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Court : Kerala

Decided On : Jul-27-1982

Reported in : (1983)ILLJ8Ker

Judge : Chandrasekhara Menon, J.

Appellant : Premakumar

Respondent : General Manager, Telecommunications

Judgement :

Chandrasekhara Menon, J.

1. The petitioner had applied for selection to the post of Telephone Operators as per an advertisement issued by the General Manger, Telecommunications, Kerala Circle, Trivandrum-1, 1st respondent. The petitioner was called for the test, passed in the test and after appearing in the aptitude test and interview, was selected for training for appointment to the cadre of Telephone Operators in the Alleppey Division headed by the Divisional Engineer, Telegraphs, Alleppey, 2nd respondent. Subsequently medical test was conducted. It is a formality required for appointment in the Post & Telegraphs Department. The petitioner was found lit as indicated by Exhibit P-3. The petitioner also submitted a declaration regarding his slate of health, copy of which is marked as Exhibit P-4.

2. After he was found medically fit, the petitioner was directed to till in a printed form issued by the Department with an attestation form in which various details are to be mentioned with photo attached. This was complied with by the petitioner. Exhibit P-5 is a copy of the form which the petitioner tilled up. In it he had stated that he had been arrested on 20-11-1975 by the S.I. of Police, Alleppey South, for shouting slogans. He was kept under judicial custody from 21-1 l-1975 to 4-12-1975 being accused under the Defence of India Rules, The Chief judicial Magistrate. Alleppey rejected the application for extending the remand, filed by the Sub-Inspector of Police, Alleppey South, on 4-12-1975 and discharged the petitioner under Section 321 of the Code of Criminal Procedure. It is also stated that the case against him was finally withdrawn on 22-7-1977 on the Assistant Public-Prosecutor's request for permission to withdraw the case, to the Chief Judicial Magistrate, Alleppey. The petitioner's name was deleted, alter this form was received, from the select list of Telephone Operators for 1978 whole year vacancies. The petitioner challenges this deletion as being totally without jurisdiction. Exhibit P-6 was issued by the Divisional Engineer, the 2nd respondent. It is stated that no reasons are mentioned in Exhibit P-6 for deleting the name of the petitioner. According to the petitioner, it is his fundamental right guaranteed under the Constitution to be considered for appointment and this cannot be infracted without even affording him an opportunity to show cause against or without even informing him the reasons for doing so.

3. In the counter-affidavit filed by the 2nd respondent it is stated that he is fully competent to delete the name of any of the candidates in the select list and he has the power to appoint candidate to the cadre of Telephone Operators. This power is vested in him and equally so is the power in him to remove any name from the select list. No reason may be given for the same. The 2nd respondent has acted in accordance with the administrative instructions issued by the Government of India in this behalf. It is stated that the petitioner has admitted that he was arrested and kept in judicial custody during the emergency. Though the charges under the Defence of India Rule's were withdrawn by the State Government on account of a change of policy, that does not necessarily mean that he was absolved from the charges.

4. When I read the counter-affidavit I was rather shocked that an officer could state that it is for him to decide to make the appointment and that he has got the arbitrary right to remove any name from the select list. To say the least, this is a perverse view. No officer serving in this land could state like that. I think he forgets that he is living in a country which has got a Constitution and as per which rule of law is to prevail. In the circumstances I directed the General Manager, Telecommunications to produce all the relevant materials on which it is said that the appointing authority had reason to believe that the petitioner was one who was prone to defy the provisions of law and, therefore, not fit for service under the Government. I have said in that interim order that apparently, on the fare of the impugned order, it is clearly illegal and violative of Article 14 of the Constitution. I have also said that if relevant materials are not produced before the Court, it is clear that the appointing authority has acted arbitrarily, illegally and unconstitutionally. It is not disputed that the appointing authority had no other materials apart from the statement made by the petitioner that he had been arrested during the emergency under the Defence of India Rules and subsequently the case against him was withdrawn.

5. I might in this connection refer to certain decisions. Certainly I take note of the decision in K. George v. State of Kerala 1964-I L.L.J. 565, There a Division Bench of this Court consisting of Chief Justice M.S. Menon and Justice Madhavan Nair dealt with the case where the petitioner was selected and recommended by the Public Service Commission for appointment as Munsiff. The State did not appoint him on the ground that on verification of his character and antecedents he was found to be a Communist and hence he was not suitable for the post. There it was said that the action of the government was not violative of Article 16(1) of the Constitution. This Court said that what is expected from the State under Article 16(1) in the matter of appointment is very much the same as what is expected from a public body in the United Kingdom. In U.K. a public body cannot be regarded as having statutory authority to act in bad faith or form corrupt motives. Further an act of the public body even though performed in good faith and without the taint of corruption can be inoperative where it is so clearly founded on alien and irrelevant grounds as to be outside the authority conferred upon the body. The Court referred to the decision in Short v. Poole Corporation [1926] Ch. 66. After

stating that this Court went on to state that the duty and the responsibility of fixing the test of character were primarily that of the State; its discretion by its very nature would have to be large and untrammelled and a Court could not possibly substantiate its own yardstick for that of the Government of the day. Therefore, what exactly were the elements that would evidence and ensure essential character was the privilege and the duty of appointing authority - and not of a Court - to decide. There may not be any controversy with those propositions. However, the Court there states that the fact that the candidate was a Communist was a relevant consideration for excluding him from appointment and such exclusion would not be violative of Article 16(1), I, on my part, do not understand this part of the reasoning at all especially in view of the provisions in Articles 14 and Hi of the Constitution, which prohibits even a Government acting arbitrarily in any manner in the matter. However, being a decision of the Division Bench. I would certainly have referred this matter to a larger Bench, but for the fact that in the light of the later Supreme Court decisions, this decision has to be considered to be wrong in law.

6. I may now refer to the decision in Sugatha Prasad v. State of Kerala : (1966)IILLJ93Ker . There Justice Vaidialingam said:.appointment to Government service is essentially an administrative or executive action. The position may, no doubt, be different if the applicants are able to establish that in addition to the right to apply and being considered for a particular post, they have also a right guaranteed under the Constitution to be appointed to the particular post. But the constitutional right does not extend to conferring a right on any person of being appointed to Government service. The nature of the materials to be collected and the satisfaction that is to be arrived about character and antecedents of the person to be appointed are entirely matters for the appointing authorities, and the appointing authorities have a right to be so satisfied especially in view of the provisions of rule 10(2)(b) of the Kerala State and Subordinate Services Rules on these matters before a person can be appointed to Government service. When there is no right to be appointed, as such to Government service, and when the limited right that is given under Article 16(1) and (2) has been sufficiently complied with the grounds available to the Government to come to a conclusion one way or the other is not a matter which the High Court can be called upon to scrutinise,

especially when the Government is entitled to pick and choose.

There I would underline the words 'the right that is given under Article 16(1) and (2)'. It could be only on proper materials that the Government could come to a conclusion that a person is not fit for appointment to a particular post. The whims and fancies of the party in power or an authority cannot determine that the person is not entitled for appointment. I certainly accept that it is open to the State to take into account the character and antecedents of the person for appointment in service. But as pointed out by a Division Bench of this Court in State of Kerala v. K.A. Balan, (1979) (1) [SLR 94] consisting of Chief Justice Gopalan Nambiyar and Justice S.K. Kader, that in assessing his character and antecedents the State was not to proceed on arbitrary and irrelevant considerations, and that generally, in this region of assessment, the Court should not .substitute its own assessment for those of the executive, with which vests the primary duty of appointment. The scope and ambit of Articles 14 and Hi has been discussed at length by the Supreme Court in the well known case, Maneka Gandhi v. Union of India : [1978]2SCR621 There Justice Bhagwati speaking jointly with Untwalia and Murtaza Fazal Ali, JJ. said that the principle of reasonableness, which legally as well as philosophically, is an essential element of equality or non-arbitrariness pervades, Article 14 like a brooding omnipresence and the procedure contemplated by Article 21 must answer the test of reasonableness in order to be in conformity with Article 14. It must be 'right and just and fair' and not arbitrary, fanciful or oppressive; otherwise, it would be no procedure at all and the requirement of Article 21 would not be satisfied. There it was also said that there are no positive words in the statute requiring that the party shall be heard, yet the justice of the common law will supply the omission of the Legislature. The principle of audi alteram portent which mandates that no one shall be condemned unheard, is part of the rules of natural justice. Justice Bhagwati further observed that natural justice is a great humanising principle intended to invest law with fairness and to secure justice and over the years it has grown into a widely pervasive rule affecting large areas of administrative action. The inquiry must always be: does fairness in action demand that an opportunity to be heard should be given to the person affected. The law must not be taken to be well settled that even in administrative proceedings which involves civil consequences that doctrine of

natural justice must be held to be applicable. In view of this decision of the Supreme Court, I do not think it is possible 4o decline employment to a person on account of the fact that he belongs to a particular political party or group, which is a lawful group and which has not been banned by the law of the State.

7. As a learned Judge of the Andhra Pradesh High Court, Justice Jeevan Reddy, said in Kalluri Vassayya v. Suptit. of Post Offices (1980) 2 SLR. 433: Article 16(1) of the Constitution of India guarantees to all citizens equality of opportunity in matters relating to employment or appointment to any office under the State. The exceptions thereto are mentioned in that Article itself. Article 19(1)(a) and (c) guaranteed the freedom of thought and expression, and the freedom of association, while Article 19(1)(g) guarantees the right to practise profession or occupation of one's own choice, subject of course, to any law made within the meaning of Clause is (2), (4) and (6) respectively. These rights were written into the Constitution by the great liberal spirits who shaped it, because they were deemed to be essential for the proper flowering of the man, his mind and his personality; without these rights, a man is something less than a man. These rights were meant to be availed of and exercised, and were made inviolate with that very object. The learned Judge then asked, once that is so, how can the State punish a citizen, seeking employment under it, for exercising these fundamental freedoms? A person seeking public employment is not required to strip himself of all fundamental and other rights and stand like a mendicant before the appointing authority. There is no law within the meaning of clause is (2), (4) and (6) of Article 19 saying so, nor can any such law be made disqualifying a citizen from public employment merely on the ground of his political views or convictions, or affiliation to a particular political party. Nor can any Act be made or Rule issued under Article 309 saying so, since any such Act or Rule has also got to conform to Part III of the Constitution. Freedom of thought and expression means that a citizen is free to believe in any ideas or ideology he chooses and a citizen is entitled to express the same, except to the extent prohibited by law. The freedom of association entitles a citizen to join any party or association, notwithstanding its political colour or programme, so long as that party or organisation is not banned or declared illegal by law. A citizen who is otherwise found fit, for public employment cannot be discriminated or priced out of employment market because of his political

convictions, or affiliations. As the learned Judge, Jeevan Reddy, points out, once a person enters the service, he would be bound by, and governed by the Rules and the code of conduct obtaining in that service, and cannot act contrary to them. But, at the stage of seeking employment he cannot be disqualified because of his convictions or affiliations.

8. It might be noted that in the Andhra Pradesh case what happened was in pursuance to an advertisement issued by the Post and Telegraphs Department, the petitioner applied for appointment to the post of time-scale clerk. He was asked to, and did appear for selection on 12th April. 1978. Four persons, including the petitioner were selected. Before issuing the order of appointment, the petitioner was called upon to furnish information, in the prescribed proforma, with respect to his character and antecedent. In that form the petitioner disclosed that he was convicted for an offence under Section 25-A of the Indian Arms Act in C. C. No. 12 of 1970 and sentenced to one year's rigorous imprisonment by the judicial First Class Magistrate, Madhira; that the sentence was modified to four months' rigorous imprisonment, in appeal and that, finally the High Court of Andhra Pradesh released him under Section 562, Crl. P.C. on probation of good conduct, on his entering into a bond for Rs. 2,000 with two sureties for like sum for a period of two years. He submitted that the two years period was over without any complaint regarding his conduct. In allowing the petition, where the petitioner wanted to quash the concerned authority's order, Justice Jeevan Reddy of the Andhra Pradesh High Court quoted the following observations of Justice Douglas in Termintello v. Chicago 93 Lawyers' Edn. 11.31 and Chief Justice Huges in Dejonge v. State of Oregan 299 U.S. 353 and Justice Brandos in Whiteny v. California 71 Lawyers' Edn. 1095. I am quoting it at length because I think they are absolutely relevant and should govern the State here also:

Douglas, J., said in Termintello v. Chicago: 'A function of free speech under our system of Government is to invite dispute. It may indeed best serve its high purposes when it induces a condition of unrest, creates dissatisfaction with conditions as they are, or even stirs people to anger. Speech is often provocative and challenging. It may strike at prejudices and preconceptions and have profound unsetting effects as it presses for acceptance of an idea. That is why freedom of

speech, thought not absolute...is nevertheless protected against censorship or punishment, unless shown likely to produce a clear and present danger of a serious substantive evil that rises far above public inconvenience, annoyance, or unrest .... There is no room under our Constitution for a more restrictive view. For the alternative would lead to standardisation of ideas either by Legislatures. Courts or dominant political or community group'. Huges, C.J. in Dejonge v. State of Oregan (supra) observed:- 'The greater the importance of safeguarding the interests of the community from incitements to the overthrow of our institutions by force or violence the more imperative is the need to preserve inviolate the constitutional rights of tree speech, free press and tree assembly in order to maintain the opportunity for tree political discussion, to the end, that Government may be responsive to the will of the people and that changes if desired may be obtained by peaceful means. Therein lies the security of the Republic, the very foundation of constitutional Government....

As far as back as 1927, Brancies, J. declaimed in Whiteny v. California (supra) 'Those who won our independence, believed that the final end of the State was to make men free to develop their faculties.... They believed that freedom to think as you will and to speak as you think are means indispensible to the discovery and spread of political truth; that without free speech and assembly discussions would be futile; that with them, discussion affords ordinarily adequate protection against the dissemination of nexious doctrine; that the greatest menace to freedom is an inert people; that public discussion is a political duty.... They recognised the risks to which all human institutions are subject, but they knew that order cannot be secured merely through fear of punishment for its infraction; that it is hazardous to discourage thought, hope and imagination; that fear breeds repression, that repression breeds hate; that hate menaces stable Government; that the path of safety lies in the opportunity to discuss freely supposed grievances and proposed remedies; and that the fitting remedy for evil Counsels is good ones....

Chinnappa Reddy, J. in A. Ram Rao v. Postmaster General (1975) 1 A.L.J 1, said in respect of the denial of appointment to a candidate on the ground that he was a member and active worker of the Students' Federation of India and he had also attended the Yuvajana Sangh meeting organised by the Marxist Communist Party,

thus:

I think it is offensive to the fundamental rights guaranteed by Articles 14 and 16 of the Constitution to deny employment to an individual because of his political beliefs or because of his past political affinities unless such beliefs and affinities are considered likely to affect the integrity and the efficiency of the individual's service. Of course, once an individual becomes a government servant he becomes subject to the various Public Servant's Conduct Rules, etc., and he may participate in agitations and continue his political affinities at his own risk. But he cannot be turned back at the very threshhold on the ground of his past political affinities.

9. The deletion of the petitioner's name from the select list without hearing him on the allegations on the basis of which the concerned authority thought it fit to do so is clearly violative of the principles of natural justice. These principles which are to ensure fairplay and prevent arbitrary action are alike applicable to judicial (or quasi-judicial) as well as administrative functions. As Prof. Wade says in his article on 'Unlawful Administrative action - Void or Voidable'. 83 Law Quarterly Review - Page 499 at 500, a public authority which acts unlawfully by violating natural justice is acting outside its powers. Lord Selborne said as early as in the last century in Spackman v. Plumstead District Board of Works (1885) 10 Appeal Cases 229 that there would be no decision within the meaning of the statute if there was anything of that sort done contrary to the essence of justice. Failure to render hearing would make an administrative action void.

10. I am not quoting the other cases which have been dealt with lengthly in the Andhra case. In the light of the discussion above, I allow this Original Petition and quash Exhibit P-6. I will direct the issuance of a writ of mandamus to the respondents to consider the case of the petitioner in the light of law stated above. The deletion of his name from the select list stands quashed. The Original Petition is disposed of as above, I make no order as to costs in the circumstances.