
(2004) 06 KL CK 0021

In the High Court Of Kerala

Case No : Writ Petition (C) No. 8498 of 2004

Sherafuddin

APPELLANT

Vs

State of Kerala

RESPONDENT

Date of Decision : 16-06-2004

Acts Referred:

Kerala State and Subordinate Services Rules, 1958 — Rule 39

Citation : (2004) 2 KLT 731

Hon'ble Judges : Kurian Joseph, J

Bench : Single Bench

Advocate : P.C. Sasidharan, for the Appellant; N. Nandakumara Menon, K. Vinod Kumar, P.K. Manojkumar, Reshmi Ramachandran and Augustine Joseph, Government Pleader, for the Respondent

Final Decision : Dismissed

Judgement

Kurian Joseph, J.—Rule 39 Part II of the Kerala State and Subordinate Service Rules provides for certain situations where the Government is empowered to relax the rigour of any rules, if it is required in the interests of justice and equity. (1) If pass in an examination prescribed under the Special Rules is mandatory for confirmation in service and in case such examination was never conducted, is it a just and equitable cause to invoke the Rule granting exemption? (2) Could the same be exercised giving confirmation retrospectively and is it mandatory that notice is issued to the affected parties?

2. Petitioners are presently holding the post of Superintendent of Police (non IPS). They are aggrieved since respondents 3 to 6 are exempted from passing the prescribed test and also in declaring their probation retrospectively. The impugned orders are Exts.P6 and P7. At the outset two things are to be noted: (1) the case is contested only by respondents 3 and 6, among the contesting party respondents. It is submitted on their behalf that the affidavits filed by them in support of the application for vacating the interim order of stay can be treated as their counter affidavit for the purpose of the Writ Petition. (2) There is no

counter affidavit by the State. Yet the learned Senior Government Pleader submits that the case can be argued since the contentions are mainly on questions of law. The prayers in the Writ Petition are also to be noted, which read as follows:-

"i) Issue a writ of certiorari quashing Exts. P6 and P7.

ii) declare that as the respondents 3 to 6 have not acquired the test qualification prescribed under Rule 8 of the special rules governing their recruitment they are not entitled either for declaration of probation or to hold any post in the police service and they are liable to be discharged from service;

iii) declare that Ext.P6 order issued in favour of respondents 3 to 6 is in violation of the principles of natural justice and the special rules;

iv) declare that Ext.P6 has no retrospective effect and hence the consequential order issued by the 2nd respondent granting retrospective regularisation on the basis of the exemption granted by the Government is bad in law;

v) issue a writ of mandamus, order or direction commanding and compelling the respondents 1 and 2 not to grant any service benefits to the respondents 3 to 6 including seniority and promotion over the petitioners based on Ext.P6."

As per Ext.P6 order passed by the Government, the contesting respondents were exempted "from passing the prescribed tests in relaxation of rules by invoking Rule 39 of the General Rules of KS & SSR". It was also ordered that the probation in respect of those officers in the category of Circle Inspector of Police should be declared and they should be confirmed against the substantive posts immediately. Ext.P7 is passed by the Director General of Police pursuant to Ext.P6. The Director General of Police found the work and conduct during the probation period of the incumbent concerned as satisfactory and that no adverse remarks were reported. There is hence a declaration of having completed the period of probation as on 9.10.1984 in the post of Circle Inspector of Police. It is not in dispute that while passing the impugned orders, none of the petitioners was given any notice.

3. Before analysing the questions of law raised in this Writ Petition it is necessary to understand the factual background as well as the rules on the issue. The contesting respondents were advised for appointment as Circle Inspector of Police under Rule 17A of the General Rules of the Kerala State and Subordinate Service Rules (hereinafter ? called the General Rules) by way of special recruitment. Ext.P1 is the executive orders governing their service known as Special Rules in respect of Special Recruitment from among members of Scheduled Castes and Scheduled Tribes to the posts of Circle Inspector of Police in the Police Department. 1980 (hereinafter called the Special Rules). Rule 8 of the Special Rules reads as follows:

"8. Test:- (1) A person appointed by direct recruitment as Circle Inspector of Police shall pass at or before the fifth examination held after such appointments,

an examination in the following subjects:-

Marks Maximum Minimum A 1. The Indian Penal Code and Special and Local Criminal Law including the Police Act 120 96

2. The Code of Criminal Procedure 120 96 B. The Indian Evidence Act 100 40 C. Medical Jurisprudence and Toxicology 100 40

D. 1. Police Department Orders 100 60 2. Scientific Aids to Investigation 100 40

Note:- The examinations will generally be conducted half-yearly by the Kerala Public Service Commission.

(b) No person shall be eligible for increments in his time-scale of pay or appointment as a full member of the Service unless and until he has passed the examination in all the subjects specified in Sub-rule (a):

(c) if any person has satisfactorily completed the prescribed period of probation and has, passed the examination in all the said subjects within the period prescribed by Sub-rule (a) he shall count his service for increments and be deemed to have become a full member of service on and from the date on which he has completed the period of probation or passed the said examination whichever is later;

(d) if any person fails to pass the examination in any of the said subjects within the period prescribed by Sub-rule (a) he shall, by order, be discharged from the service and

(e) every person appointed by direct recruitment to the post of Circle Inspectors of Police shall pass the Account test for the Executive Officers of Kerala or the Account Test (Lower) within the prescribed period of probation".

As per Ext.P2 the Special Rules were amended. The amendment was on Rule 8. It reads as follows:-

"2. Amendment of Rule 8--In the Special Rules in respect of Special Recruitment from among members of Scheduled Castes and Scheduled Tribes to the posts of Circle Inspector of Police in the Police Department, 1980 in Rule 8 for Sub-rule (a) the following sub-rule shall be substituted, namely:-

"(a)(i) Every person appointed under these Rules shall pass the tests in the following subjects at or before the fifth of such tests held after such appointment, namely:-

INDOOR

Sl.No.

Subject

Duration of test

Marks

Maximum

Minimum

(1)

(2)

(3)

(4)

(5)

Hrs.

(A)

1.

The Indian Penal Code

2

50

20

2.

The Indian Penal Code (with Book)

2

50

20

3.

The Code of Criminal Procedure

2

50

20

4.

The Code of Criminal Procedure (with Book)

2

50

20

5.

The Indian Evidence Act

1

30

12

6.

-The Indian Evidence Act (with Book)

2

70

28

(B)

1.

Special and Local Laws including the Police Act

1

30

12

2.

Special and Local Laws including the Police Act (with Book)

1

70

28.

3.

The Constitution of India (with Book)

2

50

20

(c)

1.

Police Standing Order (with Book)

3

100

40

2.

Criminology

2

50

20

3.

Scientific aids to Investigation

3

100

40

4.

Forensic Medicine

2

50

20

(D)

1.

Practical Model Police Station

1

50

25

2.

Lifting and Developing of Finger Prints

1

10

5

3.

Casting of foot prints

1

10

5

4.

Police Photography

1

10

5

5.

Handling, Labelling and Packing of Exhibits

1

10

5

6.

First Aid

1

10

5

OUTDOOR

Marks

Total

Part I -Physical Training

(1)

Table Card

10

25

(2)

Apparatus Work

5 }

(3)

Log and Rifle Exercise

5}

(4)

Yogasana and Suryanamaskara

5}

Part II -Drill

(1)

SquadDrill

20}

100

(2)

Arms Drill

20}

(3)

Lathi Drill

20}

(4)

Mob Operation

20}

(5)

Company Drill

20}

Part III-WeaponTraining

(1)

Rifle

10}

50

(2)

Bayonet

10}

(3)

Other CQB Weapons

10}

(4)

Range Work

20}

(ii) Candidates for the indoor test shall be permitted to bring with them into the examination hall the Acts on the respective subjects, Constitution of India, and the Police Standing Orders for Subjects specified as "with books".

Explanation:- The Constitution of India, Acts on the respective subjects and Police Standing Orders shall be the tests without commentaries.

(iii) Separate minimum of 40% shall be required under each part for a pass in the outdoor test, but separate minimum for each subject under each part is not required.

(iv) The examination shall generally be conducted half-yearly by the Kerala Public Service Commission. The Director General of Police shall forward to the Commission a list showing the names and addresses of the candidates for the test and the subjects for which each candidate intends to appear at least 6 weeks before the examination.

(v) No fee shall be levied from the candidates for admission to the examination.

(vi) The syllabus for the examination shall be prescribed by the Government, in consultation with the Public Service Commission.

Explanation:- It is not compulsory that a candidate should pass in all the papers at the same examination, but he should appear at all the examinations till he has passed in all subjects".

4. The examination either as per Ext.P1 Special Rules or as per Ext.P2 the amended Special Rules, was never held and there is no dispute on that. The moot question is - for the only reason that respondents 3 and 6 did not pass an examination which admittedly has not been held so far, can they be denied the service benefits including promotion/selection to higher posts, if otherwise eligible:

5. Sri. P.C. Sasidharan, learned counsel appearing for the petitioners, vehemently argued that having not cleared the mandatory test, it is mandatory as per the Rules to discharge them from service. It is his contention that since the pass in the examination was mandatory, the contesting respondents should have moved the Government for taking steps for conducting the test. In any case, while invoking Rule 39, the petitioners should have been given notice. It is further contended that there cannot be a retrospective regularisation in service.

6. Sri.Nandakumara Menon, learned counsel appearing for respondents 3 and 6 contends that their prospects cannot be prejudicially affected for not having passed a test which has never been held. It is to do justice in such situations, Rule 39 is intended, it is submitted.

7. Rule 39 of the General Rules reads as follows:-

"39. Notwithstanding anything contained in these rules or in the Special Rules or in any other Rules or Government Orders the Government shall have power to deal with the case of any person or persons serving in a civil capacity under the Government of Kerala or any candidate for appointment to a service in such manner as may appear to the Government to be just and equitable:

Provided that where such rules or orders are applicable to the case of any person or persons, the case shall not be dealt with in any manner less favourable to him or them than that provided by those rules or orders.

This amendment shall be deemed to have come into force with effect from 17.12.1958".

Whether the exemption granted to the contesting respondents in the circumstances is just and equitable is the issue that has to be considered.

8. Under the Special Rules, it is mandatory that the incumbent should pass the prescribed test. It has to be noted that such pass in the test is at or before the examination held after such appointments. Though it is provided in the Rules that the examinations will generally be conducted half-yearly by the Public Service Commission, as already observed above, so far the examination has never been conducted by the Public Service Commission. Despite the amendment as per Ext.P2, so far the Government has not taken steps for the conduct of the examination. As can be seen from the impugned proceedings of the Director General of Police, the incumbents have completed successfully the prescribed period of probation, except for the passing of the test prescribed under the Special Rules. Even otherwise there is no allegation that they are otherwise not suitable. As a matter of fact they have been provisionally included in the select list of Circle Inspectors fit for promotion to the post of Deputy Inspector General of Police, as per Ext.R3(n) dated 25.10.1994.

9. The Government having never conducted the examination, it will be unjust and inequitable to deny the service benefits to the incumbents if they are otherwise fit for such benefits. In fact the very purpose of the rule is to tide over such situations. There is no point in requiring the incumbents to perform an impossibility. They are required to pass the examination if only it is held. Admittedly it was never held. Therefore, the invocation of Rule 39 in such circumstances is justifiable in terms of justice and equity. The purpose of the rule is to use the principles of justice to supplement law in a fair and reasonable manner and for a just and equitable cause. The action/ inaction of the Government shall not prejudice an incumbent who is otherwise fit for service

benefits and hence the order is perfectly justifiable.

10. The contention that the incumbents should be discharged from service for having not passed the test cannot be appreciated. For one thing it has to be seen that even under the Special Rules, if only the incumbent fails to pass the examination within the prescribed period, he need be discharged. Nobody has failed to pass the examination. Only if a chance is offered and there is failure in the chance, there arises a question of discharge.

11. Now comes the question of notice. Though Sri.Sasidharan, referring to various decisions, argued that the petitioners being affected should have been given notice while passing orders under Rule 39, I do not think that the contentions can be appreciated. At the outset it has to be noted that the contesting respondents were advised for appointment on 17.8.1982 and all the petitioners joined service only thereafter. The contesting respondents were recruited against the quota reserved for special recruitment. It is in this background, the issue is to be analysed. In *M. Venkateswarlu and Others Vs. Govt. of A.P. and Others*, , the Supreme Court considered the issue in the factual background of relaxation of the rigour of the rules for the purpose of regular promotion to the post of Deputy Tahsildar in the Andhra Pradesh Revenue Subordinate Service Rules, 1961. Rule 47 of the General Rules in that State service to the extent relevant, reads as follows:-

"47. Relaxation of Rules by the Governor.- No rule made under the proviso to Article 309 of the Constitution of India or contained under Article 313 of that Constitution shall be construed to limit or abridge the power of the Governor to deal with the case of any class or category of persons for being appointed to any civil post, or of any person who is serving or has served in a civil capacity under the Government of Andhra Pradesh in such manner as may appear to him to be just and equitable".

Dealing with the issue of notice while invoking the Rule, it was held at paragraph 11 of the judgment as follows:-

"The question then is: whether notice to all the persons who are likely to be affected is required before exercising the power under Rule 47? The rule *ex facie* does not contemplate any notice being given. It is not a case of considering inter se claim of any particular individuals. It is a case of relaxing the eligibility of a single individual as against many. Under these circumstances, we do not think that the rule envisages notice to all the affected persons".

This ratio was followed by the Apex Court in a recent decision in *Santosh Kumar Vs. State of Andhra Pradesh and Others*, . It was a case of regularization with effect from the date of temporary appointment. Finding that even the temporary appointment was against the quota reserved for the particular category, it was held that notice to the aggrieved parties while passing orders for relaxing the rule was unnecessary. In fact the whole issue of requirement of notice has also been considered by the Full Bench in *Sreedharan Pillai v. State of Kerala* 1973

KLT 151 wherein it is stated thus:-

"It is quite possible that when such an order is passed it may directly or indirectly have repercussions regarding the seniority, rank or chances of promotion of some of the other officers in service. That, however, has to be regarded as an inevitable incident of service flowing from the exercise of the power under Rule 39 which is as much a rule regulating the conditions of service of all the officers in service of the State as the other provisions contained in the Rules. The rights conferred on the members of service by the provisions contained in the Rules. The rights conferred on the members of service by the earlier rules Nos. 1 to 38 are not absolute in character but are inherently subject to the contingent liability of their being affected by any order validly passed under Rule 39".

12. Since there is a prayer in the Writ Petition regarding seniority, it is necessary to deal with that aspect also. Ext.R3(i) is the published final seniority list of Inspectors as on 1.1.1988. Petitioners are 107, 108, 120, 128, 150 and 101, whereas respondents 3 and 6 are 96 and 98 respectively. The said seniority list published on 21.5.1988 in the post of Inspectors as on 1.1.1988 has become final. There is no challenge on the same. In the post of Deputy Superintendent of Police also there is a published final seniority list as on 1.1.2000 - Ext.R3(K) published on 23.1.2003. Serial Nos. 73 and 74 are the 3rd and 6th respondents respectively whereas the petitioners start only from 76. There is no challenge to this seniority list also and it has become final. True there is a provisional seniority list of Deputy Superintendent of Police as on 1.4.2003 wherein also respondents 3 and 6 are shown as seniors to the petitioners and the petitioners have filed their objections. But the fact remains that the petitioners had conceded seniority to respondents 3 and 6 in the final published seniority list of Inspectors as on 1.1.1988 and in the final published seniority list of Deputy Superintendent of Police as on 1.1.2000. This also is a factor which has to be taken note of while tackling the question as to whether the petitioners had to be given notice.

13. The next issue is on retrospective regularisation. That also is no more *res integra*, covered against the petitioners, both in Venkateswaralu's case and Santhosh Kumar's case *supra*. In Venkateswaralu's case it was held at paragraph 8 that "justice can be done only by exercising the power retrospectively. Otherwise, the object and purpose of Rule 47 will be largely frustrated". The Apex Court had taken the same view in an earlier case in P.V.T. Phillip Vs. P. Narasimha Reddy and Others, and both decisions were noted and followed in Santhosh Kumar's case. The consistent view taken by the Supreme Court is to endorse the invocation of such power on the Government for extending equity and meeting the ends of justice. When there is failure of justice resulting in inequity and injustice, Rule 39 of the General Rules is to be invoked in the interests of equity and justice. Such power can be exercised even with retrospective effect for doing complete equity. The contention that in the process the affected parties are also to be given notice cannot be appreciated. As already

observed above, whether the petitioners are affected is itself doubtful. It is not a situation where the settled seniority of the petitioners is unsettled. It is not a situation where the slots allotted to the petitioners are usurped by the contesting respondents. It is not a situation where a provisional/temporary employee in service for long getting regularisation with retrospective effect, affecting the seniority of regular recruits. This is a case where a regular recruit is being put to injustice for the only reason of not passing a test which was never conducted. Situation would have been probably different, if having offered a chance to pass a test and yet failing to pass the test and where Rule 39 is invoked for a special concession. Unlike such a situation, it is a question of granting exemption from passing certain tests which were never held.

14. It is the contention of Sri.Sasidharan that merely for the reason that the Rules cause hardship to an incumbent, Government may not invoke Rule 39 for relaxing the mandate under the Rules. Placing reliance on the Full Bench decision of this Court in Sreedharan Pillai's case, *supra*, it is contended that even when Rule 39 is invoked, it cannot have the effect of completely nullifying the operation and effectiveness of the rules in the guise of relaxing their rigour. It has to be seen that the Full Bench in the said decision has made it clear that "if, however, special circumstances do exist warranting a valid classification of any particular case or cases it will also open to the authority exercising the power under the rule to accord a special treatment in respect of such exceptional cases even by exempting the person or persons concerned from the operation of any particular rule". This is precisely what has been done in the instant case. That the examination under the special rules was never conducted is the special circumstances requiring the special treatment warranting a valid classification. It is a situation where the Rules have not been operated by the authorities by conducting the examination and that has resulted in inequity and injustice. It is pertinent to note that like the petitioners the contesting respondents had also passed the other tests for executive officers which is also mandatory. In the case of the examination under the Special Rules, they were never offered a chance. It is thus there is discrimination resulting in failure of justice requiring the mandatory invocation of Rule 39.

15. Yet another vehement argument on the part of the petitioners is that at any rate by Ext.P6 the Government only passed orders confirming the contesting respondents in the post of Circle Inspector of Police against substantive posts immediately and therefore, the effect of such declaration and confirmation against the substantive posts can only be after Ext.P6 dated 24.11.2003, whereas the Director General of Police has declared the period of probation with effect from 9.10.1984. The relevant paragraph 5 of Ext.P6 reads as follows:

"Government are also pleased to order that the probation in respect of the following officers in the category of Circle Inspector of Police will be declared and they will be confirmed against the substantive posts immediately..... The Director General of Police will issue necessary proceedings in this regard forthwith

according to eligibility in each individual case".

A close reading of the order would show that the direction by the Government is not to confirm them on a future date. The direction is to declare the probation and pass orders on confirmation against substantive posts. It is clear that such declaration and confirmation is not against substantive posts arising in future but against substantive posts which existed at the time of the completion of the period of probation by the concerned incumbents. In other words the confirmation is against substantive posts which existed at the time of completion of the period of probation by the contesting respondents, subject to their eligibility. The learned Government Pleader submits that the only reason for not confirming respondents 3 and 6 was that they had not passed the required test under the Special Rules and they were eligible otherwise. Therefore, once the said ineligibility is removed, there cannot be any impediment in confirming them against substantive posts which existed at the relevant time. In Registrar General of India and Another Vs. V. Thippa Setty and Others, , the Supreme Court in a case of regularisation of even adhoc employees, only cautioned that "if adhoc service is regularised from back date, it will disturb seniority of regularly appointed employees in the cadre. Ordinarily regularisation must effect prosecutive and not retrospectively". In the instant case there is no question of disturbing the seniority of others including the petitioners. As already noted above, seniority has been conceded in two final published seniority lists, one in the cadre of Inspector of Police as on 1.1.1998 (Ext.R1(i)) and the other in the cadre of Deputy Superintendent of Police as on 1.1.2000 (Ext.R3(k)).

16. Thus on an overall assessment of the situation, it can be seen that respondents 3 and 6 cannot in any way be put to any prejudice for the only reason of not performing a task impossible of performance. They have been in service for quite long. There is no case that they are otherwise unsuitable or unfit to hold the various posts which they held such as Circle Inspector of Police, Deputy Superintendent of Police and Superintendent of Police. Their only deficiency was that they had not passed the examination which was never held. It is not a situation where respondents 3 and 6 failed to pass the test. Even the failure was made impossible by not conducting the examination. The inaction on the part of the Government shall not prejudice an otherwise eligible incumbent. If Rule 39 of the General Rules is not invoked in such situations, it would certainly lead to unfairness, inequity and injustice.

There is no illegality or arbitrariness in Exts.P6 and P7 orders. There is no merit in the Writ Petition. It is dismissed.