SooperKanoon - India's Premier Online Legal Search - sooperkanoon.com

Viswanathan Vs. State of Kerala

Viswanathan Vs. State of Kerala

SooperKanoon Citation : sooperkanoon.com/723628

Court : Kerala

Decided On : Oct-18-1982

Reported in : (1983)IILLJ309Ker

Judge : Subramonian Poti, Ag. C.J. and; Chandrasekara Menon, J.

Appellant : Viswanathan

Respondent : State of Kerala

Judgement :

Subramonian Poti, Ag. C.J.

1. Our learned brother Narenclran has referred this petition to a Division Bench when it came up for admission before him. This was perhaps because the learned Judge might have felt that this Original Petition is only a further attempt to see whether provisional employees appointed temporarily could continue without termination though this Court had in a Full Bench Decision in O.P. No. 3859/81 and connected cases (1982 KLT 829) laid down the guidelines for terminating their services. A large number of Original Petitions were filed in this Court by employees of the State Government, of Municipal Corporations, of public sector concerns and other to dies seeking the application of the provisions of the Industrial Disputes Act in the matter of termination of their services and also seeking appropriate reliefs in the light of application of the provisions of the Act. The matter was referred to a Full Bench and in a series of petitions,O.P. No.

3859/81 and connected cases (1982 KLT. 829), this court examined the scope of the term 'workman' and the scope of the term 'industry'. The Full Bench held that except when the State performs its inalienable functions the class of persons who would come within the definition of 'workman' under the Industrial Disputes Act would be able to claim rights under that Act as against their employers. In those cases it was not contended that the right of such workmen under Industrial Disputes Act would extend to defeating the rights of recruits advised by the Public Service Commission to join the respective posts to which they are advised. In other words, the plea before us was only that until regular Public Service Commission recruits join the posts, those in office, though holding such office by temporary appointments, should be allowed to continue in office. This Court referred to this aspect of the matter in the Full Bench Judgment. Necessarily therefore in dispensing with the service of such temporary employees the employer will have to take note of Section 25G and in cases where Section 25F applies, that section also. In the matter of reemployment Section 25H would apply, but since it was not contended in those cases that Section 25H would operate so as to defeat the rightsof regular recruits through the Public Service Commission that was not dealt with. In 'this petition, which perhaps heralds a fresh batch of petitions the second stage commences. Here the contention raised is that if the temporary employees are entitled to the benefits of the provisions of the Industrial Disputes Act, the benefit of Section 25H should so operate as to debar any appointment of new appointees being made since that would directly contravene Section 25H of the Industrial Disputes Act. It is therefore said that when once temporary employees obtain the right under Chapter V-A, Section 25H will operate so as to nullify any appointments sought to be made on the basis of advice by the Public Service Commission. That would mean that the temporary employees will have to continue for all time without being displaced by regular appointees. Whether this could be the position calls for examination in this petition.

2. The petitioners in this Original Petition are Lower Division Typists (Malayalam). They have been originally appointed for a period of 180 days under Rule 9 of the Kerala State and Subordinate Services Rules. When the departmental authorities took steps to terminate their appointments on completion of 180 days they filed Original Petition O.P. No. 25/82 before this Court and this Court stayed the

termination of the petitioner's services till Public Service Commission hands join duty. It is subsequently that the Full Bench held that the provisional employees like the petitioners were entitled to protection of Chapter V-A of the Industrial Disputes Act, 1947.

3. Section 25G of the Industrial Disputes Act deals with the procedure for retrenchment. Retrenchment from a particular category of workmen in an establishment shall ordinarily be on the basis of the principle 'last come first go'. Though this is the ordinary rule there may be exceptions, but in the case of such exceptions the employer has to record reasons why he retrenches contrary to the rule. Section 25H really operates as supplement to Section 25G. Where retrenchment has been effected and fresh appointments are contemplated thereafter the retrenched workmen will be given an opportunity for reemployment and such retrenched workmen havepreference over others. Necessarily therefore, if provisions of Section 25G apply, normally, juniors are to be retrenched in preference to seniors. By operation of Section 25H seniors retrenched cannot be replaced by juniors and necessarily therefore by new recruits. Those who have been retrenched are entitled to preference over new appointees. What is urged is that even if the petitioners are liable to be retrenched if there is to be reappointment to those posts, under Section 25H the petitioners will have the right of preference over new appointees even though they may be those advised by the Public Service Commission in a regular recruitment. To deny this to the petitioners would be to violate Section 25H and that will be illegal. The prayer in the Original Petition is that writ of prohibition must issue restraining; the termination of the services to give place to fresh hands recruited through the Public Service Commission and to declare that the petitioners have a right of reemployment as provided under Section 25H of the Industrial Disputes Act,

4. The decision of the issue before us calls for consideration of the nature of a temporary appointment under Rule 9(a) of the Kerala State and Subordinate Services Rules. That, by its very nature, relates not to regular appointments in regular vacancies by a regular method of recruitment, but temporary appointments to fill vacancies immediately owing to an emergency in cases where regularly recruited candidates are not available. Such appointment, as Rule 9(a)(i)

indicates, is appointment of a person 'otherwise than in accordance with the said rules' temporarely. K. 9(a)(iii) provides that a person appointed under Clause (i) shall be replaced as soon as possible by a member of the service or an approved candidate qualified to hold the post under the said rules. This is subject to the proviso that persons appointed under Clause (i) shall be replaced in the order of seniority based on the length of temporary service in the unit. Clause (iv) is quite relevant and reflects the character of appointment. That reads:

(iv) A person appointed under Clause (i) or (ii) shall not be regarded as a probationer in such service, class or category or be entitled by person only of such appointment to any preferential claim in intuit appointment to such service, class or category

Of course the rule cannot operate so as to nullily the benefits, if any, under the Industrial Disputes Act, but merely by reason of the operation of the appointment under the rule no person shall have a claim in preference to any other to future appointment in the service nor shall have a claim not to be replaced by a member of the service or an approved candidatequelled to hold the post under the rules. That is the very term or condition of his appointment as seen by the provisions of Rule 9(a)(i).

5. It is in this context that we have to relief to Articles 14 and 16 of the Constitution as also Article 320 of the Constitution. Article 14 is of course general in character assuring equality before law and equal protection of the laws within the territory of India. Article 16 works out this ruleof equality in the matter of public employment Clause (1) of Article 16 guarantees to all citizens equality of opportunity in matters relating to employment or appointment to any office under the State Equality of opportunity envisages that as between persons who are qualified and unqualified, qualified persons must necessarily have preference in being appointed to the office for which they are qualified. There must necessarily be an occasion for their claims to be considered before selection is made. When the number of applicants exceed the number of posts there must necessarily be a process of selection in recruitment. The procedure for selection must be fair and equitable which alone will assure the guarantee of opportunity envisaged in Article 16(1). The

Constitution itself envisages the Public Service Commission of the Union as well as of the States as bodies in whom vests the responsibility for directing the recruitment to the civil services of the Centre and the States respectively. When the Constitution envisages such bodies and envisages functions for such bodies, in the exercise of those functions the guaranteed right to equality will be worked out. In other words the practical application of the rule of equality of opportunity must inform the functioning of the Public Service Commissions. Article 320(3) of the Constitution provides that the State Public Service Commission shall be consulted in all matters relating to the methods of recruitment to civil services and for civil posts and on the principle to be followed in making appointments to civil services and posts. The proviso to Article 320 reads:

Provided that the President as respects the All-India services and also as respects other services and posts in connection with the affairs of the Union, and the Governor as respects other services and posts in connection with the affairs of a State, may make regulations specifying the matters in which either generally, or in any particular class of case or in any particular circumstances; it shall not be necessary for a Public Service Commission to be consulted.

The Kerala Public Service Commission (Consultation) Regulations, 1957 enumerates the various matter's in respect of which it shall not be necessary for the Commission to be consulted. Regulation 5 of this Regulation may be relevant for' our purpose and therefore it is extracted here;

5(1) It shall not be necessary to consult the Commission regarding the appointment of a person temporarily for a total period not exceeding one hundred and eighty days the case of each individual to a post borne on the cadre of a service to which appointment has to be made after consulting the Commission:

(i) where it is necessary in the public interest owing to an emergency which has arisen to fill immediately a vacancy in the post and there would be undue delay in making the appointment alter such consultation; or

(ii) where it is necessary to fill a short vacancy in the post and the appointment of the person who is entilted to appointment under the rules applicable to the service

would involve excessive expenditure on travelling allowance or exceptional administrative inconvenience.

(2) In addition to the concurrence to be obtained under Clause (i) for the continuance of the temporary appointment of a person beyond the first one hundred and eighty days, a second concurrence of the Commission shall be obtained sufficiently in advance, if, in any individual case, it becomes essential to continue such appointment, beyond three hundred and sixty days.

(Provided that the concurrence of the Public Service Commission shall not be required in the case of temporary appointments made from the lists obtained from the Public Service Commission in pursuance of sub-para (a) of para 3 of G.O. (Rt) No. 2()0/7:)/Tl) dated 13th January, 1973).

6. The State Commission is not being consulted in regard to temporary appointments by virtue of this Regulation. Temporary appointment is not a method of recruitment to the service. Appointment of persons ad hoc and otherwise than by the regular process of selection, if adopted as a proper method of recruitment to services, would infringe Article 16(1) of the Constitution, since that would effectively serve to deny opportunity to eligible candidates to seek recruitment in an open process of selection. It may be necessary in some emergencies to make stop gap arrangements in the interest of administration and if persons are temporarily appointed to certain posts without such appointments conferring any preference over them the rights of those who seek regular appointments may not be affected thereby. While recruitment to civil posts is to be made by an open process of selection assuring opportunity to all those eligible to contest, if nevertheless, a rule is made which enables another method of selection of persons being made ad hoc that would offend the right under Article 16 of those who may seek to come in by a regular selection and who by theadhoc method adopted are denied that opportunity. Viewed in this background it must be evident that the rule regarding temporary appointment is made not envisaging another alternative method of recruitment or selection or intending to confer any right on a class of people, but providing by way of a stop gap arrangement for appointments temporarily of persons who do not have to stand the regular selection process as

they would have to if they are to be regularly recruited to civil posts. The provisions of Rule 9 make it clear that it is not as if the appointees under that rule have been recruited after a contest between all those who are eligible. By the very nature of the rule appointees thereunder cannot defeat the right of applicants who stand before the Public Service Commission for regular recruitment, seek their opportunity and are advised for appointment on the basis of their qualifications and eligibility.

7. The problem now pointed out is that when once this Court has held that these temporary employees are workmen entitled to the benefit of Chapter V-A under the Industrial Disputes Act as against their employer, logically it must follow that they cannot be replaced by any juniors and all fresh recruits would be juniors. They cannot be sent out and fresh recruits taken, for, whatever may be the provisions of Article 16(1) provisions of the Industrial Disputes Act would be violated if the petitioners are sent out with a view to appointing the Public Service Commission hands. The answer to this is simple. The provisions of the Industrial Disputes Act cannot override the Constitutional rights of the persons who have been selected by a due process of selection by the Public Service Commission. The latter are persons who, being eligible to be appointed, have undergone a regular process of selection. They have been afforded an opportunity to seek employment along with others similarly placed and have been found to be eligible for appointment and are accordingly advised. Rights of persons temporarily appointed by way of stop gap arrangement cannot be read so as to defeat the Constitutional rights as otherwise it would defeat the rule of equal opportunity envisaged under Article 16(1) of the Constitution and the provisions of Article 320 which enables the Public Service Commission to resort to regular recruitment in order to secure that opportunity to the applicants.

8. There is yet another aspect of the matter to which we should advert in this context. Article 16(4) of the Constitution envisages reservation by the State of posts in favour of backward classes of citizens which in the opinion of the State are not adequately represented in the services under the State. By way of working out this guarantee provisions have been made in the Kerala State and Subordinate Services Rules for reservation of appointments to socially backward

classes as also to Scheduled Castes and Scheduled Tribes. Temporary appointments are not governed by these provisions as they are not appointments made in accordance with the rules. To perpetuate temporary appointment on the plea that otherwise Section 25H of the Industrial Disputes Act would contravene would be to nullify the Constitutional protection given under Article 16(4) of the Constitution by making the rules of reservation in the Kerala State and Subordinate. Services Rules to backward classes as well as Scheduled Castes and Scheduled Tribes inapplicable. Such a result is certainly not envisaged and would certainly be unconstitutional. It is in this background that we have to read down the rights of the temporary employees particularly in relation to the provisions of Section 25H of the Industrial Disputes Act.

9. Therefore we are of the view that the rights of the temporary employees who, we have found are entitled to the protection of Chapter V-A of the Industrial Disputes Act, will not operate so as to defeat the rights of recruits advised by the Public Service Commission. In this view the petition is without any merit and is dismissed in limine.

SooperKanoon - India's Premier Online Legal Search - sooperkanoon.com