

Vijayan Vs. State of Kerala

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SooperKanoon Citation : sooperkanoon.com/725828

Court : Kerala

Decided On : Mar-23-2004

Reported in : 2004(3)KLT173

Judge : M. Ramachandran, J.

Acts : Kerala State and Subordinate Service Rules, 1958 - Rule 9

Appeal No. : W.P. (C) No. 2373 of 2004

Appellant : Vijayan

Respondent : State of Kerala

Advocate for Def. : Lal George, Government Pleader (Finance)

Advocate for Pet/Ap. : S. Ramesh Babu, Adv.

Disposition : Writ petition dismissed

Judgement :

M. Ramachandran, J.

1. By Ext. P1 order of the .Government dated 11.1995, the petitioner, who was working as a Senior Grade Assistant, attached to the Administrative Secretariat, had been temporarily appointed as Assistant Director of National Savings under Rule 9(a)(i) of the Kerala State and Subordinate Services Rules. The petitioner

was continuing thereafter in the above said post and during the year 2003, he was working in he Kottayam District.

2. The District Collector, Kottayam apparently was of the opinion that because of the poor public acceptance of the petitioner, his lack of resourcefulness and inactive posture, he was incompetent to hold the post. The District Collector had recommended the Department that the petitioner may be removed from the position. Considering the report, the Government had by Ext.P3 dated 17.9.2003, issued a memo to the petitioner. The comments of the District Collector had been brought to his notice and he had been directed to furnish his explanation in respect of the draw backs as pointed out.

3. The petitioner had thereupon furnished Ext.P4 explanation. He pointed out that there was no justification for any complaint against him and the factual situation was that he had been even put in additional charge of the Deputy Collector. There were some arrears of work because of absence of help. The supervision of 1300 Agents of the District was a heavy task, but notwithstanding that he had been turning out good work and the District Collector might have been not fully aware of the real positions and since there was no sufficient time for assessment of his work, as he had been in the Kottayam District only for a period of few months, the proposal to remove him from service was pointed to be on a misconception.

4. But thereafter, referring to the D.O. letter of the District Collector, Kottayam the petitioner had been reverted to his parent department on the basis that the explanation was not satisfactory. This order dated 15.1.2004, produced as Ext.P6, is under challenge.

5. While challenging the order, petitioner relies on a judgment passed by this Court in O.P.No.36170 of 2000 dated 9.3.2001, which had been passed in an identical circumstance. Assistant Director of National Savings, working at Thrissur, had been reverted. This Court had held that though the appointment was under Rule 9(a)(i) of the General Rules, since the officer had continued in the post for nine years the reversion order amounted to a punishment. As this was without enquiry and as a result thereof civil consequences were to befall on him, according to the learned Judge, the order was not sustainable. The petitioner now points out that

no appeal had been filed from the above said judgment. He also submits that his explanation had not been properly adverted to before passing Ext.P6. It is also submitted that though the appointment was under Rule 9(a)(i) of the General Rules, the petitioner was treated as part and parcel of the Department and his name found a place in the seniority list of officers published by the Government on 21.4.2003 consequent to a judgment passed by this Court and directions passed in a series of Original Petitions. He was rank No. 19 among the officers totalling 34.

6. The contentions of the learned counsel for the petitioner were four fold, (1) Though the appointment was under Rule 9(a)(i), by passage of years it has to be treated as a regular appointment; (2) Even if no benefits of substantial nature are to be treated as conferred to an officer under Rule 9(a)(i), the Government cannot arbitrarily nullify promotion and revert him so long as juniors continue; (3) The order is stigmatic in nature and in the nature of the allegations it should have been ensured that a proper enquiry was held before reverting him as it was undisputed that in the matter of emoluments and status the petitioner had to suffer a reduction; and (4) In view of the law laid down by this Court in Ext,P7 judgment a different yardstick should not have been applied in the case of the petitioner and a reversion was impermissible.

7. As against this, the learned Government Pleader Sri. Lal George submits that this Court should not exercise its extra ordinary jurisdiction taking notice of the totality of the circumstances. Sri. Lal George submits that taking notice of the general deficiency of the officer, and on the report of the Controlling Officer, a decision has been taken in the interest of the State. Technicalities have to give way in larger public interest. It was not been brought necessary to hold an enquiry in the matter of to prove the inefficiency of an officer, especially since there was no stigma attached to him and it was only a case of simple reversion, as there was no effectiveness by employing him in the post. The Government was authorised to exercise the power in view of the powers invested in them, considering terms of the appointment order issued to the officer concerned.

8.. He further submits that in respect of officers of the department, the pending cases disabled the Government from required interference. Stop-gap arrangements were constrained to be continued because of the pendency of Writ Petitions before this Court. So much so, a provisional arrangement, which had been intended only to govern the field for a few months, indefinitely had continued. With reference to later orders, especially Order No. 113438/Admn.A3/2003/Fin. dated 13.2.2004, a copy of which was handed over at the time of hearing, it is submitted that proposals in respect of reverting the provisional appointees is under the active consideration of the Government. It so happened that because of the report of the District Collector, Kottayam as against the petitioner, an early decision came to be taken. He submits that an appointee under Rule 9(a)(i) cannot have a right to urge that by passage of time, his rights for occupation of a post are not liable to be interfered at all.

9. The petitioner has almost entirely relied on Ext.P7 judgment passed by this Court in O.P.No.36170 of 2000. Mr. Justice Bhaskaran had been dealing with a case of almost identical nature and His Lordship had referred to the appointment order issued to the petitioner mere and expressed an opinion that even though the appointment is provisional, passage of time should have been deemed as having conferred rights on the petitioner there to continue without interruption. The decision points out that the reversion without conducting an enquiry and an opportunity of being heard may not be sustainable. Reliance is placed on the decisions of the Supreme Court in K. H. Phadnis v. State of Maharashtra, AIR 1971 SC 998; Regional Manager v. Pawan Kumar Dubey, AIR 1976 SC 1766, as also State of U.P. v. Sughar Singh, AIR 1974 SC 423. Reduction to a lower rank or to a lower grade is a major punishment under the Kerala Civil Services (Classification, Control & Appeal) Rules. It could not have been brought about without an enquiry under Rule 15 of the said Rules. Interference is seen to have been relying on the above legal position.

10. The learned counsel also submits that the pendency of other Writ Petitions in no way bound the hands of the Department, as claimed now. It is also submitted that it is not as if a rule 9(a)(i) appointee could be reverted at the likes of the respondents, since the proviso to Rule 9(a)(iii) prescribes, that a person appointed

under Clause (i) shall be replaced in the order of seniority based on length of temporary service in the unit. It is further submitted that in fact there is stigma attached to him, since accusation of the Government is that he is inefficient and therefore he cannot be accommodated in any such post, even in any other district, taking notice of the report that had been made against him.

11. When we examine the rival contentions, it has to be observed that the petitioner has been able to urge technical contentions which may appear to be valid at the first blush. The order of reversion referred to his inefficiency to produce results as an officer in a key post. It has also to be presumed that principle of 'seniority had not been taken notice of while the reversion was ordered. He was justified, to contend that the benefit of the observations made by this Court, while dealing with a case of his colleague, was to be given to him.

12. However, as contended by the learned Government Pleader, the issue involves larger aspects than the preservation of the career of an individual Officer. Service is definitely larger than an individual. The petitioner is occupying a vital position and the District Collector, who is the controlling authority, has come to assess his work, and has made a report that the petitioner was not to be permitted to continue in the position in public interest. The right man in the right place will definitely contribute to administrative efficiency. Even an efficient person may not be able to adapt himself and present his best in all situations. The initiative and drive that is expected of an officer, who is to spearhead National Savings in a Revenue District, might not have been there in sufficient amounts in the petitioner. We can see certain amount of diffidence in his reply. He had in the explanation referred to the circumstance that it was indeed difficult to supervise the activities of about 1300 Agents. He has also adverted to the absence of supporting hands in the office. As contended by the learned Government Pleader, the question is whether emphasis is to be on the alleged loss of opportunities of a person to continue in the post vis-a-vis the disadvantage of general public which came to be noticed by a dispassionate officer.

13. In this context, we have to examine whether there is really a reversion and the punishment as has been contended by the petitioner. The appointment order gives

certain clues in this region. To extract from Ext.P1, the offer for appointment is with the following rider:

'The temporary appointment of Sri. A. Vijayan is ordered in the absence of select list for appointment to the post of Assistant Director of National Savings and his appointment is not likely to be regularised. His appointments purely provisional and he will have no claim to this post'.

The petitioner had accepted the offer without any protest. The governing rules (Kerala National Savings Service Special Rules), as could be seen from Ext.P2, provides that regular appointment to the category concerned is to be made by a committee consisting of (i) the Minister for Finance/the Chairman, National Savings State Advisory Board (ii) the Finance Secretary and (iii) the Director of National Savings. It is a post to be filled up by selection. This had not been there at all. It was a provisional employment, as evidenced from Ext.P1, and the petitioner wants this Court to ignore the prime condition incorporated in the said order, that his appointment is provisional and is not likely to be regularised. This is only for the reason that he had been continuing in service for a few years. It is the settled legal position that continuation in a post, as above, will not confer rights for confirmation. The importance of the job is indicated by the method of selection postulated. Highest functionaries like the Minister for Finance, Finance Secretary etc., are to be there in the Committee for selection. Undisputedly the Government has considered appointment to such a post as of prime importance and normally selection of the very best talents alone might have been envisaged. This cannot be short circuited, according to me, for the only reason that the officer for some reason or other, could continue for a good number of years in the post on the basis of fortuitous appointment.

14. When the issue had been considered by a learned Judge, by way of Ext.P7 judgment, as now stressed by the learned Government Pleader, there has not been advertence to the law that had been laid down by the Supreme Court by later decisions which were more explicit. In other words, the reliance placed on the Supreme Court judgments was therefore of no consequence. The Supreme Court in *R.S. Sial v. State of U.P.* (AIR 1974 SC 1317), according to the Government

Pleader, had prescribed the correct parameters to be employed. Especially the observations in paragraph 8 of the judgment had been referred, this was to the following effect:

'Appointment to a post on an officiating basis, from the nature of employment, itself of a transitory character and in the absence of any contract or specific rule regulating the conditions of service to the contrary, the implied term of such an appointment is that it is terminable at any time. The Government servant so appointed acquires no right to the post.'

He had further referred to the decision of the Supreme Court in *State of Mysore v, M.K.Gadgoli*, AIR 1977 SC 1617, wherein it had been observed that 'A person officiating in a post has no right to hold it for all times. Indeed such a person is given a higher officiating post to test his suitability to be made permanent later and holds it on the implied term that he would have to be reverted if he was found unsuitable'. Adverting to the decision reported in *State of Orissa v. Pyari Mohan Misra*, AIR 1995 SC 974, the Government Pleader submits that the observations in paragraph 4 of the judgment to the following effect might be highly relevant:

'In other words, mere prolonged continuous ad hoc service does not ripen into a regular service to claim permanent or substantive status, he would remain to be on ad hoc basis until further orders'.

15. In *State of Rajasthan v. Roop Chand Shah*, 1995 Supp. (4) SCC 460, relying on the decision in *S.S. Moghe v. Union of India*, (1981) 3 SCC 271, the Supreme Court had further observed that 'The respondent was merely officiating in the promotion post and on being found unsuitable for the said post by the Screening Committee he was reverted to his substantive post. There was no question of hearing him on his suitability by the Screening Committee'. Thus, the Supreme Court had highlighted that an officiating employee had no inherent right to be heard before such officiating arrangement was discontinued.

16. Another aspect that had been highlighted by the petitioner was that there was likely to be a fall in emoluments because of the reversion order and since this was an adverse consequence, an order in the nature might not have been sustainable.

But, this point had come up before a Constitution Bench of the Supreme Court, in the decision reported in *The Divisional Personnel Officer, Southern Railway, Mysore v. Raghaavendrachar*, AIR 1966 SC 1529. The Court had held that 'iwhen a person, officiating in a post is reverted for unsatisfactory work, it cannot be said that reversion would amount to a reduction in rank. According to the Supreme Court, the Government has a right to consider the suitability of the person to hold the position to which he had been appointed to officiate and he is also entitled to make inquiries about his suitability to continue. The Court held that losing some places in the seniority list did not tantamount to reduction in rank. Citing the decision reported in *Purshottam Lal Dhingra v. Union of India*, AIR 1958 SC 36, the Court had observed that if the loss of the emoluments attached to the higher rank in which he was officiating was the only consequence of his reversion, he would have no cause of action.

17. To accept the case of the petitioner would be to say that notwithstanding the circumstance that the appointment was not made in the prescribed mariner by the Rules, it should be kept undisputed. At least some obedience has to be given to the words of his appointment order. The petitioner should think twice before criticising the present order, as we cannot shut our eyes to the covenants there. Of course there was no strict compliance with Rule 9(a)(iii) of the General Rules in the present discharge, but interference for the said reason alone does not seem to be warranted. The Government had indicated that every one of the temporary promotions are being subjected to examination (on the authority of letter No. 113438/Admn.A3/2003/Fin. dated 13.2.2004). This does not appear to be objectionable, and at least a review of the provisional appointments might be essential.

18. Selection to sensitive posts is to be normally made by high power bodies and persons who are really talented are to be given the job so as to achieve the ends that are targeted. The individual loss of the petitioner, that might be there, therefore need not unnecessarily prejudice the Court as the attempt is to bring in fresh blood and not for any oblique motives,

19. Therefore, I do not think that it will be just and expedient to interfere with the impugned orders. The Writ Petition will stand dismissed.

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