

M. Kamalamma Vs. State of Mysore and ors.

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Court : Karnataka

Decided On : Aug-25-1959

Reported in : AIR1960Kant255; AIR1960Mys255

Judge : S.R. Das Gupta, C.J. and ;H. Hombe Gowda, J.

Acts : [Constitution of India](#) - Articles 14, 16, 226, 227, 309, 310(1), 311 and 311(2)

Appeal No. : Writ Petn. No. 201 of 1959

Appellant : M. Kamalamma

Respondent : State of Mysore and ors.

Judgement :

Hombe Gowda, J.

(1) This is a petition under Arts. 226 and 227 of the [Constitution of India](#) for issue of a Writ of Certiorari cancelling the order dated 5th June 1956 passed by the State of Mysore directing that the third respondent should be treated as senior to the petitioner in the cadre of lecturers in the University of Mysore.

(2) The facts that led to the presentation of this writ Petition by the petitioner are as follows : The petitioner M. Kamalamma took her Master in Science degree of the University of Mysore in 1937. She was appointed as a temporary III Grade lecturer in Zoology by the then Vice-Chancellor of the University of Mysore on a salary of

Rs. 75/- per mensem on 11th of August 1939. The third respondent T. P. Vanajakshi who is also a Master of Science having passed the Examination in 1934 was applying for a post of a lecturer in Zoology in the University of Mysore from the date she passed her M.Sc. Examination.

The Registrar of the University of Mysore sent replies to her to the effect that there was no vacancy and that her claims would be considered when a vacancy occurred. These endorsements were issued to the third respondent prior to 9th of July 1938. It may be stated here that the third respondent belongs to a Backward Community and as per the rules of recruitment in force at the relevant period she was entitled to be appointed as a lecturer in preference to the petitioner, who belonged to the Advanced Class.

It appears that the Vice-Chancellor appointed the petitioner as a temporary lecturer on 11th of August 1939 ignoring the claims of the third respondent and quite against the assurance given to her in the endorsements issued to her on and prior to 9th of July 1938. This fact that the petitioner had been appointed to act as a temporary lecturer was not placed before the University Council which was the appointing authority. Similarly the Council was not apprised of the fact that the third respondent who belonged to the backward Community and who had the requisite qualifications for appointment in preference to the petitioner had sought for the temporary post.

The third respondent felt aggrieved and made representations to the Government of Mysore which was controlling the affairs of the University that her claims for an appointment as a lecturer had been over-looked and that the petitioner, who belonged to the Forward Community had been preferred by the Vice-Chancellor and sought for redress. The Government called for a report from the University as to the allegation made by the third respondent. A temporary post of a full time lecturer in Zoology in Bangalore occurred consequent upon the transfer of Miss. R. Samuel to the College at Mysore.

The petitioner was appointed as a lecturer in this vacancy. In the meanwhile the University sought for sanction of two posts of lecturers in Zoology (1) for the appointment of a whole time lecturer in the temporary vacancy of Miss Samuel's

post and (2) for the conversion of a part-time post into a whole time post. Out of these posts one was permanent and the other was temporary. The Government sanctioned the two posts and directed the University to appoint the third respondent as against the permanent post without advertisement. This direction of the Government was given on 3rd of January 1940.

But the Vice-Chancellor passed an order on 11th January 1940 appointing the petitioner Smt. Kamalamma on probation for two years as against the permanent vacancy and appointing the third respondent as against Miss Samuel's vacancy which was a temporary vacancy. No report was sent to the Government by the University about the order in which the appointments of the petitioner and the third respondent were made by the Vice-Chancellor. The third respondent being aggrieved by the order passed the Vice-Chancellor appointing her as against the temporary vacancy while the Government AHD specifically directed to appoint her as against the permanent vacancy made a representation to the Government.

On receipt of this representation the Government called for a report from the University in the matter. The then Vice-Chancellor placed the entire matter before the University Council at a meeting held on 9th of May 1942. After hearing the outline of the history of the appointment of the petitioner and that of the third respondent, the University Council resolved that a recommendation should be made to the Government to appoint the third respondent to the lecturership in Zoology in preference to the petitioner.

The Vice-Chancellor recommended in his letter D. O. No. F3-Mis/- 41-62 dated 7th June 1942 that since the petitioner had not yet been confirmed and that the effect of the resolution of the University Council was that the third respondent should be transferred to the appointment in which Smt. Kamalamma had been wrongly appointed orders accordingly may be issued. In spite of the resolution of the University Council it appears no action was taken by the University Council it appears no action was taken by the University to make alterations in the appointment of the petitioner and the third respondent. In the meanwhile an order was issued by the University on 21st of June 1944 confirming the petitioner, the third respondent and some other lecturers as third grade lecturers.

In the said order the petitioner was shown above the third respondent. The third respondent that on account of the illegal order passed by the Vice-Chancellor ignoring the directions of the Government and the mandate of the University Council appointing her as against a temporary vacancy, she had unjustly suffered and had to suffer a break in her appointment for some time; that the wrong that was done to her should be rectified and that she should be treated as senior to the petitioner. After a protracted correspondence and examining the entire matter the government passed an order on 5th of June 1956 recognising the claims of the third respondent.

The Government held that the third respondent had suffered in seniority and lost the benefit of increments on account of the irregularity committed by the University in not appointing her as against the permanent vacancy and in spite of the fact that she was the only qualified lady candidate belonging to the Backward Community and that therefore, she should be treated as Senior to the petitioner. In doing so the Government accepted the recommendation made by the University Council in their resolution dated 9th of May 1942.

(3) The petitioner being aggrieved by the order made a representation to the Government of Mysore Through the University for reconsideration of the matter and the Government rejected it. The petitioner has filed this Writ Petition and has prayed for issue of a Writ of Certiorari quashing the order passed by the Government refixing her seniority and treating her as junior to the third respondent.

(4) It is clear from the above narration of facts that the Government of Mysore by an order dated 5th June 1950 re-fixed the relative ranks of the petitioner and the third respondent in the cadre of lecturers in the University of Mysore. By the aforesaid order the petitioner, who was senior to the third respondent in the cadre of lecturers has now become her junior. It was strenuously urged by Sri Nathamuni Iyengar, the learned Counsel for the petitioner, that the order dated 5th June 1956 passed by the Government of Mysore by which the third respondent has become senior to the petitioner is opposed to the principles of natural justice since the same was passed without affording an opportunity to the petitioner to defend

herself or explain the circumstances in her favour and that it virtually amounted to reduction of her rank and offended Art. 311(2) of the [Constitution of India](#). It was further urged that the impugned order offends Arts. 14 and 16 of the [Constitution of India](#) as persons similarly situated are not treated equally and that the case of the third respondent was sought to be differentiated on standards prohibited by the [Constitution of India](#), namely, on grounds of caste, namely, that she belongs to the Backward Class. The learned Counsel for the petitioner was not able to cite any decision before us in support of his contention that the reduction in rank consequent upon the re-fixation of the seniority of a civil servant per se amounts to reduction in rank and attracts Art. 311(2) of the [Constitution of India](#). But he strongly relied upon some observations of the learned Chief Justice of India in *Parshotam Lal Dhingra v. Union of India*, : (1958)ILLJ544SC , in support of his contention that if the order entails loss of seniority of a civil servant in his substantive rank or the stoppage or postponement of his future chances of promotion it amounts to punishment and attracts Art. 311(2) of the Constitution. I have carefully read the judgment of my Lord the Chief Justice but do not find anything to support this view. The observations relied upon by the learned Advocate are as follows :

'The real test for determining whether the reduction in such cases is or is not by way of punishment is to find out if the order for the reduction also visits the servant with any penal consequences. Thus if the order entails, or provides for the forfeiture of his pay or allowances or the loss of his seniority in his substantive rank or the stoppage or postponement of his future chances of promotion, then that circumstance may indicate that although in form the Government had purported to exercise its right to terminate the employment or to reduce the servant to a lower rank under the terms of the contract of employment or under the rules, in truth and reality the Government has terminated the employment as and by way of penalty.'

It is true that if this passage is read torn out of the context, it is likely to give one an impression that the learned Chief Justice meant that reduction in rank of a servant whether it be by way of punishment pure and simple or otherwise would attract Art. 311(2) of the Constitution. In my opinion His Lordships has nowhere laid it down in

the above said case 'reduction of rank' of a Government servant which in all cases will amount to a penalty and will automatically attract the application of Art. 311(2) of the Constitution.

On the other hand, the following passage in the judgment of his Lordship makes it clear beyond doubt that Art. 311 of the Constitution is concerned only with dismissal or removal or reduction in rank 'as and by way of punishment' and has nothing to do with such punishments if they are brought about on other considerations or conditions :

'It follows from the above discussion that both at the date of the commencement of the 1935 act and of our Constitution the words 'dismissed', 'removed' and 'reduced in rank', as used in the service rules, were all understood as signifying or denoting the three major punishments which could be inflicted on Government servants. The protection given by the rules to the Government servant against dismissal, removal or reduction in rank, which could not be enforced by action, was incorporated in sub-ss. (1) and (2) of S. 240 to give them a statutory protection by indicating a procedure which had to be followed before the punishments of dismissal, removal or reduction in rank could be imposed on them and which could be enforced in law.

These protections have now been incorporated in Art. 311 of our Constitution. The effect of S. 240 of the 1935 Act reproduced in Arts. 310 and 311, as explained by this Court in *S. A. Venkataraman v. Union of India*, : 1954 CriLJ993 , has been to impose a fetter on the right of the Government to inflict the several punishments therein mentioned.

Thus under Art. 311(1) the punishments of dismissal, or removal cannot be inflicted by an authority subordinate to that by which the servant was appointed and under Art. 311(2) the punishments of dismissal, removal and reduction in rank cannot be meted out to the Government servant without giving him a reasonable opportunity to defend himself. The principle embodied in Art. 310(1) that the Government servants hold office during the pleasure of the President or the Governor, as the case may be, is qualified by the provisions of Art. 311 which give protection to the Government servants.

The net result is that it is only in those cases where the Government intends to inflict those three forms of punishments that the Government servant must be given a reasonable opportunity of showing cause against the action proposed to be taken in regard to him. It follows, therefore, that if the termination of service is sought to be brought about otherwise than by way of punishment, then the Government servant whose service is so terminated cannot claim the protection of Art. 311(2) and the decision cited before us and referred to above, in so far as they lay down that principle, must be held to be rightly decided.'

I am clearly of the opinion that whenever the Government proceed to modify or amend the rules relating to seniority and refix the seniority of the Government servants with reference to such rules, the affected cannot contend that his reduction in rank is by way of punishment. It is not disputed by the petitioner that the refixation of her seniority was on account of any misconduct on her part or by way of punishment and that it was done, on what the Government purported to be on equitable considerations.

The petitioner had obtained the benefit of seniority consequent upon her appointment by the then Vice-Chancellor in contravention of the then rules of recruitment and specific directions issued by the Government to appoint the third respondent as against the newly sanctioned permanent vacancy and she was deprived of that benefit by the impugned order passed by the Government on a representation made by the third respondent and refixing her seniority.

The reduction in rank of the petitioner in the circumstances of the case cannot by any stretch of imagination be stated was by way of punishment. I am unable to accept the contention of the learned Counsel for the petitioner that the loss of seniority of the petitioner which resulted from the refixing of the seniority inter se between the petitioner and the third respondent would amount to a reduction in rank of a penal nature so as to attract the application of Article 311(2) of the Constitution.

(5) The above view is in accord with the view taken by a Division Bench of the Madras High Court. In *Devasahayam v. State of Madras*, : AIR1959 Mad1 , Rajamannar, C. J., who delivered the judgment repelled the arguments that

reduction of rank of a servant on account of re-fixation of seniority would amount to reduction of his rank by way of penalty and observed in the course of his judgment as follows :

'In the case before us there has been no reduction in rank due to any alleged act or misconduct on the part of the officer for which he has penalised. It is entirely due to extraneous circumstances unconnected with his conduct. An officer may lose his seniority owing to the revision of the seniority rules or because, as for instance just mentioned, another officer is transferred to the cadre in which he is, from elsewhere and placed above him.

It may be that owing to revision of the rules the status of a post held by an officer might be reduced or by a creation of a higher grade. In all such cases there is no reduction in rank of a penal nature. Therefore, Art. 311(2) of the Constitution can have no application to those cases.'

Reference may also be made to another decision of the Madras High Court in A. Sambandhan v. Regional Traffic Superintendent, AIR 1958 Mad 243. The facts of that case were somewhat similar to the facts of the instant case. By an order re-fixing the ranks in the gradation list Sambandhan lost nearly 800 places. He sought for the quashing of the order as being illegal and invalid as the same amounted to reduction of his rank and it had been passed without affording him an opportunity.

The question for consideration was whether the officials who were so affected could challenge the order on the ground that it violated the protection afforded by Article 311 of the [Constitution of India](#). Rajagopalan J., while dismissing the petition of Sambandhan observed :

'A violation of a rule framed by the executive authority to determine seniority as one of the conditions of service of a civil servant is not an actionable wrong for which the Court could grant redress. To hold that the Court has that jurisdiction would constitute an inroad on the concept that the civil servant holds office during the pleasure of the executive, not warranted by the terms of the Constitution. Service rules promulgated under Art. 309 of the Constitution do not of their own

force become part ' of the Constitution to come within the scope of the expression 'except as expressly provided by the Constitution' in Article 310(1).'

Sambandhan having filed an appeal against the order, the matter came up before a Division Bench of the Madras High Court, chief Justice Rajamannar who delivered the judgment in the case held that the reduction in rank by way of seniority on account of re-fixation of the seniority, even assuming that the seniority of the railway servant had been adversely affected by an order of the General Manager passed in contravention of a rule made by him, was not justiciable and cannot be enforced by the High Court by the issue of a Writ or other appropriate order. In the course of his judgment the learned Chief Justice observed :

'rules of seniority no doubt are based on certain equitable principles but they also depend upon certain principles of administrative practice which may in certain cases lead to hardship.'

It is clear from the above discussion that the petitioner cannot invoke the extraordinary jurisdiction of the Court for issue of a Writ of Certiorari for quashing the order by which he seniority has been changed. The order passed by the Government remedying the injustice that had been done to the third seniority over the petitioner cannot in any way be said to be unjust or not warranted by the facts and circumstances in the case.

(6) It was next urged by the learned Counsel for the petitioner that the impugned order passed by the Government offended Art. 14 of the [Constitution of India](#) inasmuch as persons similarly situated were not treated equally. I must say that I am unable to understand on what basis the passing the impugned order had denied to her equal protection of law.

(7) The last contention of Sri Nathamuni Iyengar is that the order by which the third respondent has been treated as senior to the petitioner offends Art. 16 of the Constitution as the basis adopted by the second respondent for reaching such a conclusion, as is clear from the impugned order, is that the third respondent was entitled for preferential treatment as he belonged to the Backward Class. There is no substance in this contention. It is clear from a perusal of the impugned order

that the second respondent recognised the claims of the third respondent that she was senior to the petitioner not solely on the ground that she belonged to the backward class.

The order sets out many reasons for re-fixation of the seniority inter se between the petitioner and third respondent and they are :

(1) that though the third respondent had taken her Masters Degree in the year 1934 and she was the only lady candidate belonging to the Backward Community seeking employment, she was not appointed as a lecturer till 1940;

(2) that the petitioner who passed her M.Sc. in 1937 and who belongs to the Advanced Community was preferred by the then Vice-Chancellor for the appointment though the third respondent was applying for an appointment in the University;

(3) that the appointment of the petitioner on 1st of September 1938 in preference to the third respondent was contrary to the rules of recruitment then in force;

(4) that the appointment of the petitioner as a lecturer as against a permanent vacancy by the Vice-Chancellor on 11-1-1940 was against the specific directions issued by the Government to the University that the third respondent should be appointed against the newly sanctioned permanent vacancy without advertisement and that the petitioner should be appointed as against the temporary vacancy occurred consequent upon the transfer of Miss Samuels and

(5) that the University Council had on 9th of May 1942 resolved that the third respondent should be appointed as against the permanent vacancy in preference to the petitioner and that a report to that effect should be sent to the Government and that in spite of it the University Authorities had not given effect to the same and had on the other hand confirmed the petitioner as against the permanent vacancy quite against the resolution. There is, therefore, no merit in the contention of the petitioner that the claims of the third respondent had been accepted solely on the ground that she belonged to the Backward Class or particular Caste. This contention of the petitioner should, therefore, fail.

(8) There is one other ground on which the petition is liable to be dismissed, namely, the inordinate delay in moving this Court under Article 226 of the Constitution. It is no doubt true that the rule which applies to civil suits and appeals do not apply to applications for Writs. But the fact remains that the party aggrieved and who invokes the extraordinary jurisdiction of this Court should do so at the earliest opportunity, at any rate within a reasonable period from the date of the order which affects him.

The order impugned in this case was passed on 5th of June 1956 and by that order the seniority of the petitioner was affected. The petitioner was quite clear in her mind that it is the order dated 5th of June 1956 which affects her seniority that was invalid as being manifestly unjust. Once the Government passed the order which materially affected the seniority of the petitioner nothing thereafter remained to be done. Admittedly there is no provision for preferring an appeal or revision or an application for review to the Government against the order.

The petitioner should have moved this Court for issue of an appropriate Writ within a reasonable time. She did not do so till March 1959, i.e., nearly for three years. The fact that the petitioner sent up a memorial or submitted representations for reconsideration of the case to the Government does not excuse the delay. In these circumstances, this Court, in my opinion, cannot be called upon to grant any relief in its extraordinary discretion conferred by Article 226 of the Constitution when an aggrieved party comes after such a long delay. The petition is liable to be dismissed on this ground also.

(9) In the result, for the reasons stated above this petition must fail and is dismissed with costs to the 3rd respondent only. Advocate's fee Rs. 100 (Rupees one hundred).

S.R. Das Gupta, C.J.

(10) I agree.

(11) Petition dismissed.

