments in accordance with the rules and the special rules and it is felt necessary in public interest and owing to an emergency that the posts should be filled up immediately. It is therefore a purely stop gap arrangement to fulfill the immediate needs of the administration pending regular recruitment in accordance with the relevant statutory provisions. Appointments in accordance with the regular statutory provisions in cases like this have to be made in pursuance of the selection made by the P.S.C. The vacancies have to be advertised giving an opportunity to all qualified persons to offer themselves as candidates so that equality of opportunity in the matter of appointment as required by Articles 14 and 16 of the Constitution is made available. It is pending such regular recruitment that Rule 9 permits temporary or provisional appointment being made subject to express statutory conditions and limitations. One of the statutory limitations is in regard to the period of appointment. So far as direct recruitment to the teaching post attached to institutions in which regular vacation is not allowed is concerned, it is provided that it can be made for a period not exceeding one year or till a candidate advised by the P.S.C. joins duty whichever is earlier. As temporary appointments are required to be made on the ground that regular recruitment by the P.S.C. is likely to take some time, it is obvious that a duty is cast on the concerned authorities to take speedy and expeditious steps to make selection for filling up the vacancies on a regular basis. That is the reason why a limitation has been prescribed for the term of temporary appointment as one year or till a candidate advised by the P.S.C. joins duty whichever is earlier. The clear mandate of the statute therefore is that every effort must be made to ensure that the entire selection process is completed

within a period of one year. The maximum title of the provisional appointees under Rule 9 cannot therefore be more than one year. Another limitation has been prescribed by this statutory provision in regard to the further appointment of a person who has been appointed once under Rule 9. A person appointed under Rule 9 by direct recruitment when he is discharged from service after the admissible period cannot be re-appointed to the same post by the same appointing authority, except when fresh candidates are not available for appointment through Employment Exchange and such re-appointment shall be made only with the prior concurrence of the Public Service Commission. The rule does not favor re-appointment of a person who has been once appointed under Rule 9. A further appointment of such a person is permitted only under exceptional circumstances stipulated in the proviso. He can be re-appointed only when fresh candidates are not at all available for appointment through Employment Exchange and that too with the prior concurrence of the P.S.C. A further appointment cannot therefore be made without these two conditions being satisfied. As there is a duty on the part of everyone concerned to ensure that the vacancies are filled up on a regular basis, a provision has been made for securing prior concurrence of the P.S.C. This would enable the appointing authority to know firstly as to whether candidates selected by the P.S.C. are likely to be available within a short time, in which event there would be no need to make any further provisional appointment. It would also be a reminder to the P.S.C. to perform its duty of selecting the candidates in respect of which a request has been made to it as early as possible to avoid repeated provisional appointment being made contrary to the intention of the rule making authority. This Court has in the aforesaid decision held that no provisional appointment can be made in violation of Rule 9, as provisional appointments are regulated by express statutory provisions. Clause (iv) to Rule 9(a) provides that a person appointed under Clause (i) or (ii) shall not be regarded as a probationer in such service, class or category or be entitled by reason only of such appointment to any preferential claim to future appointment to such service, class or category. Apart from the limitations that have been prescribed in regard to the period of appointment and in regard to re-appointment of a provisional appointee, the rule expressly states that a provisional appointee cannot claim status as a probationer nor can he claim any preference to future appointment to such service, class or category. In otherworld, the fact that a person was appointed provisionally or temporarily under Rule 9 for a particular period or periods does not give him any right whatsoever in the matter of future appointment. It therefore follows that the only right that a provisional appointee is entitled to under Rule 9 is to hold the post for a period of one year or until the candidate selected by the P.S.C. joins duty whichever is earlier. His right to further provisional appointment under Rule 9 is subject to the limitation that the Employment Exchange is not in a position to offer candidates and that too with the prior concurrence of the P.S.C. The statutory provision expressly states that a person appointed under Rule 9 cannot claim any other right as a probationer or in regard to future appointment in service. This is so because his appointment is

only by way of stop gap arrangement pending regular appointment. Apart from the fact that there is no statutory provision on the basis of which a person appointed under Rule 9 can claim regularisation of services, the stipulation contained in that rule clearly mandates that no such regularisation is legally permissible as there is a positive bar against any claim for future appointment to such service being recognised on the strength of his prior appointment as a provisional appointee. It therefore follows that there is in effect an express bar against regularisation in service of those appointed under Rule 9. A person appointed under Rule 9 cannot therefore seek a writ in the nature of mandamus directing the authorities to regularise his services on the ground that he has rendered service for several years as a provisional appointee under Rule 9. Granting of such a relief would be clearly in violation of the statutory prohibition contained in Rule 9. We have pointed out in the aforesaid decision that the jurisdiction of this Court under Article 226 can be exercised for the purpose of keeping within bounds of law. We have therefore no hesitation in holding that the Petitioners cannot claim a writ or direction against the Respondents requiring them to regularise their services as tutors having regard to the fact that they have rendered service as provisional appointees under Rule 9(a)(i) of the K.S. and S.S.R.

7. Though Sri Paikeday, learned Counsel for the Petitioners invited our attention to the decisions of the Supreme Court reported in *Municipal Corporation of Delhi Vs. Jagan Nath Ashok Kumar and Another*, ; *Daily Rated Casual Labour Employed under P and T Department Vs. Union of India (UOI) and Others*, ; *Narender Chadha and Others Vs. Union of India and Others*, and *Dr. Mrs. Sumati P. Shere Vs. Union of India (UOI) and Others*, in support of his case for regularisation of services of the Petitioners, it is enough to state that none of those decisions bear on the interpretation of Rule 9 of the K.S. and S.S.R. or the rights flowing from provisional appointment under the said statutory provision. As already stated, there is a direct decision of this Court on the interpretation of Rule 9 which is relevant for our purpose which stands affirmed by the Supreme Court. Hence we have considered it unnecessary to discuss the decisions pressed into service by Sri Paikeday.

8. As regards the termination of the services of the Petitioners it was submitted that the conditions specified in the orders of appointment not having been fulfilled, their termination and that too without notice is clearly illegal. It was submitted that the orders of appointment of the Petitioners Exts. P-8 and P-9 show that their appointment is purely on temporary basis for a period of one year or till the P.S.C. recruits join duty, whichever is earlier. It was submitted that the termination of the services of the Petitioners was made before the expiry of one year and that too when candidates selected by the P.S.C. had not reported to duty. The stand taken by the Respondents in this behalf is that the provisional appointment of the Petitioners was made without referring the vacancies to the employment exchange and pending ratification by the authorities. It is stated that the ratification sought from the higher authorities having been refused, they

had no other alternative but to terminate their services. The case pleaded by the Respondents in substance therefore is that they have committed a mistake in making the order of appointment in favor of the Petitioners which mistake they have now sought to correct by canceling the order of appointment. The appointment which the Petitioner held on a provisional basis were further appointments, they having held earlier appointment on a provisional basis. Before their further appointment under Rule 9 the appointing authority was required firstly to be satisfied that there are no candidates available which have been forwarded by the employment exchange and to obtain prior concurrence before making the appointment. The counter-affidavit says that the employment exchange was not approached for forwarding names. It is further stated that they sought ratification of the higher authorities in this behalf which has been refused. It is not the case of the Petitioners that the Employment Exchange offered names and that they have been rejected. There is therefore no reason why we should not accept the statement in the counter-affidavit that they did not approach the Employment Exchange for names for making provisional appointments. It therefore follows that the appointing authority appointed the Petitioners in violation of the statutory provisions. It is because they made the appointment in violation of the statutory requirements that they appear to have sought ratification from the higher authorities, which has rightly not been granted. Another requirement is to obtain prior concurrence of the P.S.C. That condition is also not fulfilled. As we are satisfied that the appointment of the Petitioners was made in contravention of the statutory provisions contained in Rule 9 and as their appointments have been terminated on that ground, we will not be justified in interfering with the orders of termination of the services of the Petitioners, as the effect of interference would only be to sustain or continue further illegality. Hence we see no good ground to interfere with the orders made during the tendency of this writ petition.

For the reasons stated above this writ petition fails and is dismissed. No costs.