

(2010) 07 KL CK 0039

In the High Court Of Kerala

Case No : Writ Petition (C) No. 31585 of 2009 (P)

Sreekanth R. and Others

APPELLANT

Vs

The Kerala Public Service Commission

RESPONDENT

Date of Decision : 06-07-2010

Acts Referred:

Advocates Act, 1961 — Section 24A, 26(1), 49
Bar Council of India Rules, 1975 — Rule 24, 49, 5, 5(1), 5(3)
Constitution of India, 1950 — Article 233(2)

Citation : (2010) 2 KLJ 733 : (2011) 1 RCR(Civil) 299 : (2011) 1 RCR(Civil) 299

Hon'ble Judges : Antony Dominic, J

Bench : Single Bench

Advocate : KRB Kaimal, Anil K. Nair and B. Unnikrishna Kaimal, for the Appellant; Alexander Thomas, S.C., for the Respondent

Judgement

Antony Dominic, J.—Issue raised in these writ petitions is common and therefore, these cases were heard together and are disposed of by this common judgment.

2. For the sake of convenience, WP(C) No. 31585/2009 is treated as the leading case, and the facts pleaded and the documents produced therein are referred to in this judgment.

3. The petitioners herein were enrolled as Advocates on the rolls of the Bar Council of Kerala. While practising as Advocates, they were appointed in different departments of the Government of Kerala. Thereupon, they applied to the Bar Council of Kerala for suspending their right to practise and surrendered their certificates in terms of Rules 49 & 5, Part-VI of the Bar Council of India Rules (hereinafter referred to as the Rules for Short). Exts.P3, P5 & P7 are the communications issued by the Bar Council of Kerala recording voluntary suspension of their practice with effect from the dates mentioned therein and acknowledging receipt of the enrolment certificates surrendered by the petitioners.

4. While the petitioners are thus continuing in Government Service, by Ext.P1

notification, Public Service Commission invited applications for appointment to the post of Legal Assistant Gr-II in the Law Department of the Government of Kerala. Ext.P14 is the Special Rules, viz., the Kerala Secretariat Subordinate Service Rules, which prescribes the qualification for the post of Legal Assistant Gr.11. Ext.P1 vacancy notification incorporates the qualification prescribed, which is extracted below for reference.

7. Qualifications:

(1) Degree in Law of any recognized University

(2) Pass in the Bar Council Examination

OR

Enrolment as an Advocate.

Note: (i) A Pass in the "Apprentice Examination" of the Madras High Court or the possession of the Enrolment Certificate of Mysore High Court will be considered as equivalent to a pass in the Bar Council Examination.

(ii) Candidates belonging to the scheduled Castes or Scheduled Tribes (in the absence of qualified persons, from among them) shall not be required to possess the qualifications prescribed in (2) above.

5. In response to Ext.P1 notification, the petitioners submitted their applications. They appeared for the written test held on 10/01/2009. In the meantime, the PSC issued Ext.P15 to the Government of Kerala stating that a doubt has arisen whether a candidate, who was enrolled once as an Advocate and later has taken up an employment under the Government with or without getting the enrolment suspended or has engaged in any other profession or calling, is eligible to be considered for the post. The Government was requested to examine the issue and clarify the doubt. Accordingly, the Government considered the matter and issued Ext.P16 dated 04/07/2008 clarifying that a candidate, who was enrolled once as an Advocate and later taken up employment with or without suspending practice continues in the roll of advocates and as such, is eligible to be considered for appointment to the post of Legal Assistant Grade-11. Despite the clarification issued by the Government, the PSC passed Ext.P18(a) resolution dated 17/11 /2008 which reads as under on the last date for receipt of application, the candidate should have enrolment with the Bar Council. Candidates having an employment in Govt. service as on the date will not be considered as having enrolment with the Bar Council."

6. Subsequently, the petitioners were issued Exts.P8 to P10 memos dated 15/09/2009 requiring them to produce the documents mentioned therein, with a note to the effect that candidates, who were employed in Government Service at the time of submission of their applications, will not be treated as having enrolment with the Bar Council. Thereupon, petitioners submitted Exts. P1 1 to PI 3 representations to the PSC against the note incorporated in Exts.P8 to P10

memos, which had the effect of rendering them ineligible for the post. Response was not forthcoming. Therefore, this writ petition was filed on 15/11/2009 seeking mainly to quash ExtP18(a) resolution of the PSC and the note added to Exts.P8 to P10 memos and to declare that the decision of the PSC to treat them ineligible to be considered for the post of Legal Assistant Cr.II is illegal.

7. Pursuant to the interim orders passed by this Court, the petitioners were permitted to appear for the interview. However, when ranked list was published on 07/06/2010, their results were withheld. Contention raised by the learned Senior counsel for the petitioners is that in view of the provisions contained in the Advocates Act, 1961 (hereinafter referred to as the Act for short), and the Rules, an Advocate, who takes up any employment, shall intimate the fact to the Bar Council on whose roll his name appears and that thereupon, he shall only cease to practise as an Advocate so long as he continues to be in employment. It is stated that an Advocate whose right to practice is suspended, desires to resume practice, he has only to apply to the Secretary of the Bar Council for resumption of practice in compliance with the provisions of the Rules and that thereupon the Enrolment Committee is to take a decision in the matter and return the certificates surrendered by the Advocate concerned. It is stated that suspension contemplated by the Act and the Rules is only suspension of the right to practice and the suspension does not amount to suspension of the enrolment itself.

8. It is contended that since the qualification prescribed in Ext.P14 Special Rules, which is also incorporated in Ext.P1 vacancy notification, only requires "enrolment as an Advocate" and as the petitioners still continue to be enrolled on the rolls of the Bar Council of Kerala, they are eligible candidates and are entitled to be included in the ranked list that was published by the PSC on 07/06/2010. Learned Senior Counsel also contended that in response to Ext.P15 clarification sought for by the PSC, the Government, the appointing authority, clarified by Ext.P16 that candidates like the petitioners are eligible in terms of the Special Rules and that in such circumstances, the PSC should not have resolved that they are ineligible in terms of the provisions contained in the Special Rules.

9. Learned Senior Counsel also referred me to Ext.P17 application made under the provisions of the Right to Information Act and Ext.P18 information obtained and contended that similar candidates were included in the ranked list that was published by the PSC in 2006. Further, according to the counsel, even going by the terms of the resolution, Government employees alone are ineligible and therefore, the resolution also is discriminatory in nature. Further it was also contended that in view of Clause 10 of the notification, general conditions of the notification are made applicable and that Clause 20 of the General Conditions prescribed the procedure to be complied with by applicants, who are already in Government Service. It is stated that therefore the note incorporated in Exts.P8 to P10 memos referred to above is an after thought

10. On the other hand, learned Standing Counsel for the PSC contended that an

Advocate whose right to practice is suspended is not an Advocate having valid enrolment with the Bar Council, in terms of the provisions contained in the Act and the Rules. According to the learned Standing Counsel, once the right to practice is suspended, the very enrolment itself is suspended and that the petitioners, whose right to practice is admittedly suspended, cannot be treated as candidates having valid enrolment with the Bar Council. Learned Counsel for the PSC also placed considerable reliance on the judgments of this Court in Anil Kumar v. High Court of Kerala 2008(1) KLT 23, which was confirmed by the Division Bench in Biju Babu v. High Court of Kerala 2008(2) KIT 171. He also referred to the Apex Court judgments in Sushma Suri Vs. Govt. of National Capital Territory of Delhi and Another, and Satish Kumar Sharma v. Bar Council of HP 2001 (2) SCC 365. Insofar as Ext.P16 clarification furnished by the Government and also Ext.P18, the information obtained in response to Ext.P17 application made under the Right to Information Act are concerned, learned Counsel contended that what arises for consideration is the eligibility of the petitioners in terms of the Special Rules and therefore Exts. P16 & P18 can have no impact on the legality or otherwise of the decision of the PSC.

11. Insofar as the contention of the learned Senior Counsel for the petitioners that Ext.P18(a) resolution of the PSC is discriminatory, learned Standing Counsel for the PSC contended that in Ext.P15 the clarification sought by the PSC was not confined to employees in the Government Service alone. It is stated that Ext.P16 reply also is general in nature. However, according to him, since applications were received only from Government employees, in Ext.P18(a) resolution the PSC dealt with the eligibility of only Government employees. On this basis, it is contended that Exts. P15, P16 & P18 are of general nature and are not confined to the eligibility or otherwise of Government employees alone,

12. The main issue that arises for consideration is the legality of Ext.P18(a) resolution, where the PSC has decided that employees in Government Service like the petitioners are ineligible to be candidates in response to Ext. P1 notification, Ext.P1 notification incorporates the provisions contained in Ext.P14 Special Rules, and the qualifications prescribed, insofar as it is relevant, are a Degree of Law of any recognised University, a pass in the Bar Council Examination or enrolment as an Advocate.

13. The validity of Ext. P18(a) resolution of the PSC will depend upon the answer to the question whether, in the light of the provisions of the Act and the Rules, the petitioners are candidates having enrolment as Advocates. Admittedly, all the petitioners have enrolled themselves on the rolls of the Bar Council of Kerala in terms of the provisions contained in the Act and the Rules referred to above.

14. These Rules are framed by the Bar Council of India in terms of the provisions contained in Section 49 of the Act. In terms of the provisions contained in the Act and the Rules, Advocate means a person whose name has been entered on the rolls under the provisions of the Act. Rule 49 of Part- VI of the Rules reads as under.

49. An advocate shall not be a full-time salaried employee of any person, government, firm, corporation or concern, so long as he continues to practise, and shall, on taking up any employment, intimate the fact to the Bar Council on whose roll his name appears, and shall thereupon cease to practise as an advocate so long as he continues in such employment.

(emphasis supplied)

Rule 5 of Chapter III of Part-VI of the Rules, which is of relevance, also reads asunder:

5(1): An advocate who voluntarily suspends his practice for any reason whatsoever, shall intimate by registered post to the State Bar Council on the rolls of which his name is entered, of such suspension together with his certificate of enrolment in original.

(2) Whenever any such advocate who has suspended his practice desires to resume his practice, he shall apply to the Secretary of the State Bar Council for resumption of practice, along with an affidavit stating whether he has incurred any of the disqualifications u/s 24A; Chapter III of the Act during the period of suspension.

(3) The Enrolment Committee of the State Bar Council may order the resumption of his practice and return the certificate to him with necessary endorsement. If the Enrolment Committee is of the view that the advocate has incurred any of the disqualifications the Committee shall refer the matter under proviso to Section 26(1) of the Act.

(4) On suspension and resumption of practice the Secretary shall act in terms of Rule 24 of Part IX.

(emphasis supplied)

15. A reading of Rules 49 and 5, which have been extracted above, show that if an Advocate accepts employment as a full time salaried employee, he shall intimate the fact to the Bar Council concerned and shall thereupon "cease to practise as an Advocate so long as he continues in employment". When he is desirous of resuming practice, he has to make an application as per Rule 5 extracted above and on receipt of the application, the Enrolment Committee of the Bar Council is to consider the matter and pass order of resumption and return the enrolment certificate surrendered by him in terms of Rule 5(1). Therefore, on accepting employment when an application is made to the Bar Council what is suspended is not the enrolment as such, but only the right of the Advocate concerned to practise as Advocate and he does not cease to have his enrolment on the rolls of the Bar Council. In terms of Rule 5(3), when an application for resumption of practice is made, all that is required is that the Enrolment Committee should decide as to whether the Advocate is entitled to resume his practice and if the decision is favourable to him, without anything further, the Bar Council has to return the certificate to the candidate concerned.

The Rules do not contemplate any fresh enrolment for resumption of practice. If that be the effect of Rules 49 & 5 extracted above, the fact that the petitioners have accepted employment in the Government Service and that their right to practice is suspended, does not result in depriving them of their enrolment as Advocates on the rolls of the Bar Council.

16. Clarification offered by the Government, the appointing authority, in Ext.P16 is also consistent with the above view. It should also be noticed that in Ext.P18 reply given by the PSC in response to Ext.P17, the PSC itself has accepted that in the ranked list published in 2006, similar candidates were included. Therefore, there was no reason for the PSC to have taken, a contrary view when recruitment was held pursuant to Ext.P1 notification,

17. Insofar as the judgments of this Court in Anil Kumar v. High Court of Kerala 2008(1) KLT 23 & Biju Babu v. High Court of Kerala 2008(2) KLT 171 relied on by the learned Standing Counsel for the PSC are concerned, in these judgments this Court dealt with the eligibility of Special Public Prosecutors appointed by the CBI for appointment as District Judges. A reading of these judgments show that one of the qualifications for appointment was that candidates shall be practicing Advocates and should have so practised for a period of not less than 7 years. As against this, the qualification mentioned in Ext.P1 vacancy notification is only enrolment as Advocate and not practicing Advocate. Therefore, the Rules which were considered being substantially different, these judgments are of no assistance to the PSC to canvass for the ineligibility of the petitioners.

18. Insofar as the judgment of the Apex Court in Sushma Suri Vs. Govt. of National Capital Territory of Delhi and Another, is concerned, that again dealt with the eligibility of an Additional Government Advocate in Government of India to be appointed as District Judge. Interpreting the provisions contained in Article 233(2) of the Constitution of India and Rule 49 of the Rules as it stood then, the eligibility of the candidate was upheld. The facts of the case are totally different from the facts obtaining in these cases and therefore, this judgment also will not improve the case of the PSC in any manner. Similar is the judgment in Satish Kumar Sharma v. Bar Council of HP 2001(2) SCC 365, where the issue dealt with was regarding the eligibility of an employee of the Himachal Pradesh State Electricity Board to enroll as an Advocate. This case also was decided in a factually different context and is of no relevance.

19. For these reasons, I uphold the eligibility of the petitioners and therefore the decision of the PSC to reject the candidature of the petitioners cannot be sustained. Since the eligibility of the petitioners has been upheld for the aforesaid reasons, it is unnecessary for this Court to deal with the other contentions raised at the bar. Therefore, Ext.P18(a) resolution and the consequential note added in Exts.P8 to P10 memos issued to the petitioners in WP(C) No. 31585/2009 will stand set aside. The PSC is directed to treat the petitioners herein as candidates eligible in terms of the provisions contained in Ext.P1 notification and include them at appropriate places in the ranked list.

20. WP(C) No. 31585/2009 is disposed of as above.

21. WP(C) Nos. 28144,29672 of 2009 & 7164 of 2010 also will stand disposed of, in the light of the above.

These writ petitions are disposed of as above.