
(1983) 09 KL CK 0018

In the High Court Of Kerala

Case No : O.P. 4524/83E and 5887/83M

Varghese Maymadum C. and Others

APPELLANT

Vs

State of Kerala and Others

RESPONDENT

Date of Decision : 30-09-1983

Acts Referred:

Dentists Act, 1948 — Section 2, 20, 21, 22, 24

Nurses and Midwives Act, 1953 — Section 17, 17(1), 19, 19(1)

Citation : (1983) 09 KL CK 0018

Hon'ble Judges : T. Kochu Thommen, J

Bench : Single Bench

Advocate : M.P. Krishnan Nair, in O.P. No. 4524/83-E and M.G.K. Menon, in O.P. No. 5887/83-M, for the Appellant; Government Pleader for Respondent Nos. 1 and 3 and P.G.P. Panicker, for the Respondent

Final Decision : Allowed

Judgement

Kochu Thommen, J.—The common question which arises in both these Petitions is as regards the validity of G.O. (Ms.) No. 129/83/HD, dated 31st May 1983 (Ext. P-3 in O.P. No. 4524 of 1983 and Ext. P-1 in O.P. No. 5887 of 1983) whereby the Government appointed the 2nd Respondent as Registrar of the Travancore-Cochin Medical Council, Kerala Nurses and Midwives Council and the Kerala Dental Council. The main contentions of the Petitioners are: (1) the 2nd Respondent was appointed by the Government as Registrar of the State Dental Council without authority; (2) the 2nd Respondent's appointment as Registrar of the Travancore-Cochin Medical Council and the Kerala Nurses' and Midwives' Council was without proper consultation and (3) the 2nd Respondent was not qualified to be appointed to the post.

2. I shall first deal with the appointment of the 2nd Respondent as Registrar of the State Dental Council. Ext. P-1 shows that the appointment was made by the Government. The Petitioners rightly contend that the Government is not the appointing authority. Section 28 of the Dentists Act, 1948 (Act No. XVI of 1948)

reads:

28. Staff, remuneration and allowance.--(1) The State Council may, with the previous sanction of the State Government.

(a) appoint a Registrar, who shall also act as Secretary and if so decided by the State Council also as its treasurer;

* * *

(d) fix the salaries and allowances and other conditions of service of the Registrar and other officers and servants of the State Council;

* * *

(2) Notwithstanding anything contained in Clause (a) of Sub-section (1) for the first four years from the first constitution of the State Council, the Registrar of the State Council shall be a person appointed by the State Government who shall hold office during the pleasure of the State Government.

This section shows that, subject to Sub-section (2), the Government has no power to appoint. The appointing authority is the State Council. The Council must, however, receive the previous sanction of the Government before the appointment is made. By the same procedure the Council must fix the salaries and allowances and other conditions of service of the Registrar. Section 20 is the Council's power to make Regulations in regard to various matters. Section 20(i) says:

any other matter which is to be or may be prescribed under this Act.

"Prescribed" means prescribed by rules or regulations made under this Act [Section 2(g)]

It is by means of Regulations made by Council u/s 20 that it can prescribe the salaries and allowances and other conditions of service including qualifications of the Registrar. The State Dental Council is constituted u/s 21 which says:

21. Constitution and composition of the State Councils.--Except where a Joint State Council is constituted in accordance with an agreement made u/s 22, the State Government shall constitute a State Council....

Section 24 provides that the Council shall be a body corporate having perpetual succession and a common seal with power to acquire and hold property. Section 55 gives the State Government the power to make rules in regard to matters specified under Chapters III, IV and V. Clause (f) of Sub-section (2) of Section 55 says:

(f) the term of office and the powers and duties of the Registrar and other officers and servants of the State Council, including the amount and nature of the security to be given by the Treasurer.

The power of the Government to make rules under this clause must be read consistently and in harmony with the power specifically given to the State Dental Council u/s 28 to fix, with the previous sanction of the Government, the salaries and allowances and other conditions of service of the Registrar. The rules made by the Government u/s 55(2)(f) cannot, therefore, override or derogate from or erode into the power of the Council to fix the salaries and allowances and other conditions of service. Qualification being part of the conditions of service, this is a matter, as in the case of salary and allowances, to be regulated by the Council u/s 28. The rule making power of the Government in this respect has to be confined to what Clause (f) of Sub-section (2) of Section 55 specifically enumerates, namely, the term of office and the powers and duties of the Registrar. The term of office must be specified by the rules and the appointment has to be made in terms thereof. So must the powers and duties of the Registrar.

3. Ext. R-1(a) is an executive order which prescribes the scale of pay as well as the qualifications of the Registrar. This order cannot take the place of Regulations made by Council u/s 28. I am told that the Government has not made rules in terms of Section 55(2)(f). However, it is unnecessary to finally pronounce upon the validity of Ext. R-1(a), for its validity has not been challenged in either of the two Petitions.

4. The impugned order is unsustainable on the face of it. It was made in excess of the power vested in the Government under the Statute. The Government is not competent to make an appointment to the post of Registrar, for Section 28 says to the contrary. The appointing authority under the Act is the State Council and none other. The Council must, however, as I have stated earlier, obtain the previous sanction of the Government before its power u/s 28 is exercise. The 2nd Respondent's appointment by the Government as Registrar of the State Dental Council is accordingly ultra vires and is therefore unsustainable.

5. The next question is whether Ext. P-3 is sustainable in so far as the T.C. Medical Council and the Kerala Nurses and Midwives Council are concerned. The Travancore-Cochin Medical Council is governed by the Travancore-Cochin Medical Practitioners Act, 1953 (Act IX of 1953). Section 19(1) reads:

The Government shall, after consulting each council, appoint a Registrar who shall be the Secretary to such council....

There are three medical councils governed by that Act. They are the Council of Modern Medicine, the Council of Homoeopathic Medicine and the Council of Indigenous Medicine. Each of them must be consulted by the Government before it makes an appointment. That consultation has not taken place. This is clear from paragraph 3 of the counter affidavit tiled on behalf of Respondents 1 and 3. This is what is stated in the counter affidavit:

...As the qualification and method of appointment for the post of Registrar have been made based on the recommendation of the three Councils viz. Medical Councils, Nurses and Midwives Council and Dental Council, a further consultation

with those Councils is actually not necessary when appointment is made in accordance with the above rules. However, in the case of the second Respondent all the Councils except the Dental Council had given their concurrence; subject to his eligibility for the appointment....

The stand of the Government is that consultation is not necessary where the principles regarding qualification and method of appointment to the post had been already agreed upon between the Government and the councils. However, the Government says that the Councils had, subject to eligibility of the 2nd Respondent, given their concurrence. With the counter-affidavit of the 2nd Respondent, he has produced the representation made by him before the Minister for Health, Kerala State in which he has extracted the resolution passed by the Medical Council and the Kerala Nurses and Midwives Council at their meeting held on 4th February 1983 and 15th February 1983 respectively. The resolution reads:

Read the submission from Shri N. Santhakumaran Nair and resolved that his name may also be considered, if he is eligible for the post of Registrar, at the proper time.

(emphasis supplied)

Admittedly this is the resolution which the Government has in mind when it says that the Councils had given their concurrence. The resolution shows that 2nd Respondent made a representation to the Councils to sponsor his case. That representation is produced by him as Ext. R-2(d). The Councils told the Government that, if he was eligible for the post of Registrar, his name may also be considered at the proper time. This is not a consultation that is prescribed by the legislature. Section 19 postulates that the Government must apply its mind to the comparative merits of the candidates, and by a process of selection prepare a list of the most competent among them who, according to the Government, are suitable for appointment to the post. The list should be forwarded to each Council for its opinion. The Government after obtaining the opinion of each council apply its mind to the question afresh in the light of what is stated by the Councils and appoint the person who in its opinion emerges as the most suitable candidate. The final choice is of course that of the Government, but before it chooses the person it must have the benefit of consultation with each Council. The object of consultation is to aid the Government to form a clear opinion as to the suitability of the candidate. To ignore this process by avoiding it or diluting it is to defeat the legislative intent.

6. Consultation must be effective. It is on receipt of the Government's suggestions that each Council can apply its mind. The Council will consider the facts stated by the Government and examine them from the Council's point of view. Only on such application of the mind can the Council communicate to the Government its views on the particular candidate suggested by the Government. A casual recommendation to the Government as in the present case, that the

name of a particular person, if found qualified and suitable, may also be considered by the Government along with other persons is not the consultation envisaged u/s 19. The Council did not have a due opportunity to apply its mind in the manner in which it ought to have done for due fulfilment of its statutory responsibility u/s 19. Nor has the Government acted in accordance with its statutory responsibility in so far as it appointed the 2nd Respondent on the vague recommendation made by the two Councils in their resolution. In the circumstances, the appointment of the 2nd Respondent as Registrar of the Travancore-Cochin Medical Council was made in excess of power and is therefore unsustainable.

7. In regard to the Kerala Nurses and Midwives Council, the appointment is governed by Section 17(1) of the Nurses and Midwives Act, 1953 (Act X of 1953). Section 17 is identical to Section 19 of Act IX of 1953. Section 17(1) says:

17(1) The Government shall after consulting the Council appoint a Registrar who shall be the Secretary to the Council....

Here again the so-called consultation is what is referred to by the Government in their counter affidavit with reference to the resolution of the Councils which I have extracted. For the reasons stated by me in regard to the Travancore-Cochin Medical Council, the 2nd Respondent's appointment as Registrar of the Kerala Nurse's and Midwife's Council is equally unsustainable.

8. The Petitioners have raised various objections in regard to the qualification of the 2nd Respondent. However, in view of my finding that the impugned order is unsustainable, it is unnecessary to express any view upon that question. It is therefore left open.

9. In the light of what is stated above, G.O. (Ms.) No. 129/83/HD, dated 31st May 1983 is declared to be null and void and of no effect. It is quashed without prejudice to the power of the Government to make any suitable appointment according to law. The Original Petitions are allowed in the above terms. No costs.