
(2014) 06 KL CK 0001

In the High Court Of Kerala

Case No : Writ Petition (Civil) No. 28784 of 2013

Sugathan

APPELLANT

Vs

Union of India

RESPONDENT

Date of Decision : 24-06-2014

Acts Referred:

Constitution of India, 1950 — Article 14, 226
Notaries Act, 1952 — Section 5

Citation : (2014) 3 ILR (Ker) 446 : (2014) 2 KHC 763 : (2014) 3 KLT 33

Hon'ble Judges : Anil K. Narendran, J

Bench : Division Bench

Advocate : B. Mohanlal, Advocate for the Appellant; Viju Abraham, Sr. Government Pleader and P. Parameswaran Nair, Asst Solicitor General of India, Advocate for the Respondent

Judgement

Anil K. Narendran, J.—The petitioner has filed this Writ Petition seeking a writ of certiorari to quash Ext.P4 communication issued by the 2nd respondent to the extent it orders withdrawal of the Certificate of Practice issued to the petitioner as Notary in Kollam Taluk in Kollam District and for other consequential reliefs. The petitioner, a practising lawyer in the courts situated in Kollam District, submitted Ext.P1 memorial dated 27.10.2000 before the 2nd respondent, seeking appointment as Notary, under the Notaries Act, 1952, for Kollam Taluk. Based on Ext.P1 application the 2nd respondent conducted an inspection and submitted Ext.P2 inspection report reporting that the petitioner is eligible to get appointment as Notary having jurisdiction over Kollam Municipal area. In Ext.P2, the 2nd respondent recommended that, the petitioner may be allowed to appear before the Interview Board. Pursuant to Ext.P2 the petitioner was interviewed by the Interview Board on 24.2.2011 and according to the petitioner the Board has recommended that he is competent to be appointed as Notary. On 3.3.2011 the petitioner remitted Rs. 1,000/- vide Chalan No. 94 of the Sub Treasury, Kollam, towards fee for issuing Certificate of Practice as a Notary.

2. Ext.P3 is the relevant extract of the File Note concerning the appointment of

Notaries by the 2nd respondent. Since the Model Code of Conduct of the Election Commission was in force, it was noted in Ext.P3 File Note as follows:

If the Government intends to make any further fresh appointment, the concurrence of the Election Commission is required.

In the said File Note, the Minister concerned remarked as follows:

Certificate/notification may be issued after concurrence from the Election Commission.

3. Thereafter, the file was forwarded to the Chief Electoral Officer, which was returned by the Chief Electoral Officer, on 16.5.2011, as the Model Code of Conduct was lifted on 14.5.2011. After few months, the petitioner was issued with Ext.P4 communication dated 24.12.2011 of the 2nd respondent, stating that, order dated 28.2.2011 made on his application for appointment as Notary has been reviewed by the Government on 8.11.2011 and it stands withdrawn along with similar other applications, as there was no vacancy on the date of the order of appointment. The petitioner was further informed that, his application is kept pending in the Department. The chalan receipt dated 3.3.2011 for Rs. 1,000/- was also returned to him along with Ext.P4.

4. According to the petitioner, the 1st respondent by notification dated 31.8.2012 permitted the 2nd respondent to appoint 1000 Notaries in the State of Kerala. Immediately knowing about the said notification enhancing the maximum number of vacancies of Notaries in the State, the petitioner submitted Ext.P5 representation dated 21.11.2012 before the 2nd respondent, requesting the Government to appoint him as Notary. It is also the case of the petitioner that, a similarly situated applicant seeking appointment as Notary had approached this Court in W.P.(C). No. 23864 of 2011 and this Court, while disposing the matter vide Exhibit P6 judgment, directed the 2nd respondent to reconsider the applications submitted by the petitioner in that Writ Petition and also that of the party respondent for appointment as Notary in the concerned Taluk and pass appropriate orders on the basis of merit and seniority, within a period of three months from the date of receipt of a copy of the judgment. According to the petitioner, in obedience to Ext.P6 judgment the petitioner in W.P.(C) No. 23864 of 2011 was given appointment as Notary in Kottarakkara Taluk in Kollam District. Pointing out the above aspects, the petitioner has submitted Ext.P7 representation dated 29/8/2013 before the 2nd respondent and thereafter approached this Court in this Writ Petition seeking various reliefs.

5. A statement has been filed on behalf of the 2nd respondent contending that on the basis of the recommendation of the competent authority the petitioner was allowed to appear before the Interview Board. Accordingly, the Board interviewed the petitioner and on the basis of the recommendation of the Interview Board a decision was taken to appoint the petitioner as Notary in Kollam Municipal area. At the time of considering the application, the maximum number of Notaries that could have been appointed by the Government of Kerala

was 845. Going by R.8 (4A) of the Notaries Rules, 1956, the appropriate Government may on or after 9/5/2001 appoint Notaries in a State or Union Territory, as the case may be, not exceeding the number of Notaries specified in the Schedule. The proviso to the said sub-rule make it clear that the number of Notaries whose certificate of practice has been renewed under sub-s. (2) of S. 5 of the Notaries Act shall be included in the total number of Notaries appointed for the purpose of counting the total number of Notaries specified in the Schedule. As the total number of Notaries in Kerala exceeded the total number of 845 specified in the Schedule any further appointment of Notary would have resulted in violation of R.8(4A). There were other 24 similarly placed applicants. Since issuance of Certificate of Practice would have been in violation of R.8(4A), Certificate of Practice and notification in respect of the said 25 applicants including the petitioner was not issued. It was in such circumstances the 2nd respondent has issued Ext.P4 communication to the petitioner.

6. The 2nd respondent further contended that, the petitioner has not challenged Ext.P4 order by filing a review, as contemplated in R.8(3) and on that ground the present Writ Petition is not maintainable. In accordance with R. 17, the 2nd respondent has published the list of Notaries, vide S.R.O. No. 54/2013 dated 22.1.2013, as per which, there are 73 Notaries in Kollam District. The 2nd respondent has to maintain equilibrium in the matter of appointment of Notaries in all districts according to the needs of the people in those districts. Seniority of the application is not a criteria for appointment as Notary. The list of Notaries published vide S.R.O. No. 82/2011 dated 31.1.2011 contained 743 Notaries. After the said notification, the 2nd respondent had appointed 82 fresh Notaries for the period from January, 2011 to 1.3.2011. Applications for renewal of Certificate of Practice in respect of 20 applicants were also pending with the 2nd respondent. As such, 845 Notaries, the maximum number that can be appointed in the State as per R.8(4A) was exhausted. In these circumstances, the request made by the petitioner for issuance of Certificate of Practice as Notary was turned down. The 2nd respondent decided to withdraw the order of appointment made in the case of 25 applicants including that of the petitioner since there was no vacancy of Notary at the time of the order of appointment.

7. In Ext.P6 judgment there was a direction to reconsider the application submitted by certain applicants for appointment as Notaries in the concerned Taluk. The petitioner preferred Ext.P7 representation which is pending consideration before the Government Now, the maximum number of Notaries that can be appointed in State of Kerala is 1000. The 2nd respondent has appointed 963 Notaries throughout the State, in which 78 Notaries are appointed in Kollam District. The memorial of the petitioner was processed in accordance with the provisions of Notaries Act and Rules made thereunder. But the order of appointment was withdrawn by the Government on the basis of lack of vacancy of Notaries at that time and for avoiding any violation of R.8(4A). Therefore the 2nd respondent justified the stand taken in Ext.P4.

8. The petitioner has filed a reply affidavit contending that, as on 1.3.2011 there were 19 vacancies of Notaries and that the petitioner has remitted Rs. 1,000/- on 3.3.2011 towards fee for Certificate of Practice as directed by the 2nd respondent. The contention raised by the 2nd respondent regarding the non-filing of Review as contemplated in R.8(3) is not tenable as the above contention was considered and answered against the 2nd respondent in Ext.P6 judgment of this Court. Pursuant to the direction contained in Ext.P6 judgment, the 2nd respondent considered the application made by the petitioner in that Writ Petition and issued him Certificate of Practice as borne out from Ext.P8. As the total number of Notaries to be appointed in the State of Kerala has been enhanced to 1000 during 2012, the 2nd respondent ought to have considered the petitioner's application. Relying on Ext.P8 the petitioner would contend that the 2nd respondent had already appointed 7 candidates in Kollam District overlooking seniority and in violation of the direction contained in Ext.P6 judgment that the application preferred by the eligible candidates have to be considered and persons have to be appointed in the order of their merit and seniority in respect of the vacancies earmarked. Now there exist vacancies of Notaries in Kollam District. Therefore, the petitioner contended that the Writ Petition may be allowed as prayed for.

9. Heard the arguments of the learned counsel for the petitioner and the learned Senior Government Pleader appearing for the 2nd respondent.

10. The learned counsel for the petitioner reiterated the contentions raised in the Writ Petition. Relying on Ext.P6 judgment it was argued that a similar direction may be issued, directing the 2nd respondent to reconsider the petitioner's application for appointment as Notary in Kollam Taluk in Kollam District within a time limit fixed by this Court.

11. Per contra, the learned Senior Government Pleader would contend that, there is no illegality in Ext.P4 communication issued by the 2nd respondent as the total number of Notaries that can be appointed in State of Kerala as on that date was only 845, which number had already been exceeded at the time of the order of appointment of the petitioner. Ext.P4 communication has been issued strictly in terms of R.8(4A). Regarding Ext.P6 judgment, it was pointed out that, a Division Bench of this Court in its judgment dated 12.7.2010 in W.A. No. 1887/2009, after taking note of the amendment made to the Notaries Rules vide Notaries (Amendment) Rules, 2009, held that, an application for appointment as Notary that was pending as on the date of amendment, i.e., as on 1.3.2009, can be disposed of only in accordance with the amended Rules and the judgment of this Court in Ext.P6 was without adverting to the principle laid down in the above judgment of the Division Bench. Hence, consideration of the application submitted by the petitioner can only be in accordance with the amended rules, as held by the Division Bench in its judgment in W.A. No. 1887/2009.

12. I have considered the rival submissions made at the Bar. I shall first consider the contention raised by the learned Senior Government Pleader regarding

maintainability of this Writ Petition, relying on R.8(3) of the Notaries Rules. According to the learned Senior Government Pleader, the petitioner has not challenged Ext.P5 order by filing a review, as contemplated in R.8(3) and on that ground the present Writ Petition is not maintainable. Sub-r.(3) of R.8 of the Notaries Rules reads thus:

8(3). An applicant whose application has been rejected or allowed in respect of only a part of the area to which it relates or against whom an order as to costs has been made under sub-rule (1) may, within sixty days of the date of the order apply to the appropriate government for reviewing the order and that Government may, after making such further inquiry as it thinks fit pass such order as it considers necessary.

Going by sub-r.(3) of R.8, the statutory remedy by way of review contemplated under the said sub-rule can be availed by an applicant whose application has been rejected or allowed in respect of only a part of the area to which it relates or against whom an order as to costs has been made under sub-r.(1) of R.8. The time limit prescribed for availing such review is 60 days of the date of order. In the case on hand, Exhibit P1 application submitted by the petitioner is neither rejected nor allowed in part by Ext.P4. Similarly, no order as to costs has been made under sub-r.(1) of R.8. As stated in Ext.P4, the 2nd respondent has withdrawn the order made on the petitioner's application as there was no vacancy of Notaries as on the date of the order of appointment and his application is kept pending in the Department. Therefore, no review, as contemplated under sub-r.(3) of R.8, will lie against Ext.P4. In such circumstances, the challenge made against Ext.P4 in the present Writ Petition is maintainable and I hold so.

13. Now I shall consider whether there is any illegality in the stand taken by the 2nd respondent in Ext.P4. Sub-r.(4A) of R.8 of the Notaries Rules, which was inserted with effect from 10.5.2001, reads thus:

8(4A). The appropriate Government may on and after the ninth day of May, 2001, appoint notaries in a State or Union Territory, as the case may be, not exceeding the number of notaries specified in the Schedule:

Provided that the number of notaries whose certificate of practice has been renewed under sub-section (2) of Section 5 of the Act shall be included in the total number of notaries appointed for the purpose of counting the total number of notaries specified in the Schedule:

Provided further that if in a State or Union Territory the number of notaries appointed before the ninth day of May, 2001 exceeds the number of notaries specified in the Schedule, such notaries shall continue to be so appointed in that State or Union Territory, as the case may be.

Going by sub-r.(4A) of R.8, after 9.5.2001, the total number of Notaries appointed in a State or Union Territory shall not exceed the number of Notaries

specified in the Schedule to the Rules. As per the first proviso to sub-r.(4A), for the purpose of counting the total number of Notaries specified in the Schedule, the number of Notaries whose certificate of practice has been renewed under sub-s. (2) of S. 5 of the Act shall be included. As per the 2nd proviso to sub-r.(4A), if the number of Notaries appointed in a State or Union Territory before 9.5.2001 exceeds the number of Notaries specified in the Schedule, such Notaries shall continue to be so appointed in that State or Union Territory. In view of the above position, after insertion of sub-r.(4A) of R.8, i.e., after 9.5.2001, no fresh appointment of Notaries can be made in any State or Union Territory if the total number of Notaries appointed in that State or Union Territory exceeds the maximum number of Notaries specified in the Schedule to the Rules.

14. In addition to this, going by sub-r.(3) of R.7, in making recommendation under sub-r.(1), the competent authority shall have due regard to the matters enumerated in Clauses (a) to (e) of sub-r.(3). Clauses (b) and (e) of sub-r.(3) read thus:

7(3)(b). whether, having regard to the commercial importance of the area in which the applicant proposes to practice and the number of existing notaries practicing in the area, it is necessary to appoint any additional notaries for the area;

7(3)(e) where applications from other applicants in respect of the area are pending, whether the applicant is more suitable than such other applicants.

Going by Clause (b) of sub-r.(3) of R.7, while making recommendation under sub-r.(1), the competent authority has to consider whether, having regard to the commercial importance of the area in which the applicant proposes to practice and the number of existing Notaries practising in that area, it is necessary to appoint any additional Notaries for that area. This means that the recommendation made by the competent authority under sub-r.(1) of R.7 should reflect the subjective satisfaction of that authority as to the necessity for appointment of additional Notaries for that area. Similarly, going by Clause (e) of sub-r.(3) of R.7, where applications from other applicants in respect of the area are pending, the competent authority, while making recommendation under sub-r.(1) has to consider whether the applicant is more suitable than such other applicants. This further means that any applicant having seniority, if any, in respect of an area, on the basis of the date of application, can also be overlooked in order to give appointment to a more suitable applicant.

15. It is not in dispute that, as on the date of issuance of Ext.P4 the maximum number of Notaries who can be appointed in the State of Kerala was 845 and that has already been exceeded. In which event, any order issued by the 2nd respondent appointing the petitioner as Notary in Kollam Taluk would be contrary to sub-r.(4A) of R.8. As evident from Ext.P4, an order was passed on 28.2.2011 to appoint the petitioner as Notary, which order stands reviewed on 8.11.2011 along with similar orders in the case of other applicants, as there was no vacancy

as on the date of the order of appointment, and the same was communicated to the petitioner vide Ext.P4 communication dated 24.12.2011. It was much after Ext.P4, the 1st respondent by notification dated 31.8.2012 increased the total number of Notaries to be appointed in the State of Kerala from 845 to 1000. The only contention raised by the petitioner in his reply affidavit is that, as the total number of Notaries to be appointed in State of Kerala has been enhanced to 1000 during 2012, the 2nd respondent ought to have considered his application. In such circumstances, the reasoning in Ext.P4 communication of the 2nd respondent that, the order made on the petitioner's application was reviewed and stands withdrawn as there was no vacancy of Notaries as on the date of the order of appointment is perfectly legal and the same is not liable to be interfered with in this Writ Petition and I hold so.

16. Moreover, I find that the challenge made against Ext.P4 is highly belated. It is trite law that, delay and laches is one of the important factors which this Court must bear in mind while exercising discretionary power under Art. 226 of the Constitution. It is so held by the Apex Court in Tamil Nadu Housing Board, Chennai Vs. M. Meiyappan and Others, . As borne out from records, after Ext.P4 communication dated 24.11.2011, the petitioner submitted Ext.P5 representation before the 2nd respondent only on 21.11.2012. Later, on coming to know about Ext.P6 judgment of this Court dated 10.6.2013, he submitted Ext.P7 representation before the 2nd respondent on 28.9.2013 and thereafter, he has filed this Writ Petition on 21.11.2013. No explanation whatsoever has been stated in the Writ Petition regarding the inordinate delay of nearly 2 years in challenging Ext.P4. In such circumstances, the challenge made against Ext.P4 is liable to be rejected on the ground of delay as well and I hold so.

17. By Ext.P4, the 2nd respondent has informed the petitioner that for want of vacancy his application for appointment as Notary is being kept pending in the Department. Now the next question to be decided is as to whether the petitioner is entitled for reconsideration of his application following Ext.P6 judgment or whether his application has to be dealt with in accordance with provisions of the Notaries Rules, as amended by the Notaries (Amendment) Rules, 2009, following the principle laid down in the judgment of the Division Bench of this Court in W.A. No. 1887 of 2009.

18. The Notaries Rules was amended with effect from 1.3.2009 whereby the procedure prescribed for appointment was changed. By the said amendment, substantial changes were effected in the Rules. Sub-r.(1) of R.4 was amended and the amended sub-rule reads thus;

4(1). A person may make an application for appointment as a notary (hereinafter called "the applicant"), through the concerned District Judge or the Presiding Officer of the Court or Tribunal where he practices as an Advocate, in the Form of memorial addressed to such officer or authority (hereinafter referred to as the "competent authority") of the appropriate Government as that Government may, by notification in the Official Gazette, designate in this behalf.

Sub-r.(1) of R.6 was also amended and the amended sub-rule reads thus:

6(1). The competent authority shall examine every application received by him and if he is satisfied that the application is not complete in all respects or the applicant does not possess the qualifications specified in rule 3, or that any previous application of the applicant for appointment as a notary was rejected within six months before the date of the application, shall reject it summarily and inform the applicant accordingly.

Sub-rule (1) of R.7 was also amended and the amended sub-rule reads thus:

7(1). The competent authority shall, after holding such inquiry as he thinks fit and after giving the applicant an opportunity of making his representations against the objections, if any, received within the time fixed under sub-rule (2) of Rule 6, make a report to the appropriate Government recommending that the applicant may be allowed to appear before the Interview Board.

Rules 7A and 7B were newly introduced and the newly introduced Rules read thus:

7A. Constitution of the Interview Board:- (1) If the appropriate Government allows that the applicant may be asked to appear before the Interview Board, the competent authority shall inform the applicant to appear before the Interview Board, on the date, time and place fixed, to judge the competency of the applicant for being appointed as a Notary. The Interview Board shall submit its recommendations to the appropriate Government.

(2) For the said purpose, a three members Interview Board shall be constituted by the appropriate Government from amongst its officers dealing with legal matters. The Chairperson of the Interview Board shall not be an officer below the rank of Joint Secretary of that Government.

7B. Transitional provision:- (1) All the memorials received by the Competent Authority till 28th February, 2009 and which are pending shall be processed/ examined in accordance with the provisions of the rules as amended by the Notaries (Amendment) Rules, 2009.

(2) The fresh memorials shall only be submitted on or after 1st July, 2009.

Sub-rule (1) of R.8 was also amended and the amended sub-rule reads thus:

8(1). On receipt of the recommendations of the Interview Board the appropriate Government shall consider the recommendation and shall-

- (a) allow the application in respect of the whole of the area to which it relates; or
- (b) allow the application in respect of any part of the area to which it relates; or
- (c) reject the application, and shall also make such orders as the Government thinks fit regarding the persons by whom the whole or any part of the cost of the application including the cost of hearing, if any, shall be borne.

19. Going by the amended provisions referred to above, especially R.7B, all the memorials received by the Competent Authority till 28/2/2009 and which are pending will have to be processed in accordance with the provisions of the Notaries Rules, as amended by the Notaries (Amendment) Rules, 2009. As per amended sub-rule (1) of R.4, an application for appointment of Notary has to be made through the concerned District Judge or the Presiding Officer of the Court or Tribunal where the applicant practices as an Advocate, in the form of memorial addressed to such officer or authority as the appropriate Government may, by notification in the Official Gazette, designate. As per sub-rule (1) of R.7, the competent authority shall, after giving the applicant an opportunity of making his representations against the objections, if any, received within the prescribed time, make a report to the Government that the applicant be allowed to appear before the Interview Board constituted under R.7A. After the interview, the competent authority shall make its recommendation to the Government, under sub-rule (3) of R.7 and it is based on such recommendation that the appointment has to be made. In view of the amendment made to the Notaries Rules, which came into force on 1.3.2009, an application for appointment of Notary, which was pending as on 28.2.2009, can be disposed of only in accordance with the provisions contained in Notaries Rules, 1956, as amended by the Notaries (Amendment) Rules, 2009, and I hold so.

20. As borne out from Ext.P3, the petitioner and other applicants were neither issued with any Certificate of Practice nor the 2nd respondent issued any consequential notification in terms of the Notaries Act and the Rules made thereunder. Going by Ext.P4, the order made on the petitioner's application was reviewed and stands withdrawn as there was no vacancy of Notaries as on the date of the order of appointment. As stated in Ext.P4, his application is kept pending in the Department. Therefore, EXT. P1 application submitted by the petitioner for appointment as Notary will have to be disposed of by the 2nd respondent in accordance with the provisions contained in Notaries Rules, 1956, as amended by the Notaries (Amendment) Rules, 2009. The view I have taken finds support from a judgment of the Division Bench of this Court in W.A. No. 1887/2009, wherein the Division Bench held that applications for appointment as Notary which were pending as on 1.3.2009 can be disposed of only in accordance with the amended Rules.

21. The learned counsel for the petitioner, relying on Ext.P8 information obtained under the Right to information Act, 2005, contended that, the 2nd respondent had already appointed 7 candidates in Kollam District, overlooking his seniority, likewise the petitioner should also be appointed, otherwise, it would offend the guarantee of equality enshrined in Art. 14 of the Constitution of India. It is pertinent to note that, the appointment of the aforesaid 7 candidates is not under challenge in this Writ Petition. Moreover, it is trite law that, the guarantee of equality before law enshrined in Art. 14 of the Constitution of India is a positive concept and it cannot be enforced by a citizen or court in a negative manner. If an illegality or irregularity has been committed in favour of any

individual or a group of individuals or a wrong order has been passed by a judicial forum, others cannot invoke the jurisdiction of the higher or superior court for repeating or multiplying the same irregularity or illegality or for passing wrong order. It is so held by the Apex Court in State of Bihar Vs. Upendra Narayan Singh and Others, . Therefore, the contention raised by the learned counsel for the petitioner relying on Art. 14 of the Constitution of India has also to be rejected and I do so. In the result, the only direction that can be issued in this Writ Petition is to direct the 2nd respondent to consider the application submitted by the petitioner for appointment as Notary in Kollam Taluk in Kollam District in accordance with the relevant provisions of the Notaries Rules, 1956, as amended by the Notaries (Amendment) Rules, 2009, and take appropriate decision thereon strictly in accordance with law, with notice to the petitioner. Necessary steps in this regard shall be taken and completed within a period of four months from the date of receipt of a copy of this judgment.

The Writ Petition is disposed of. No order as to costs.