

(2001) 12 KL CK 0013

In the High Court Of Kerala

Case No : W.A. No"s. 3376 of 2000 and 105, 128 and 628 etc. of 2001

State of Kerala and Others

APPELLANT

Vs

Jyothi, S.S. and Others

RESPONDENT

Date of Decision : 21-12-2001

Acts Referred:

Constitution of India, 1950 — Article 14, 16, 162, 309, 320
Kerala Public Service Commission (Consultation) Regulations, 1957 — Regulation 5
Kerala State and Subordinate Services Rules, 1958 — Rule 39, 9

Citation : (2001) 12 KL CK 0013

Hon'ble Judges : K.S. Radhakrishnan, J;K. Balakrishnan Nair, J

Bench : Division Bench

Advocate : Thomas Kutty, M.A., Government Pleader, for the Appellant; G. Hariharan, for Respondent 1, S. Subashchand, for Respondents 42 to 52 and P.C. Sasidharan, for Public Service Commission, for the Respondent

Final Decision : Allowed

Judgement

K.S. Radhakrishnan, J.—Writ Appeal No. 105 of 2001 is filed by State of Kerala represented by its Chief Secretary and another against the Judgment in O.P. No. 20042 of 1998, Issue involved in these cases is identical and hence we are disposing of all these cases by common Judgment.

2. Government of Kerala by letter No. 9516/Adv. C1/92/P and ARD, dated 17th 5 March 1998 wrote to all Heads of Departments, Chief Executives and Public Sector Undertakings, Companies and Corporations and District. Collectors to furnish category-wise details of all provisional (temporary) hands (including those on daily wages and on contract appointments and part-time employees) who have been appointed in public services (including Public Sector Undertakings) upto 1st January 1994 and who have completed a minimum period of three years service as on 1st January 1997 and are continuing in service subject to the following conditions:

(i) The post held by them should have been duly sanctioned by the Competent

Authority.

(ii) The incumbents should be fully qualified to hold the post; and

(iii) The period of service may be continuous or broken but shall be in the same category in the same Department.

A consolidated report with category-wise details were directed to be sent on or before 31st March 1998. It is pointed out that the question of regularisation of the service of provisional employees, who have been continuing in service for a long time has been engaging the attention of the Government for long. Consequently, Chief Secretary to Government by letter No. 9516/Adv. C1/92/ P and ARD, dated 9th March 1995 ordered that provisional employees who have been appointed in public service, Public Sector Undertakings before 1st November 1987 and who have been continuing in service as on 13th January 1995 may not be discharged from service and may be allowed to continue in the posts held by them until further orders purely on a provisional basis provided the following conditions are satisfied:

(i) The post held by them should have been duly sanctioned by competent authority (except in the case of part-time contingent employees in whose case sanctioned posts are not required).

(ii) The incumbents should be fully qualified to hold the post.

(iii) They should have put in seven years or more of service as on 13th January 1995.

3. The writ petition was preferred by a person who had written the test conducted by the Public Service Commission for appointment to the post of Laboratory Technician contending that the above-mentioned orders would adversely affect her rights for getting public employment through Public Service Commission. According to her, if such temporary appointments are regularised equality of opportunity as enshrined in Articles 14 and 16 of the Constitution of India for public employment would be violated. According to her as per Article 320 of the Constitution of India it is mandatory for any appointing authority or Government to consult the Public Service Commission to effect substantive appointments to the civil service.

4. As per the Kerala Public Service Commission (Consultation) Regulations, it is mandatory that the State Government and appointing authorities shall consult that constitutional body before making appointment to public service. It was pointed out many of the posts in Government service against which temporary appointments are effected under Rule 9(a)(i) of the Kerala State and Subordinate Services Rules are posts which come within the purview of the Commission. It was pointed out that temporary appointments on direct recruitment in Government service are permissible under Rule 9(a)(i) of the General Rules, which reads as follows:

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.

As soon as emergency ceases services of those provisional appointees have to be terminated and regular appointments are to be effected. Even though temporary appointments are made only for 179 days, State is allowing them to continue in service indefinitely, even in violation of Regulation 5 of the Kerala Public Service Commission (Consultation) Regulations which reads as follows:

5. (1) It shall not be necessary to consult the Commission regarding the appointment of a person temporarily for a total period not exceeding one hundred and eighty days in the case of each individual to a post borne on the cadre of a service to which appointment has to be made after consulting the Commission.

(i) Where it is necessary in the public interest owing to an emergency which has arisen to fill immediately a vacancy in the post and there would be undue delay in making the appointment after such consultation; or

(ii) where it is necessary to fill a short vacancy in the post and the appointment of the person who is entitled to appointment under the rules applicable to the service would involve excessive expenditure on travelling allowance or exceptional administrative inconvenience.

(2) In addition to the concurrence to be obtained under Clause (i) for the continuance of the temporary appointment of a person beyond the first one hundred and eighty days a second concurrence of the Commission shall be obtained sufficiently in advance, if, in any individual case, it becomes essential to continue such appointment beyond three hundred and sixty days;

Provided that the concurrence of the Public Service Commission shall not be required in the case of temporary appointments made from the lists obtained from the Public Service Commission in pursuance of Sub-para (a) of Para 3 of G.O. (Rt) No. 260/73//PD, dated 13th January 1973.

Any appointments temporarily effected for more than 180 days require consultation with the Public Service Commission, Apart from that concurrence of the Public Service Commission is also necessary if the appointment is effected for a period of 360 days.

5. As per the Kerala Public Service Commission (Additional Functions) Consultation) Rules, 1966 appointments to various posts shall also made from the list drawn up by the Public Service Commission in accordance with Article 320 of the Constitution of India. It was pointed out it is in violation of those statutory requirements that candidates are being appointed on provisional basis and allowed to continue for number of years to the detriment of persons aspiring

appointments through Public Service Commission and other statutory, bodies.

6. The apex court in Keshav Chandra Joshi and others etc. Vs. Union of India and others, has deprecated the practice of effecting massive ad hoc appointments de hors the rules giving a go-by to the recruitment rules and then resort to regularisation of such appointments subsequently. Apex court held:

It is common experience that it is a vicious circle that initially Governments impose baa on recruitment and make massive ad hoc appointments de hors the rules giving a go-by to make recruitment in accordance with the rules and then resort to regularisation of such appointments exercising the power under Article 320(3) proviso or Article 162 to make them the members of the service. This practice not only violates the mandates of Articles 14 and 16 but also denies to all eligible candidates, their legitimate right to apply for and stand for selection and get selected.

In State of Orissa and others Vs. Smt. Sukanti Mohapatra and others, and also in J and K. Public Service Commission, etc. Vs. Dr. Narinder Mohan and others etc. etc., , the apex court held that appointments made in violation of recruitment rules violate Articles 14 and 16. Same is the view taken by the apex court in R.N. Nanjundappa Vs. T. Thimmiah and Another, A three Judges Bench in B.N. Nagarajan and Others Vs. State of Karnataka and Others, , held that regularisation in violation of the statutory rules is not permissible, in exercise of the executive power of the State which have the effect of overriding the rules framed under proviso to Article 309 of the Constitution and that therefore, no regularisation in exercise of the executive power under Article 162, in contravention of the sututory rules, is permissible. In P. Ravindran and Others Vs. Union Territory of Pondicherry and Others, , apex court was dealing with the question of regularisation of ad hoc appointees of Lecturers which should have been normally done by the Public Service Commission. Dealing with the said case apex court held as follows:

The admitted position is that the Commission having been entrusted with the constitutional duty to select suitable candidates by inviting applications from the open market, every candidate has a fundamental right to seek consideration and for selection through open competition. The Petitioners also have that right. At one time, they staked their claims but were not selected. Therefore, the process of recruitment through the Commission, as envisaged under the Constitution, cannot be bypassed by issuing direction for regularisation of the services of the ad hoc persons who had come to the service through back door entry. This Court in a catena of decisions has deprecated this practice of regularisation except in extraordinary cases by directing the Government to frame a scheme and regularise Classes III and IV services in accordance with the scheme. Even in subsequent decisions that leverage is not being insisted upon. This Court in J and K Public Service Commission v. Dr. Narinder Mohan had held that the Court cannot adopt hybrid process of direction to regularise the services bypassing the process of selection envisaged under the Constitution. This Court has deprecated

the Government for exercising the power under Article 320 of the Constitution taking out the pests from the purview of the Commission and to regularise services de hors the Commission.

Same is the view taken by the apex court in V. Sreenivasa Reddy and others Vs. Govt. of Andhara Pradesh and others,

7. Learned Single Judge found force in the contention of the writ Petitioner. Learned Judge held as follows:

In such circumstances, the attempt to regularise temporary hands as per Exts. P-1 and P-2 is violative of the right for equality of opportunity as enshrined in Article 16 of the Constitution of India and it militates against the Constitutional and statutory requirements and mandates as mentioned above...Exts. P-1 and P-2 are violative of Article 14 of the Constitution of India and are arbitrary as well, on the aforesaid reason. It is beyond the power of the Government. Government themselves allowed the temporary hands to continue for long violating several mandatory provisions of law. Persons illegally continued cannot steal a premium. Nobody can be conferred a benefit on the basis of an illegality. Apart from that Government cannot violate the rights of other persons for equal consideration. It is thus beyond the power of Government. Accordingly Exts. P-1 and P-2 are quashed.

Learned Judge gave a further direction to the State Government to terminate the services of temporary appointees forthwith. There was a further direction to fill up those vacancies by making regular appointments through Public Service Commission in respect of any category or department. It was also ordered that in case there is no list prepared by the Public Service Commission in respect of any category or department, fresh appointment under Rule 9(a)(i) shall be made limiting such appointment to the period mentioned in the said rule. Direction was also given to the Government to see that the direction given by the court are complied with by all the authorities under it and by the public sector/autonomous/local bodies and Universities. Aggrieved by the Judgment of the learned Single Judge these appeals have been preferred by the State as well as by other affected parties.

8. Learned Government Pleader submitted that question of regularisation of service of provisional employees who have been continuing; in service was engaging the attention of the Government for long. Government noticed that many of them are working in duly sanctioned posts and are fully qualified to hold the post and they were put in number of service in those posts. Category-wise details of those persons working were directed. to be sent by all the Heads of Departments, Chief Executives of Public Sector Undertakings and District Collectors. It was pointed out Government was yet to take a final decision in the matter. It is not as if Government have decided to regularise the service of those persons. According to the Government Pleader, Rule 39 of the Kerala State and Subordinate Services Rules gives ample power to the Government 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.

9. We find that Government has not taken any decision yet to regularise the service of those persons who have been appointed before 1st November 1987 and are continuing service as on 13th January 1995. If the State Government is taking such decision they have to bear in mind the constitutional requirement of filling, up the posts through Public Service Commission. In effecting appointments to various categories of posts in Corporations and Companies, consultation by the Public Service Commission is mandatory under the Kerala Public Service Commission (Consultation) Regulations. So many provisional hands are continuing in service and are being appointed by the Government and other Public Sector Undertakings without following any statutory provisions.

10. We are of the view Government have got the power to deal with the case in a just and equitable manner but can be exercised in exceptional circumstances. Since Government is yet to take a final decision in the matter, we are of the view the direction given by the learned Single Judge at this stage is premature.

11. In the facts and circumstances of the case, we are inclined to give a direction to the Government to pass final orders on the basis of the details collected pursuant to Exts. P-1 and P-2. Indefinite continuance of provisional hands is not good for good governance. Considering the facts and circumstances of the case, Government should pass final orders within a period of four months from the date of receipt of a copy of this Judgment taking into consideration all aspects of the matter on the basis of the details collected pursuant to Exts. P-1, and P-2. Fate of provisional hands has been in balance leading to a stage of uncertainty. We may remind the constitutional obligation of the State Government to fill up substantive posts on a regular basis rather than allowing the provisional hands to continue for years to come. We find provisional hands are continuing for number of years. It is for the State Government to take a final decision on the question of regularisation of provisional hands after examining the merits of each case bearing in mind the various observations contained herein before. We remind the Government that any order of absorption and regularisation of a provisional employee appointed not in accordance with the rules would result in denial of equal opportunity in the matter of employment to other eligible candidates for public employment. Only in genuine cases and in public interest Government can exercise its powers under Rule 39 of the Kerala State and Subordinate Services Rules. We leave it to the State Government. With the above observation the writ appeals are allowed. Those who are continuing in service on the basis of interim Order passed by this Court could continue till a decision is taken by the Government as directed above.