

Maridev (M.) (M. Mariyappa) Vs. State of Mysore and ors.

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Court : Karnataka

Decided On : Feb-23-1968

Reported in : ILR1968KAR270; (1969)ILLJ284Kant; (1968)1MysLJ325

Judge : G.K. Govinda Bhat and ;M. Sadanandaswamy, JJ.

Acts : [Constitution of India](#) - Articles 14, 16 and 309; Mysore Excise Department Service Cadre Rules, 1963; Mysore Excise Department Service Recruitment Rules, 1963; Mysore Civil Services Rules, 1958 - Rules 32 and 68; Civil Service Regulations

Appeal No. : Writ Petition No. 2345 of 1967

Appellant : Maridev (M.) (M. Mariyappa)

Respondent : State of Mysore and ors.

Judgement :

Govinda Bhat, J.

1. The petitioner and respondents 3 to 8 are excise Inspectors (Juniors in the Mysore Excise Service. The posts of Excise Inspectors, Senior and Junior, are class III posts; the posts of the Assistant District Excise Officers are class II posts. The petitioner has challenged the order of the State Government (respondent 1) made on 27 September, 1967 appointing respondents 3 to 8 to be in independent

charge of the posts of Assistant District Excise officers at different places. The challenge is made on two grounds : first the impugned appointments are opposed to the Cadre and Recruitment Rules, and second, the petitioner being senior to respondents 5 to 8, he should have been appointed and by the appointment of his juniors, the petitioner has been denied the protection guaranteed by Arts. 14 and 16 of the constitution of India.

2. In order to appreciate the contentions urged by the petitioner, it is necessary to set out the circumstances under which the impugned order came to be made. Consequent on the relaxation of prohibition, when it became necessary to increase the cadre strength of Assistant District Excise officers, the State by order No. HD 154 EDC 67, dated 31 August, 1967, created twelve new posts of Assistant District Excise officers; three became available consequent on certain other orders made by the Government.

3. Under the Mysore Excise Department Service Cadre Rules, 1963, the cadre strength of Assistant District Excise Officers before the aforesaid orders was two permanent and five temporary. The cadre strength of Excise Inspectors (Senior) was four and that number has not been increased. The Mysore Excise Department Service Recruitment Rules, 1963, made by the Governor under Art. 309 of the Constitution provides for appointment of Assistant District Excise Officers by promotion - 80 per cent. from the cadre of Excise Inspectors (Senior) and 20 per cent. from the post of Manager and from the cadre of senior clerks - on the basis of seniority-cum-merit. The said rules provide for appointment of Excise Inspectors (Senior) by promotion from the cadre of Excise Inspectors (Junior) and the minimum qualification for such promotion is five years of service as Excise Inspector (Junior).

4. When vacancies of fifteen posts of Assistant District Excise Officers were newly created in August and September 1967 in the manner referred to above, there were only four Excise Inspectors (Senior) and one senior clerk eligible for promotion and they were promoted as per Para. II of the impugned order. Since there were no more Excise Inspectors (Senior) available for promotion and the Excise Inspectors (Junior) eligible for promotion had to be promoted in the first

instance as Excise Inspectors (Senior) and thereafter promoted as Assistant District Excise Officers, the State Government as per Paras. III and IV of the impugned order appointed respondents 3 to 8 and three others to be in independent charge of the posts of the Assistant District Excise Officers under rule 32 read with rule 68 of the Mysore Civil Services Rules, 1958, for a period of four months or till the date of relief of their independent charge, whichever is earlier, purely on a temporary basis. It is necessary to set out in full Paras. III and IV of the impugned order :

'III The following appointments of Excise Inspectors and senior clerks of the Excise Department to be in independent charge of the posts of Assistant District Excise Officers are ordered with immediate effect, in the vacancies newly sanctioned in G.O. No. HD 154 EDC 67 dated 31 August 1967 on their present grade and pay as Excise Inspectors and senior clerks under rule 32, read with rule 68 of the Mysore Civil Services Rules, 1958, for a period of four months or till the date of relief of their independent charge whichever is earlier, from the date of their taking charge of the respective posts, purely on a temporary basis :

(1) * * * (2) * * * (3) Sri K. Puttaraju (respondent 3), Excise Inspector, Nelamangala range, Bangalore district, is appointed to be in independent charge of the post of District Excise Officer and posted to Mandya district.

(4) Sri G. A. Hiremath (respondent 5), Excise Inspector, working as District Inspector of Prohibition and Excise, Belgaum, is appointed to be in independent charge of the post of Assistant District Excise Officer and posted to North Kanara district.

(5) Sri Syed Muzafar Hussain (respondent 6), Circle Inspector of Excise, Lingsugur Circle, Raichur district, is appointed to be in independent charge of the post of Assistant District Excise Officer and posted to Intelligence Bureau, Dharwar Division, with headquarters at Hubli.

(6) * * *

(7) Sri Mohmed Hussain (respondent 7), District Inspector of Prohibition and Excise, Coorg, is appointed to be in independent charge of the post of Assistant District Excise Officer and posted to Coorg district.

(8) Sri Rajagopal Mudaliar (respondent 8), Circle Inspector of Excise, Sedam Circle, Gulbarga district, is appointed to be in independent charge of the post of Assistant District Excise Officer and posted to Excise Intelligence Bureau, Raichur Division, with headquarters at Raichur.

IV. The following appointments of Excise Inspectors and senior clerk of the Excise Department to be in independent charge of the post of Assistant District Excise Officers are ordered with immediate effect on their present grade and pay as Excise Inspectors and senior clerk, respectively, under rule 32, read with rule 68 of the Mysore Civil Services Rules, 1958, for a period of four months or till the date of their relief of independent charge, whichever is earlier from the date of their taking charge of the respective posts, purely on a temporary basis :

(1) * * * (2) Sri B. V. Raghavan (respondent 4), Excise Inspector, Excise Intelligence Bureau, Bangalore, is appointed to be in independent charge of the post of Assistant District Excise Officer and posted to Excise Intelligence Bureau, Bangalore, in the vacancy caused by the transfer of Sri Bheemasena Rao, Assistant District Excise Officer (Independent charge), to Hospet Distillery.

(By order and in the name of the Governor of Mysore)'

5. Rules 32 and 68 of the Mysore Civil Services Rules referred to in the aforesaid order, read thus :

'32 Instead of appointing a Government servant to officiate, it is also permissible to appoint him to be in charge of the current duties of a vacant post. In such a case a 'charge allowance' (additional pay) is payable as specified in rule 68.

Note. - The provision of this rule apply also to cases where a Government servant being relieved of his own appointment is appointed to be in independent charge of a higher appointment as a temporary measure.

68. When a Government servant is appointed to be in charge of the current duties of an office in addition to his own duties and the charge entails a substantial increase of responsibility and some additional work, he is entitled to additional pay (charge allowance) to be fixed by the authority competent to appoint him as such, not exceeding one-tenth of the pay of the office (minimum pay of the post).

Sanction of Government should be obtained where the in-charge arrangement is proposed to be continued beyond four months.'

6. In Paras. III and IV of the impugned order, while appointing respondents 3 to 8 to be in independent charge of the posts of Assistant District Excise Officers, respondent 1 has employed the language of the note to rule 32 of the Mysore Civil Services Rules but the learned counsel for the petitioner, Sri S. K. Venkataranga Ayyangar, submitted that is the garb of making in-charge arrangements under rule 32, Government has promoted the respondents though not eligible for promotion.

7. The petitioner and respondents 3 to 8 are Excise Inspectors (Junior); under the Cadre and Recruitment Rules they are not eligible for promotion as Assistant District Excise Officers, unless they are first promoted as Excise inspectors (Senior). Petitioner was promoted as Excise Inspector (Junior) on 6 December, 1957; respondents 3 and 4 were promoted before 1 November, 1956. Respondent 5 was promoted on 14 June 1957 and respondents 6 to 8 were promoted on 23 March 1965. Under the Cadre and Recruitment Rules, respondents 6 to 8 are not eligible for promotion as Excise Inspectors (Senior) before they have completed five years of service as Excise Inspectors (Junior). Sri Ayyangar argued that though the petitioner was eligible for promotion as Excise Inspector (Senior) and thereafter as Assistant District Excise Officer, respondents 6 to 8, who are not eligible for promotion, by the device of in charge arrangements, have been promoted in contravention of the Cadre and Recruitment Rules, Relying on the words 'appointed to be in independent charge of the post of Assistant District Excise Officer and posted to' in the impugned order, he argued that the word 'appointment' connotes not an in-charge arrangement to perform the current duties of a vacant post, but the appointment to the vacant posts newly created. The learned counsel also relied on the omission of the words 'current duties' in the

impugned order.

8. Rule 32 of the Mysore Civil Services Rules without the note corresponds to rule 88 in the Civil Service Regulation (Central). Rule 88 reads :

'88. It is also permissible instead of appointing an officer to officiate, to appoint him to be in charge of the current duties of the vacant appointment. In such cases 'a charge allowance' is given as explained in Arts. 94, 95, 165 to 169A and 174A.'

9. Corresponding to the note to rule 32, there is rule 94 in the Civil Service Regulations (Central) which reads :

'94. An officer appointed to be in charge of the current duties of an office independently, i.e., under orders which expressly relieve him of the charge of his own office, is entitled to a charge allowance of three quarters of the acting allowance which would be admissible to him if he were appointed to officiate in the office. An officer cannot be thus appointed to be in charge of a 'grade'.'

10. The note to rule 32 does not expressly state that the appointment contemplated is to be in charge of the current duties of an office independently; but the meaning of the note is quite clear. It means that instead of appointing a Government servant to officiate, it is also permissible to appoint him to be in independent charge of the current duties of a vacant post in a higher appointment as a temporary measure. When the impugned order expressly states that the in-charge appointment is made under rule 32 on a temporary basis, it has to be construed as meaning that respondents 3 to 8 are placed in independent charge of the current duties of the vacant posts of Assistant District Excise Officers and nothing more. Placing a subordinate officer, in independent charge of the current duties of a vacant post in a higher appointment does not amount to his promotion to the higher post. A subordinate officer charged with the performance of the duty of a superior for a limited time and under special and temporary conditions, is not thereby transformed into the superior and permanent official. Officiating appointments, and in charge arrangements are well-understood terms in civil service. When an officer is appointed to officiate in a higher appointment, he is invested with the powers of the higher post, but when he is placed in charge of the

current duties of a vacant post in a higher appointment, whether in addition to his own duties or independently, he cannot exercise any of the statutory powers of the office; he can merely perform the day-to-day office duties only.

11. In *E. E. Gupta v. State of Mysore* [1962 Mys. L.J. Sup. 555], the substantial distinction that exists between an acting or officiating appointment and the arrangement where under a person is placed in charge of the current duties of another vacant post has been stated thus :

'In our opinion, an appointment to a post, whether acting or permanent, imports the actual holding of that post by the appointee whether permanently or for a stated period. This flows directly from the normal meaning which one attaches to the word 'appoint.' On the other hand, 'to be in charge of the duties of a post' merely means to discharge or perform those duties without necessarily holding the particular post to which the additional duties appertain. The person so put in additional charge of other duties already holds a post to which he had been formerly appointed. The imposition of new duties upon such an officer already appointed to a post does not, as pointed out in *George W. Evans v. U.S.* (57 U.S.L. Ed. 353) constitute a fresh appointment of that officer. This result stands to reason, because the duties of an office or post may vary from time to time without making any distinction or difference to the post itself. If the additional duties do not change the character of the post or convert it into a new post, the result cannot be different for reason only of the fact that the additional duties imposed are such as do not normally appertain to that post, for exigencies of administration may require the imposition temporarily for a short period, upon an officer of certain duties which do not normally appertain to his office. So long as he continues to hold the office to which he had been originally appointed, the imposition of additional duties cannot therefore amount to either a fresh appointment of the officer or the appointment of the officer to another post.'

12. In Chaudri's compilation of the Civil Service Regulations, 5th Edn., at p. 76, there is the following note to rule 88 of the Central Civil Service Regulations referred to above :

'Government of India's decision. - (1) The Law Ministry has since advised that an officer appointed to perform the current duties of an appointment can exercise administrative or financial powers vested in the full-fledged incumbent of the post but he cannot exercise statutory powers, whether those powers are delivered direct from an Act of Parliament (i.e., Income-tax Act) or rules, regulations and bylaws made under various articles of the Constitution (e.g., Fundamental Rules, Classification, Control and Appeal Rules, Civil Service Regulations, Delegation of Financial Powers Rules, etc.).'

13. Respondents 3 to 8 who by impugned order were placed in independent charge of the current duties of the vacant posts of Assistant District Excise Officers as a temporary measure are empowered only to perform the day-to-day duties of the vacant office; they do not have any title to the vacant posts nor can they perform any of the statutory duties of that office.

14. When rule 32 states that instead of appointing a Government servant to officiate, it is also permissible to appoint him to be in charge of the current duties of a vacant post whether in addition to his own duties or to be in independent charge, we are unable to appreciate the argument that the respondents have been appointed to officiate in the higher posts and that it is a colourable or fraudulent exercise of power. The order of the Government can be challenged on the ground that it is a fraud on power where it has no power to place an official to be in independent charge of the current duties of the vacant post in a higher appointment as a temporary measure. When there is such a power and that is a well-recognized power in service regulations, we are unable to accept the argument that the impugned order is a fraudulent exercise of power.

15. In the course of the hearing, the petitioner filed an additional affidavit alleging that respondents 3 to 8 are in fact performing the statutory duties of Assistant District Excise Officers and not merely the current duties of the said posts. On a construction of the impugned order, we have come to the conclusion that the respondents were merely placed in charge of the current duties of the office of the Assistant District Excise officers as a temporary measure and they cannot perform any of the statutory duties of that office. There, if they have exercised any statutory

powers which they are not empowered, those actions alone can be challenged.

16. The complaint of the petitioner that he has been discriminated and denied equality before law guaranteed by Arts. 14 and 16 of the Constitution is also devoid of merit on the facts and circumstances of the case. Consequent on the relaxation of prohibition fifteen posts of Assistant District Excise Officers were created and there were only four Excise Inspectors (senior) eligible for promotion. Before any further promotions could be made, Excise Inspectors (Junior) eligible for promotion have to be promoted as Excise Inspectors (Senior) and such promotions would normally take some time for consideration of claims of the eligible officers in the situation created by S. 115 of the States Reorganization Act, 1956. In that situation under special and temporary conditions the arrangement for performance of the current duties of the vacant posts was made by the impugned order. When an officer is placed in charge of the current duties of a vacant post in addition to his own, the consideration is not one of seniority as in the case of promotion, but one of public interest. The official who is nearest to the vacant post is normally placed in charge of the current duties of the vacant post in the higher appointment irrespective of his seniority. It was not disputed that if the respondents had been placed in charge of the current duties of the posts of Assistant District Excise Officers in addition to their own, the order is not open to challenge on the ground of violation of Arts. 14 and 16 of the Constitution. If that be so, we fail to see how the order can be challenged merely because the respondents are placed to be in independent charge of the current duties of the vacant posts. It is seen from the impugned order that when it was made, respondents 3 to 8 were nearer to the places of the vacant posts. The State in its counter has stated that respondents 3 to 8 were chosen because they were senior to the petitioner in the provisional inter-State seniority list of Assistant Excise Inspectors. It was urged by the learned counsel for the petitioner that for the purposes of promotion to the posts of Assistant District Excise officers, the seniority in the provisional inter-State seniority list of Assistant Excise inspectors is not relevant and what is relevant is their seniority in the cadre of Excise Inspectors. It is unnecessary, in our opinion, to go into this controversy since the petitioner's grievance rests on his case that by the impugned order the respondents were promoted and posted to officiate as Assistant District Excise

Officers and that case we have rejected.

17. Besides challenging the order of the Government dated 27 September 1967, the petitioner has also prayed for a writ in the nature of a mandamus to direct the State Government and the Excise Commissioner (respondents 1 and 2) to include the petitioner's name in the inter se list of Excise Inspectors of old Mysore State and the inter-State seniority list of Excise Inspectors as on 1 November 1956. On the date of the reorganization of States, the petitioner was an Assistant Excise Inspector. He was temporarily promoted as an Excise Inspector (Junior) by the order dated 6 December 1957. By the same order one K. Rangappa, Excise Assistant Inspector, was also temporarily promoted. In the erstwhile old Mysore State the said R. Rangappa was junior to the petitioner and in the said order dated 6 December 1957 the petitioner ranked above the said Rangappa. Respondents 3 and 4 are officials of the erstwhile Mysore State and they were promoted as Assistant Excise Inspectors in the years 1952 and 1953 respectively. The said K. Rangappa preferred an appeal on 9 April 1956 against the promotion of respondents 3 and 4 from the ministerial line to the executive line. The Government by their order dated 31 July 1961 ordered that the said Rangappa should be ranked above respondents 3 and 4 in the inter se seniority list. Thereafter the petitioner preferred an appeal on 20 February 1962 to fix his rank above the said Rangappa and respondents 3 and 4 in the cadre of Excise Inspectors as on 1 November 1956 in the inter se seniority list as well in the inter State seniority list. It is alleged by the petitioner that the appeal has not been disposed of and therefore he has sought for a direction to respondents 1 and 2 to include his name in the list of Excise Inspectors. The petitioner would be entitled to this relief only if the Government accepts his appeal and fixes his rank above the said K. Rangappa and respondents 3 and 4 as they did in the case of the appeal of Rangappa; but he would not be entitled to the relief if his appeal is rejected. If the Government allows the petitioner's appeal, there is no need for issuing any direction as now prayed for by the petitioner; when his appeal succeeds, the relief now sought for would be given to him by the State.

18. For the reasons stated above, the petitioner is not entitled to any of the reliefs claimed in this writ petition. Accordingly it is dismissed, but in the circumstances

without costs.

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