

Narayanan Vs. State of Kerala

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Court : Kerala

Decided On : Jan-29-1981

Reported in : (1981)IILLJ354Ker

Judge : Subramonian Poti, Acting C.J. and; Khalid, J.

Appellant : Narayanan

Respondent : State of Kerala

Judgement :

Subramonian Poti, Acting C.J.

1. Our learned brother Kochu Thommen, J., referred this original petition for hearing by a Division Bench in view of conflicting decisions on the point agitated in the original petition. The decisions referred to are those in O.P. 2979 of 1976 and Mariakutty v. Municipal Commissioner (1975) S.L.R. 188.

2. The controversy in the original petition concerns appointment to the post of Section Officer in the Legislature Secretariat in accordance with the Special Recruitment Scheme under Rule 17A of the Kerala State and Subordinate Services Rules. It is said that two vacancies to be filled up by way of special recruitment of Section Officers from among Scheduled Castes and Scheduled Tribes were reported to the Public Service Commission. The petitioner is a member of the Scheduled Tribe, being a Mala Araya. He is a graduate. He applied for the post. In the rank list prepared by Public Service Commission the petitioner

ranked as No. 2 in the list of Scheduled Tribes No. 1 was one K. M. Mary. The appointment of candidates from among Scheduled Castes and Scheduled Tribes is governed by Ext. P2, G.O. (P) 397/76/PD dated 18-11-1976. Clause 3(1)(b) of that order envisages the reservation in a cycle of the second, 7th, 12th, 17th turn posts for Scheduled Tribes if 2 or more posts are earmarked for special recruitment. That means that the second appointment, 7th appointment, 12th appointment, the 17th appointment and so on will be that due to Scheduled Tribe while the other places will go to Scheduled Castes. Rule 3(b) of Ext. P 2 further provided thus:

If no qualified candidates from Scheduled Tribes are available for recruitment, the vacancies reserved for them will be filled up by Scheduled Castes.

In accordance with Ext. P2 the first available post went to a Scheduled Caste on an earlier occasion. The second post was due to a member of the Scheduled Tribe. K. M. Mary being the first in rank among those in the Scheduled Tribe list she was advised for appointment by the Public Service Commission. But she did not accept the appointment evidently because she obtained a job elsewhere. It is the petitioner's case that thereupon that post should have gone to him he being the next in rank in the Scheduled Tribe list. But instead of offering that post when K. M. Mary declined to accept it to the petitioner the Public Service Commission seems to have taken the view that it must then be treated as a vacancy available to be filled up afresh to which a member of the Scheduled Caste must be advised. Two vacancies having been reported to the Commission and the rotation at that time calling for a start from the Scheduled Tribe K. M. Mary was advised as against '2 Scheduled Tribe'. The next place went to one K. P. Karuppan '3 Scheduled Castes'. When K. M. Mary declined to accept the appointment the consequent vacancy was considered as the 4th place and in that one Sri Prabhakaran, Scheduled Caste was advised. He too did not accept the appointment. He requested for cancellation of his advice since he had taken up appointment as Tahsildar in the Revenue Department. The next rank holder in the Scheduled Caste list Sri Rajan had asked for removal of his name from the rank list since he was working as Special Tahsildar in the Revenue Department. His name was removed from the rank list. So the next rank holder in Scheduled Caste

Sri L. Promod Raj was advised in the vacancy and during the pendency of this Original Petition Sri Promod Raj was appointed to that post. According to the petitioner when once Mary declined the offer of appointment that vacancy should have gone to the next Scheduled Tribe candidate. But according to the Public Service Commission the turn of the next Scheduled Tribe candidate will come only as 7th when once the second turn was satisfied by advice though not by actual appointment.

3. The prayer in this petition is that the petitioner should be declared to be entitled to the post of Section Officer in the Legislature Secretariat under the Special Recruitment Scheme in the vacancy in which K.M. Mary was advised, the communication of Public Service Commission, Ext. P4. stating that the petitioner's turn had not arisen should be quashed and a writ of mandamus should be issued compelling the respondents to appoint the petitioner to the second post of Section Officer and to restrain them from appointing any Scheduled Caste candidate to that post. As we have stated the situation has changed subsequent to the filing of the petition, for, in the place in which the petitioner prayed that he may be appointed one Promod Raj has been appointed. He is the additional 4th respondent in this original petition.

4. The facts are not in dispute. The stand taken by the Public Service Commission in the counter-affidavit is that under the existing rules of reservation and rotation the 'non-joining duty' vacancies and vacancies caused on account of the cancellation of advice are to be treated as fresh vacancies and allotted to the next in the rotation. In other words, it is the case of the Public Service Commission that if vacancies arise by reason of cancellation of advice or by reason of the person advised failing to join duty the turn of the communities for which reservation is made having been satisfied once advice is made the turn goes not to any person of the same community but to the community which is entitled to the next turn. It is for this reason that it was assumed that notwithstanding the fact that K. M. Mary, the Scheduled Tribe candidate did not join the post to which she was advised for appointment once she was so advised the turn of Scheduled Tribe was satisfied and the vacancy caused by her failure to join was available for a Scheduled Caste candidate in the next turn and that would continue to be the case until the 7th turn

is reached when alone a Scheduled Tribe will again be entitled to appointment.

5. The short question, therefore, is whether the rules of reservation will be adequately met by merely advising a candidate of a particular class to a post reserved for that class and whether where such candidate fails to join that post the right of that class to that post will be lost. Exhibit P2 is the Government order on which reliance has been placed. We have already adverted to Clause 3(b) of that order. Existing R1 is the earlier order of 17-1-1976 It has been modified by Ext. P2. Of course the modification is of no consequence so far as this original petition is concerned. The Government order envisages forfeiture of the turn of a Scheduled Tribe only in one contingency. 'If no qualified candidates from Scheduled Tribes are available for recruitment, the vacancies reserved for them will be filled up by Scheduled Castes.' Could it be said that when, in the list of eligible candidates there are candidates available for advice to vacancies to be filled up by Scheduled Tribes the right to a particular turn in the matter of appointment to a post earmarked for Scheduled Tribes will be lost if the candidate advised is unable to take up that post even though the next in rank is available and is willing to take up the post. At what stage does a class or community lose its right on the assumption that the reservation for that community is satisfied? Is it on appointment to that post or is it merely on advice for appointment? De hors any rules it appears to us that the rule of reservation would be effective only if to a post reserved for a community a person is actually appointed. It is more so when, as the facts of this case show, there may be quite often cases where a candidate advised for appointment may not be available for appointment. In the scramble to get an appointment to one post or other candidates may have applied for appointments to several posts at the same time. There is nothing wrong in making such applications. It may be that they may get advice for appointment to more than one post and they might have accepted appointment pursuant to the earliest advice. Naturally, therefore, when they are advised a second time to another post they would decline. The mere fact that the candidate advised is not available for appointment should not result in the class to which the person advised belongs losing such right when eligible candidates are available for appointment to such post. Otherwise it would be a reservation in form only and not in substance. When once a person advised is appointed whether subsequently he continues or not in

that post is another matter. But in the matter of appointment to the post the principle of reservation would have to be adhered to in such a case. To treat the reservation as applicable at the stage of advice and not at the stage of appointment may not, in circumstances where many of the people advised may not be able to join because they are already appointed, satisfy the rule of reservation in its true form and spirit as envisaged.

6. Of course we are governed by a rule here and, therefore, we have to see whether the rule makes any difference to this situation. We think the rule also promotes the very construction we put upon the situation. That rule envisages filling up vacancies reserved for Scheduled Tribe by Scheduled Castes in the event 'no qualified candidates are available for recruitment'. If there is a ready list of eligible Scheduled Tribe candidates and the second rank holder is available when the first declines it cannot be said that no qualified candidate is available. Such candidate is in truth and in law available for recruitment. It will be contrary to the rule to say, merely because the candidate of the first rank advised for appointment does not accept the offer in view of the fact that he is already employed elsewhere, that no qualified candidate from that class is available for recruitment.

7. Though in the counter-affidavit of the Public Service Commission reference has been made in Paragraph 21 to which we have already adverted, to 'existing rules of reservation and rotation', at the hearing, learned Counsel for the Commission fairly conceded that there are no such rules and the reference made therein is to the practice adopted by the Public Service Commission. That practice cannot be justified, at any rate in view of what this Court had said as early as in 1974. In the decision in *Mariyakutty v. Municipal Commissioner* (1975) 1 S.L.R. 188, Justice Chandrasekhara Menon, examined a plea similar to the one now urged before us. The learned Judge said thus:

To me it appears the contention taken up by the first respondent is not correct and has to be overruled. Saraswathi Amma's appointment had not become effective as she did not accept the same. It is stated in the counter that Saraswathi Amma was appointed in the 5th vacancy in the cycle and when Saraswathi Amma did not

accept the appointment, the next appointment is to the 6th vacancy. It is clearly erroneous as the 5th vacancy had not been filled up. Issuing an order of appointment which is not accepted would not tantamount to 'appointment' as such as mentioned in Section 14(c). What is contemplated there is effective appointment. Therefore, that vacancy to which Saraswath Amma had been appointed and which she did not accept has to be filled up by appointing the person on the basis of open competitions, Saraswathi Amma having been offered the appointment on the basis of her coming in the open competition group.

We are in respectful agreement with the view expressed by our learned brother Chandra-sekhara Menon, J.

8. Perhaps having been not a party to that judgment the Public Service Commission was unaware of the decision.

9. Now we will advert to the decision of our learned brother Vadakkel, J., in O.P. 2979 of 1976. The learned Judge seems to have been told in a similar situation that the practice followed by the Commission was that when a candidate is advised against a turn reserved for a particular community that turn is treated as having been satisfied and the cycle of rotation is continued for further recruitment. Having noticed this the learned Judge expressed the view that there was no merit in the contention of the petitioner that she should have been advised in the vacancy arising from non-joining duty. For reasons which we have already indicated the vacancy arising by reason of failure of the Scheduled Tribe candidate to join must go to the next Scheduled Tribe candidate in the list. The question has not been considered in that light in the judgment of our learned brother Vadakkel, J. In this view the petitioner in this case is entitled to succeed. That means that the petitioner has to be appointed in the vacancy in which the additional 4th respondent was appointed. That shall be done forthwith

10. Though normally we should have left the case here, we are unable to do so in the facts and circumstances of this case. Our attention has been drawn to the circumstances under which the 4th respondent was advised and he joined duty as a Section Officer in the Legislature Secretariat. Evidently on the basis of the view which prevailed with the Public Service Commission at that time the 4th

respondent is seen to have been advised to a vacancy in which the petitioner here should have been advised. This error is seen to have caused considerable prejudice to the 4th respondent. It is seen from his counter-affidavit that at the time he was advised by the Public Service Commission he was employed as Senior Assistant in the Kerala State Electricity Board. He had put in 9 years of service then. Evidently he must have felt that his appointment as Section Officer in the Legislature Secretariat offered better prospects. Since he could join the post only after resigning the post which he held, he naturally resigned the post. It is further seen from his : counter-affidavit that he is now 36 years of age. It means that he is overaged for fresh recruitment and cannot aspire for a fresh appointment in the future. He has lost the post which he was holding for 9 years. Of course the situation in which he is placed, namely, that he has to maintain his wife and four female kids should not make any difference in the disposal of the petition. All the same the fact that he was induced to give up the office he was holding on the advice to this post and now he is not eligible to apply for fresh appointment are matters which are of grave concern. It makes the injury to him really irreparable. We cannot put him back to the position he occupied prior to his appointment as Section Officer. What course we should adopt in these circumstances is a matter that has caused us considerable anxiety and concern. It is not as if in a petition under Article 226 of the Constitution we are concerned only with adjudicating the rights of the petitioner before us. If as a result of such adjudication injury is caused to another that is a circumstance we should take into account. Not that in a situation like this that should in any way induce us to deny relief to the petitioner for, the petitioner has not been responsible for this situation. But it is open , to this Court in the exercise of its power to make necessary and appropriate directions. In fact we feel it is our duty to do so to see that while administering justice to a citizen it does not result in injustice to another. If the 4th respondent is sent out which would be the logical course in this case, we cannot see any mode of repairing the harm that would be caused to him thereby. It is really to meet such situations that a power is reserved in the Government under Rule 39 of the Kerala State and Subordinate Service Rules. This is a power to be exercised in rare and exceptional cases in extraordinary circumstances where ends of justice demand its exercise. It would be appropriate for this Court to point out this to the Government on this

occasion to alert the Government to the need for appropriate treatment of the case of 4th respondent in the situation in which he is placed. A Full Bench of this Court had occasion to go into the scope of Rule 39 of the Kerala State and Subordinate Service Rules. This Court said in *Sreedharan Pillai v. State of Kerala* 1973-II L.L.J. 180, in that context thus;

If, however, special circumstances do exist warranting a valid classification of the particular case or cases it will also be open to the authority exercising the power under Rule 39 to accord a special treatment in respect of such exceptional cases even by exempting the person or persons concerned from the operation of any particular rule. In saying this we consider it necessary to emphasise that such a course will be permissible only in those rare cases where very strong grounds exist justifying a valid classification of the cases of the officers in question for the purposes of Articles 14 and 16 of the Constitution.

The Supreme Court had occasion to consider the scope of a similar Rule in force in Andhra Pradesh. This was in the decision in *Govt. of A.P. v. D.J. Rao* 1977-I L.L.J. 12. Dealing with Rule 47 of the Andhra Pradesh State and Subordinate Service Rules which gives power to the Governor to relax the rigour of the General rules in such manner as may appear to the Governor to be just and equitable, the Supreme Court said thus:

Clearly, the power under Rule 47 is to be exercised in the interest of justice and equity. It is not difficult to see that the occasion for acting under Rule 47 may well arise after the attention of the Government is drawn to a case where there has been a failure of justice. In such cases justice can be done only by exercising the power under Rule 47 with retrospective effect, otherwise the object and purpose of the rule will be largely frustrated.

In the circumstances to which we have made mention in: rather great detail, we feel it necessary that despite the petitioner being directed to be appointed to the post which the additional 4th respondent is now holding, the additional 4th respondent shall also be allowed to continue in office till such time as the Government considers and decides upon the proper treatment to be given to him in the light of facts and circumstances pointed out herein, and communicates such

decision to him. Government may make necessary provision to enable the continuance of the 4th respondent till that time. The Original Petition is allowed as above No. Costs.

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