(2003) 12 KL CK 0011

In the High Court Of Kerala

Case No : O.P. No. 6401 of 2003

Sanu APPELLANT

Vs

State of Kerala RESPONDENT

Date of Decision : 19-12-2003

Acts Referred:

Rules for the Kerala Agricultural Income Tax and Sales Tax Subordinate Service — Rule 2

Citation : (2004) 1 ILR (Ker) 565 : (2004) 1 KLT 591

Hon'ble Judges : K. Thankappan, J

Bench : Single Bench

Advocate : O.V. Radhakrishnan and M.A. Shihabudeen, for the Appellant; K.G. Bhaskaran, Government Pleader, for the Respondent

Final Decision : Allowed

Judgement

K. Thankappan, J.—The question to be decided in this Original Petition is whether the provisos and notes attached to statute and rules could be interpreted or construed beyond or in derogation of the intent or purport of the main provision.

2. The brief facts necessary for deciding the question are as follows: The petitioners are presently working as Confidential Assistants under the Kerala Agricultural Income Tax and Sales Tax Department. On passing the eligibility test conducted by the Public Service Commission, they were entitled for promotion/ appointment by transfer as Sales Tax Inspector/Assistant Sales Tax Officer/ Agricultural Income Tax Inspector/Intelligence Inspector/Check Post Inspector/ Junior Superintendent in the Agricultural Income Tax and Sales Tax Department. It is, submitted by the petitioners that appointment to the above mentioned posts is governed by the Special Rules for the Kerala Agricultural Income Tax and Sales Tax Subordinate Service issued under G.O.(MS) 525/TD dated 11.10.1962. The provision under Rule 2(aa) of the Special Rules as it stood originally have been amended in 1985 as per G.O.(P)No.132/85/TD dated 4.11.1985. Ext.P12 is the amended provision which reads as follows:

"In the said rules, in Rule 2 for Sub-rule (aa) and (b), the following shall be substituted, namely:-

(aa) appointment to the service by the transfer shall be made from among the eligible Head Clerks and Upper Division Clerks, Stenographers and Upper Division Typists in the Kerala Ministerial Subordinate Service employed in the Kerala Agricultural Income Tax and Sales Tax Department in the ratio of 30:1:1 on the basis of seniority.

(b) 12% of the substantive vacancies shall be filled or reserved to be filled by direct recruitment and the rest shall be filled or reserved to be filled by recruitment by transfer."

These amendments shall be deemed to have come into force with effect from the 1st April 1981.

Explanatory Note

(This does not form part of the Notification but is intended to indicate the general purport).

As per the existing provisions in the Special Rules of the Kerala Agricultural Income Tax and Sales Tax Subordinate Service, appointment to the post of Assistant Sales Tax Officers including Junior Agricultural Income Tax Officers, Sales Tax Inspectors, Agricultural Income Tax Inspectors, Intelligence Inspectors, Check Post Inspectors and Junior Superintendents are made as follows:

Out of every four successive substantive vacancies, one shall be filled or reserved to be filled by direct recruitment, the rest being filled or reserved to be filled by recruitment by transfer. Appointment to the service by transfer shall be made from the select list prepared from among eligible Head Clerks, U.D. Clerks, Stenographers and U.D. Typists in the Kerala Ministerial Service employed in the Agricultural Income Tax and Sales Tax Department.

Government have now decided to reduce the direct recruitment quota to 12%. It is also decided to abolish the Departmental Promotion Committee system to the cadre of Assistant Sales Tax Officers. This Notification is intended to achieve the above object."

3. Prior to the above amendment, the rule as it stood originally was as follows:

"2(aa) appointment to the service by transfer shall be made from the select list prepared from among the eligible Head Clerks and Upper Division Typists in the Kerala Ministerial Subordinate Service employed in the Agricultural Income Tax and Sales Department in the ratio 30:1:1 on the basis of merit and ability, seniority being considered only where merit and ability are approximately equal. Persons included in the select list shall be ranked in the order of their seniority.

Provided that a Stenographer or an Upper Division Typist shall not be appointed to the Service by transfer in preference to an Upper Division Clerk or equal or longer service.

Note: For the purpose of this provision, service in both Lower and Upper Divisions shall be counted for reckoning seniority".

This provision was challenged by one Babu Chandran, Confidential Assistant by filing O.P.No. 835 of 1982 which was disposed of along with O.P.No. 6930 of 1981 holding that the intention of the rule makers was to ensure that out of every 32 posts in the cadre of Assistant Sales Tax Officer/Sales Tax Inspector etc., one place should go to the Stenographer and one to the U.D. Typist and 30 places to the U.D. Clerks. Against the judgment of the learned Single Judge, Writ Appeal Nos. 315 and 317 of 1982 were filed which was dismissed by Ext. P11 common judgment dated 14.2.1985. The Division Bench held as follows:

"A definite ratio of 30:1:1 has also been fixed in order to ensure that when 32 appointments are made, one post should go to the stenographer, another to the upper division typist and the balance 30 to the Upper Division Clerks. It could not have been the intention of the rule-makers to deprive this benefit provided by the main rule, by introducing a proviso. If the provision is given meaning, which would enable appointments to the post of Assistant Sales Tax Officer etc. without maintaining the ratio of 30:1:1, it would be absolutely destructive of the idea sought to be achieved and would defeat the very purpose of the amendment to be the rule. By harmonious construction of the rule and the proviso, bearing in mind the sought to be achieved and the mischief to be subdued, it would be reasonable to conclude that the intention of the rule makers was to ensure that out of every 32 posts in the cadre of Assistant Sales Tax Officer etc. for which appointments are to be made in accordance with the Special Rules with particular reference to Rule 2(aa), one place should go to the stenographer, another place to the Upper Division Typist and the remaining 30 places to the upper division clerks when there are 32 vacancies at a time. Actual appointment or posting from such select list should be so made as to ensure that no stenographer or typist shall be appointed from out of the list before every upper division clerk having equal or longer service, taking into account the aggregate length of service in the cadre of lower division and upper division, has been appointed. In other words, it would mean that from the select list priority or the order of appointment should be so effected that upper division clerks having equal or longer service should riot be made junior to the stenographer or upper division typist having equal or lesser service included in the select list. It might be said that the proviso has not been quite happily worded, the confusion could have been avoided if only instead of using the expression ''appointment'', the word ''posting'' or some other more appropriate word was used. All the same, the proviso considered in the light of the main rule, is not capable of yielding a reasonable conclusion that the intention of the rule-makers was to allow a fluctuating in the operation of the ratio fixed, depending upon the number of upper Division Clerks at a given lime. In fact, if the purpose of the proviso is so understood, it might even so happen that the ratio would never work, as too many upper division clerks may be actual or longer service, thus defeating the very avowed object of the amendment to the rule, binding the ratio."

4. Against the above judgment, a SLP was filed by the State and during the pendency of the Special Leave Petition, it appears that on the basis of the judgment this Court dated 2.4.1982 in O.P.Nos. 6930 of 1981 and 835 of 1982, the Government had amended the Special Rules deleting the proviso in Rule 2(aa) of the Special Rules as shown in Ext.P12. On the basis of the amendment, the Supreme Court dismissed the SLP filed against Ext.P11 judgment of the Division Bench dated 14.2.1985. As per Ext.P16 notification, the Government have re-inducted the proviso which was already declared as irregular and illegal by this Court. The grievance of the petitioners is that on the basis of Ext.P16, the ratio fixed for promotion to the posts mentioned above is violated. They, therefore, seek a direction to quash Ext.P16 notification and that portion of Ext.P18 order which states that the claim of persons like the petitioners will be considered only on condition that the claim of no eligible clerk who entered into service prior to them is overlooked. In other words, as per Ext.P16 amendment, persons like the petitioners will get promotion only after the persons from the category of Upper Division Clerks of the Department have been promoted. The ratio fixed as per the main proviso is that out of 32 posts taken as one unit, 30 posts shall be filled up by promotion from the category of Upper Division Clerks, one from Upper Division Typist and one from Confidential Assistant. Hence, adding of the proviso and Note is with a view to purtail the promotion chance of persons like the petitioners and hence induction of the same is not correct.

5. The term proviso is used to qualify a preceding provision and the purpose of the proviso is to restrict or to explain the general terms of the provisions of which it forms part of and not to add to the body of the substantive provision nor to take away anything there from. A proviso cannot travel beyond the provisions to which it is provided. This proposition is well founded by the Apex Court in the decision reported in Ram Narain Sons Ltd. Vs. Asst. Commissioner of Sales Tax and Others, . In the above judgment, the Apex Court held as follows:

"......... It is a cardinal rule of interpretation that a proviso to a particular provision of a statute only embraces the field which is covered by the main provision. It carves out an exception to the main provision to which it has been enacted as a proviso and to no other".

This view of the Apex Court was followed in a later judgment reported in The Commissioner of Income Tax, Mysore, Travancore-cochin and Coorg, Bangalore Vs. The Indo Mercantile Bank Limited, , in which it was observed as follows:

"The proper function of a proviso is that it qualifies the generality of the main enactment by providing an exception and taking out as it were, from the main enactment, a portion which, but for the proviso would fall within the main enactment. Ordinarily it is foreign to the proper function of a proviso to read it as providing something by way of an ad-dendum or dealing with a subject which is foreign to the main enactment.

It is a fundamental rule of construction that a proviso must be considered with relation to the principal matter to which it stands as a proviso.

Therefore it is to be construed harmoniously with the main enactment".

6. It has to be noted that the function of a proviso attached to a statute, Act or Ordinance is to explain, qualify or restrain the operation of a preceding provision and it has to be read in the light of the subject matter of the main statute, Act or Ordinance. Proviso in a statute has to be strictly construed as it is instead to qualify what is affirmed in the body of the statute, provision, section or paragraph preceding it.

7. The facts of the case in hand would clearly show that the petitioners are entitled to be promoted as Sales Tax Inspectors as per Ext.P12. But Ext.P12 has been reissued by adding the proviso, as can be seen from Ext.P16. As per the added proviso in Ext.P16 notification, persons like the petitioners are denied promotion only for the reason that the select list contains names of Upper Division Clerks and the petitioners would be promoted only after the entire select list of Upper Division Clerks is exhausted. The reinduction of the proviso is against the spirit of the main proviso which clearly provides that the ratio of promotion will be 30:1:1. By introducing Ext.P16, the authorities have gone beyond the purport of the main provision of the special rules which allows promotion to persons like the petitioners in accordance with the ratio of 30:1:1.

8. Hence, this Court is of the view that the induction of the proviso to Rule 2(aa) in Ext.P16 is beyond the legislative competency and also against the power conferred on the Department to issue orders giving effect to the proviso which was already disapproved by this Court. The proviso added in Ext.P16 is irregular and illegal. Ext.P16 and P18 which was issued consequent to Ext.P16 are, therefore, quashed. It is also declared that the petitioners are entitled to be promoted as Sales Tax Inspectors in accordance with the ratio prescribed in Ext.P12.

Original Petition is allowed as above.