
(1970) 02 KL CK 0005

In the High Court Of Kerala

Case No : O.P. No"s. 3348 and 3393 of 1968 and 2001 of 1969

T.R. John and Others

APPELLANT

Vs

The State of Kerala and Others

RESPONDENT

Date of Decision : 25-02-1970

Acts Referred:

Constitution of India, 1950 — Article 14, 16

Kerala State and Subordinate Services Rules, 1958 — Rule 39

Citation : AIR 1970 Ker 281 : (1970) 2 LLJ 359

Hon'ble Judges : M.U. Isaac, J

Bench : Single Bench

Advocate : K. Kuttikrishna Menon, A.P. Chandrasekharan and K. John Mathew, for the Appellant; Govt. Pleader, S.A. Nagendran, M.M. Abdul Aziz and M.V. Joseph, for the Respondent

Final Decision : Dismissed

Judgement

M.U. Isaag, J.—The petitioners in the first and third writ petitions are the same. Petitioners 1 and 2 are First Grade Draftsmen, while the third petitioner is a Second Grade Draftsman in the Public Works Department of the State, The first two petitioners have got the requisitie qualification for being promoted as Junior Engineers, while the third petitioner has got the necessary qualification for being promoted as First Grade Overseer/Draftsman. There are two petitioners in O. P. No. 3393 of 1968. The first is an engineering graduate qualified for being appointed as a Junior Engineer, while the second is a holder of a diploma in engineering; and he is qualified for being appointed as First Grade Overseer/Draftsman.

2. The Engineering and Technical persons of the Public Works Department, Public Health Engineering Department and the Town Planning Department of the State launched a "No Work" programme with effect from 11th August 1967 and it continued in force till 5-10-1967. Naturally the Government was much upset with this "No work" programme; and certain emergency steps were taken by the

Government to carry on the administration. One of them was to appoint Administrative Officers for each District to be in overall charge of all the items of work pertaining to these Departments, and to function in" close co-operation with the District Collectors concerned. Emergency powers had also to be vested in the Administrative officers. They were given all the powers of an Executive Engineer and the administrative powers of a Superintending Engineer within the respective Districts. They were also authorised to recruit or requisition technical and other staff to the extent necessary. Accordingly the Administrative Officers recruited on the whole 23 Junior Engineers and 9 First Grade Draftsmen/ Overseers on a temporary basis. These 32 persons are respondents 4 to 35 in O. P. No. 3318 of 1968 and O. P. No. 2001 of 1969. Respondents 7 to 21 are new recruits, while the remaining are promotees from lower grades of the Departments. Most of the promotees did not have the qualification laid down by the special rules to hold the post to which they were promoted. Some of the direct recruits, also have not got the requisite qualification for the appointment. On 23-12-1967 the Government passed an order sanctioning the creation of additional posts to speed up the execution of works under the School Buildings Programme, and directing that the aforesaid 32 persons may be absorbed against the said posts for a period of six months. A few persons, who felt aggrieved by the above order, filed O. P. No. 124 of 1968 challenging the validity of the said appointment. In that case, the State Government filed a counter-affidavit stating that their appointment was only on a temporary basis, and that the petitioners had, therefore, no ground for complaint. On the basis of such a stand taken by the Government O. P. 124 of 1968 was dismissed by judgment dated 22-3-1968. A few months later the State Government passed an order dated 27-7-1968 according sanction for the regularisation of the provisional appointments of the aforesaid 32 persons with effect from the date of their initial appointments in relaxation of the existing rules. This order is marked Ext. P-3 in O. P. N. 2001 of 1969. O. P. No. 3348 of 1968 has been filed to quash the aforesaid order. During the pendency of this petition, the Governor of Kerala in exercise of the powers conferred by Rule 39 of the Kerala State and Subordinate Services Rules, 1959 passed another order dated 1st March, 1959. This is marked Ext. P-4 in O. P. 2001 of 1969. This order reads as follows:--

"GOVERNMENT OF KERALA Abstract

Establishment -- Public Works Department and Public Health Engineering Department -- Provisional appointments made during "No Work" agitation of Engineering Personnel --Regularised -- Revised orders -- issued.

PUBLIC WORKS (ESTABLISHMENT A)

DEPARTMENT

G. O. Ms. No. 46/PW, Dated Trivandrum, 1st March, 1969

Read: G. O. Ms. No. 158/PW, dated 27-7-1968.

ORDER

In exercise of the powers conferred by Rule 39 of the General Rules for the Kerala State and Subordinate Services the Governor hereby directs that the 32 provisional appointments (22 Junior Engineers and 0 Draftsmen/Overseers I Grade in the Public Works Department and one Junior Engineer in the Public Health Engineering Department) made by the Administrative Officers during the "No Work" agitation of the Engineering personnel be regularised with effect from the dates of their initial appointments in relaxation of Rule 2 and Rule 3 (b) of the Special Rules for the Kerala Engineering Subordinate Service and Rule 2 (a) (1) and Rule 6 of the Special Rules of the Kerala Public Health Engineering Subordinate Service (in respect of item 11 only of the list appended.) A list showing the particulars of the provisional appointments is appended.

2. Paragraph one of the G. O. read above is modified to this extent.

(By Order of the Governor) R. Gopalaswamy Secretary to Government

To

The Chief Engineer, General & B. & K.

xxxxx"

O. P. 2001 of 1969 has been filed to quash Ext P-4 and for incidental reliefs. The petitioners in O. P. 3393 of 1968 also seek to quash the above-said order of the Government They further pray for a writ of mandamus directing the State of Kerala, the Chief Engineer, General and Buildings and Roads, and the Chief Engineer, Public Health Engineering Department, to terminate the appointment of the aforesaid 32 persons and to make fresh appointments to their vacancies in accordance with the rules.

3. There is no dispute that the appointment of the aforesaid 32 persons were made in the regular course in compliance with the rules; some of them, as already stated, have not got the requisite qualifications for holding the posts to which they have been appointed. That is why these appointments have been regularised by Ex. P-4. The common attack against these appointments is that Rule 39 of the aforesaid rules under which Ext. P-4 was issued is unconstitutional, as it confers an arbitrary and unguided power on the Government. This Rule 39, reads as follows:--

"Notwithstanding anything contained in these rules or in the Special Rules, the Governor shall have power to deal with the case of any person 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 him to be Just and equitable;

Provided that, where any such rule is applicable to the case of any person, the

case shall not be dealt with in any manner less favourable to him than that provided by that rule."

There is also a contention that, on the facts and circumstances of the case, Ext. P-4, the Governor's order was not just and equitable, and that it is, therefore, invalid.

4. In support of the contention that Rule 39 is unconstitutional, the learned counsel for the petitioners first referred me to the decision of the Supreme Court in *S.G. Jaisinghani Vs. Union of India (UOI) and Others*, . In that case, the Union Government had made rules fixing the quota for appointments by direct recruitment and by promotion to the post of different classes of the Income Tax Officers; but appointments were made in contravention of the said rules. It was contended in support of the said appointments that the quota rule was only an administrative direction, breach of which was not justiciable. The Supreme Court rejected that contention, and held that the Government have no discretion to alter the quota rule according to the exigencies of the Department or to deviate from it in any particular year at its will and pleasure. In holding so the Court said:--

"In this context it is important to emphasize that the absence of arbitrary power is the first essential of the rule of law upon which our whole constitutional system is based. In a system governed by rule of law, discretion, when conferred upon executive authorities, must be continued within clearly defined, limits. The rule of law from this point of view means that decisions should be made by the application of known principles and rules and, in general, such decisions should be predictable and the citizen should know where he is. If a decision is taken without any principle or without any rule it is unpredictable and such a decision is the antithesis of a decision taken in accordance with the rule of law."

The learned counsel relied on the above passage in support of his contention. Reference was also made to the decision of this Court in *K.M. Joseph, Trivandrum and Another Vs. State of Kerala and Another*, where the above decision of the Supreme Court has been referred to. That was a case of appointment of a principal in a Government College by direct recruitment in contravention of the rule on the subject, which provided that the appointment to that post must be made by promotion from qualified persons. The principles stated in the decision of the Supreme Court and followed in the above decision of this Court have no application in the instant case. Conference of arbitrary and naked power of an executive is liable to be struck down as unconstitutional. But it is not an invariable rule. There is a presumption that, if such a power is vested in a high authority, it would be exercised only on just and equitable grounds; and in such case, the conference of the power by itself would not be unconstitutional; but any act done by abuse or improper exercise of that power would be struck down. It may not be possible in many cases to lay down any hard and fast rule regarding the manner and circumstances in which a power may be exercised. It may depend on a variety of circumstances; and it has to be exercised on just and

equitable grounds. In my view, Rule 39 is such an instance. The power is vested in the highest authority of the State, viz., the Governor; and it is not possible for rule-making authority to lay down precisely under what circumstances that power has to be exercised. That the conferment of such a power is not unconstitutional is firmly established by the decision of the Supreme Court in *Pannalal Binjraj Vs. Union of India (UOI)*, and the various authorities referred to and followed therein. The constitutional objection raised by the petitioners to the validity of Rule 39 of the Kerala State and Subordinate Services Rules " cannot, therefore, be sustained.

5. The next question for consideration is whether the exercise of power under Rule 39 by the Governor was on just and equitable grounds. The circumstances which necessitated the issuance of the above order have been already referred to. Respondents 4 to 35 are persons, who offered their services to the Government at a time, when the Engineering Personnel had abandoned work, in violation of their duty to the State and the Society. It was a public crime. The administration could not possibly be carried on, except by the emergency recruitment of the aforesaid men, who offered their services with some amount of risk. After their recruitment they worked on a temporary basis for a period of about one and a half years; and they would have gone out, if the impugned order was not passed by the Government. In my view, it was eminently a just and equitable act, to recognise the valuable services rendered by these persons by regularising their appointments. I find no substance in the contention that the said order was an abuse of the power. It may be true that in the case of other service personnel the Government acted differently under similar circumstances. That the Government acted wrongly on previous occasions is no ground to strike down a just and equitable act on the ground of discrimination.

6. The petitioners in O. P. No. 3393 of 1968 advanced a special contention that the appointment of the aforesaid 32 persons without giving an opportunity to the said petitioners for being considered for appointment is violative of Articles 14 and 16(1) of the Constitution. The affidavit filed in support of the above petition shows that these two persons acquired the necessary educational qualification in 1967, and that they had made applications to the Employment Exchange as well as to the Chief Engineer for appointment. The date on which they passed the qualifying examinations or the dates on which they applied for appointments are not disclosed. There is nothing to show that at the time when the emergency arose on account of the "No Work" campaign or the above 32 persons were appointed, the petitioners in O. P. No. 3393 of 1968 had either the requisite educational qualification; or they had submitted their applications for appointment. The argument based on violation of Articles 14 and 16 of the Constitution has, therefore, no factual basis. Even according to them, all that they claim is that they had a chance for being considered for appointment, if the appointments were made in the regular course. It is not necessary for me to consider whether this by itself would create a sufficient interest to invoke the aid of Articles 14 and 16 of the Constitution.

7. No other point arises in these writ petitions. Accordingly they are dismissed. In the circumstances of the case there will be no order as to costs.