

Saifuddin Vs. State of Kerala

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Court : Kerala

Decided On : Jul-19-2006

Reported in : 2006(3)KLT873

Judge : K.S. Radhakrishnan and; V. Ramkumar, JJ.

Acts : Kerala State and Subordinate Service Rules, 1958 - Rules 8, 16 and 18; Co-operative Societies Rules - Rules 186 and 187; Municipal Common Service Rules

Appeal No. : W.P.(C) Nos. 34556 of 2004 and 34110 of 2005

Appellant : Saifuddin

Respondent : State of Kerala

Advocate for Def. : P.C. Sasidharan, Adv. and; P. Nandakumar, Government Pleader

Advocate for Pet/Ap. : K. Jaju Babu and ; M.U. Vijayalakshmi, Advs.

Judgement :

K.S. Radhakrishnan, J.

1. This matter has been placed before us on a reference made by Justice K. Balakrishnan Nair after having noticed that the Full Bench of this Court in

Balakrishnan Nair v. Ram Mohan Nair 1998 (1) KIT 766 had not considered the correctness or otherwise of the judgment of the Division Bench in W.A .Nos. 1380 of 1994 and connected matters and also with regard to the interpretation of Clause (c) of Rule 8 of the Kerala State and Subordinate Service Rules and hence felt that an authoritative pronouncement is necessary on the scope of Clause (c) of Rule 8 of K.S. & S.S.R by a larger Bench.

2. The Full Bench of this Court in Balakrishnan Nair's case, 1998 (1) KLT 766 supra, has specifically considered the scope of Clauses (a) and (b) of Rule 8 of the General Rules which enables a member of a service who is absent from duty in such service to return back to that service if he is not otherwise ineligible. The question as to whether such a person is eligible for appointment to a substantive or officiating vacancy in another service was not the issue which came up for consideration before the Full Bench. Division Bench of this Court in WA No. 1380 of 1994 decided on 23rd February 1986, prior to the decision of the Full Bench, had taken a contrary view in the case of ministerial staff of the police/vigilance department who had left to join K. S. E. Board, General Education Department etc. The Bench took the view that unless they continue in the parent department they cannot aspire for the post of Sub Inspector of Police which is to be filled through Public service Commission. Similar view has been taken by another Division Bench in W.A. No. 1437 of 2003 and W.A. No. 1440 of 2003. Few of the other judgments cited before us are relating to the appointment to the post of Clerk/Cashier in the District Co-operative Bank. Interpreting the provision, a Bench of this Court in Vijayan v. Kerala Public Service Commission 2005 (1) KIT 440 took the view that the object of Rules 186 and 187 of the Co-operative Societies Rules is to provide an avenue for appointment to the persons working within the district in the societies affiliated to the District Co-operative Bank. Similar is the view taken by two other Division Benches in W. A .2048 of 2005 and Biju v. State of Kerala 2005 (4) KLT Short Notes 84 page 62. Cases dealing with co-operative societies fall on a different facts situation and can be easily distinguished on facts and on law, unlike the judgment in W.A. Nos. 1380 of 1994, 13 of 1995, 13852 of 1994 and the judgment in W.A. No. 1437 of 2000 and W.A. No. 1440 of 2003.

3. Petitioner in W.P.C. No. 34556 of 2004 commenced service as Lower Division Clerk in the Municipal Common Service with effect from 6.7.1968. He was promoted as U.D. Clerk on 25.3.2001 and completed probation in that cadre on 6.5.1992. The Kerala Public Service Commission invited applications for appointment to the post of Municipal Secretary Grade III as per notification published in the gazette dated 20.11.2001 and the petitioner submitted application in January 2002.

4. The Public Service Commission by order dated 10.12.2003 had advised the petitioner for appointment to the post of Secretary, Grama Panchayat. Based on the said advice petitioner was appointed by the Director of Panchayats as Panchayat Secretary by Ext. P2 order dated 10.12.2003. Pursuant to the said order he was relieved from the post of U. D. Clerk from the Municipal Common Service on 30. 12.2003 to enable them to join duty as Panchayat Secretary. Petitioner joined duty as Panchayat Secretary on 31.12.2003.

5. The Public Service Commission later conducted the written test for selection to the post of Municipal Secretary Grade III on 25.02.2004. Petitioner had already applied for that post while he was continuing as U. D. Clerk in the Municipal Common Service. Written test was held on 25.02.2004. Petitioner came out successful and was included in the short list of candidates eligible to be called for interview which was published on 29.09.2004. Petitioner then submitted Ext. P4 representation on 20.10.2004 before the second respondent, Director of Urban Affairs requesting him to repost him in the Municipal Common Service. Later Deputy Director of Panchayats, Alappuzha addressed the Director of Panchayats, Thiruvananthapuram requesting him to relieve the petitioner from Panchayat service to rejoin the Municipal Common Service. Later by Ext.P8 order dated 20.6.2005 petitioner was reposted in the Municipal Common Service.

6. The Public Service Commission in the meanwhile published rank list for appointment to the post of Municipal Secretary was published by the Public Service Commission. Petitioner's name was not included in it on the ground that he had ceased to be member of the Municipal Common Service and hence his candidature cannot be considered as per Municipal Common Service Rules.

Public Service Commission has taken up the stand that the petitioner was a member of the Municipal Common Service but when he was appointed as Panchayat Secretary and he lost his lien in the parent department and therefore was ineligible to apply to the post of Municipal Secretary Grade III in the Municipal Common Service. In such circumstances petitioner approached this Court seeking a writ of mandamus directing the P.S.C to include the petitioner's name in the rank list for appointment to the post of Municipal Secretary Grade III (Departmental) on the basis of his performance in the written test and interview and also for other consequential reliefs.

7. Sri K. Jaju Babu, counsel appearing for the petitioner placed considerable reliance on the decision of this Court in O.P. No. 13547 of 1997 and also the Full Bench decision of this Court in Balakrishnan Nair 's case, supra. Counsel submitted petitioner is a permanent member of Municipal Common Service and at the time of submitting the application he was holding substantive appointment in the post of U.D.C in the Municipal Common Service. Counsel submitted that the mere fact that he was subsequently appointed as Secretary, Grama Panchayat would not take away his lien. In the Municipal Common Service and therefore he is entitled to apply to the post of Municipal Secretary Grade III.

8. Sri Roy Chacko, Senior Government Pleader, appearing for the first respondent supported the case of the petitioner and submitted that even though petitioner was relieved from the department for obtaining another job his lien has not been lost and therefore he is eligible to apply for the post of Municipal Secretary Grade III.

9. Sri P.C. Sasidharan, Standing Counsel appearing for the Public Service Commission, on the other hand, contended that on the appointment of the petitioner as Secretary to Grama Panchayat, he ceased to be an employee of Municipal Common Service. Counsel submitted that the petitioner is no more available in the source for recruitment and he became ineligible to be considered for the quota reserved for employees of the Municipal Common Service. Counsel placed strong reliance on the decision of this Court in W.A. No. 1380 of 1994 and connected matters. Counsel also made reference to the decision in Vijayan v. Kerala Public Service Commission 2004 (1) KLT 440 and the decision in W.A. No.

2048 of 2005. Counsel submitted that the Full Bench had no occasion to consider the scope of Clause (c) of Rule 8 of the General Rules and consequently the principle laid down is not applicable to the facts of this case. Counsel submitted that the moment petitioner has left Municipal Common service he has lost his lien in that service and also does not remain in the source from which recruitment is to be made.

10. We may at the outset point out that the principle laid down by the Full Bench in Balakrishnan Nair's case is equally applicable to Clause (c) of Rule 8 of the General Rules of the K.S. & S.S.R. We may extract relevant portion of Rule 8 for easy reference.

8. Members absent from duty: The absence of a member of a service from duty in such service, whether on leave, other than leave without allowances for taking up other employment on foreign service or on deputation or for any other reason and whether his lien in a post borne on the cadre of such service is suspended or not, shall not, if he is otherwise fit, render him ineligible in his turn-

(a) for reappointment to a substantive or officiating vacancy in the class, category, grade or post in which he may be a probationer or an approved probationer:

(b) for promotion from a lower to a higher category in such service; and

(c) for appointment to any substantive or officiating vacancy in another service for which he may be an approved candidate: as the case may be in the same manner as if he has not been absent. He shall be entitled to all the privileges in respect of appointment, seniority, probation and appointment as full member which he would have enjoyed but for his absence:

1.

2. Provided that subject to the provisions of Rule 18 he shall satisfactorily complete the period of probation on his return:

3. Provided further that a member of a service who is appointed to another service and is a probationer or an approved probationer in the latter service, shall not be

appointed under Clause (c) to any other service for which he may be an approved candidate unless he relinquishes his membership in the latter service in which he is a probationer or the approved probationer:

Provided further that this rule shall not have retrospective effect so as to disturb the decisions taken by the Travancore-Cochin Government in respect of the Travancore-Cochin personnel:

Provided also that this rule shall not apply in the case of a member of a service whose absence from duty in such service is by reason of his appointment to another service not being Military Service, solely on his own application, unless such appointment is made in the exigencies of public service.

Note 1: An appointment made in pursuance of application invited, sponsored or recommended by Government or other competent authority shall be deemed to be an appointment made in the exigencies of Public Service for the purpose of this rule.

Note 2: The benefit of this rule shall not be available to a person holding a post in any class or category in a service if his appointment to that post was from a post in another class category in the same service.

(emphasis supplied)

Interpreting the above Rule, Full Bench held as follows:

The above Rule enables a member of a service who is absent from duty in such service to return back to that service, if he is not otherwise ineligible. On return, he is eligible (1) for appointment to a substantive or officiating vacancy in the class, category, grade or post in which he may be a probationer or an approved probationer; (2) for promotion from a lower to a higher category; and (3) for appointment to any substantive or officiating vacancy.

Full Bench has also considered the question as to whether employee retains lien in the parent department. Interpreting Rule 18(a) of Part I K.S.R. Full Bench held as follows:

From a reading of the above rule, the following position emerges. When an officer is appointed substantively to a permanent post, he acquires a lien on that post and ceases to hold the lien which he acquired previously on any other post. If Rule 16 stood as such, the argument of the respondents could have been accepted that when the appellants were appointed substantively to a permanent vacancy in the Co-operative Department, they lost their lien in the Rural Development Department. But Rule 16 is not absolute. The lien has to be suspended by the Government under Rule 18 and before suspending the lien the Government has to consider the result of the suspension. The lien of an officer cannot be suspended or terminated without his consent.

Apex court in *Ali v. State of Kerala* 2003 (2) KLT 922 affirmed the decision of the Full Bench in *Balakrishnan Nair's* case and held that it is a settled position in law; that a person can be said to acquire a lien on a post only when he has been confirmed and made permanent on that post and not earlier. Further, apex court also affirmed the principle laid down by the Full Bench that so long as employee is not confirmed he retains his lien in the parent department. Above principle, in our view, would also apply while we interpret Clause (c) of Rule 8 as well.

11. Rule 8 specifically deals with members who are absent from duty. Evidently they form a class by themselves. Rule 8 specifically says that the absence of a member of a service from duty whether on leave, other than leave without allowance for taking up other employment on foreign service or on deputation or for 'any other reason' and whether his lien in a post borne on the cadre of such service is suspended or not 'shall not' render him ineligible in his turn for reappointment to a substantive or officiating vacancy in the class, category, grade or post in which he may be a probationer or an approved probationer and so also for promotion from a lower to a higher category in such service. The expressions 'any other reason', 'shall not render him ineligible in his turn' etc. give a reassurance to members who are absent from duty and that they would not be ineligible in their turn when their claim falls under category (a) to (c).

12. The Rule making authority has given an assurance statutorily that the claim of members who are absent from duty would not be lost and they would be treated

as it they were not absent from duty. The expressions 'in the same manner as if he has not been absent' require emphasis, which make it further dear that they would not render ineligible for appointment to any substantive or officiating vacancy in another service though they were absent from duty in their parent department. Further it is also stated in Clause (c) of Rule 8 that such persons shall be entitled to all the privileges in respect of appointment, seniority, probation and appointment as full member which they would have enjoyed but for their absence. The third proviso as well as note (1) makes the position further dear and re-emphasises the statutory assurance given to members who are absent from duty.

13. We are of the view that the principles laid down by the Full Bench in Balakrishnan Nair's case which was affirmed by the apex Court in All's case would apply with all force when we consider the scope of Clause (c) of Rule 8. Full Bench as well as the apex Court reiterated the position of law stating that a person can be said to acquire a lien on a post only when he has been confirmed and made permanent on that post and not earlier. The mere completion of probation of a member who is absent from duty of another service does not result in automatic confirmation in that service. Constitution Bench of the apex Court in Secretary, State of Karnataka v. Umadevi (2006) 4 SCC 1 : 2006 (2) KLT (SC)(SN) 55 took the view that the words 'regular' or 'regularisation' do not connote permanence and cannot be construed so as to convey an idea of the nature of tenure of appointments, meaning thereby the mere fact that a person has been regularised in service does not mean that he has been confirmed in that service. Apex court in Triveni Shankar Saxena v. State of UP. (1992) Supp. 1 SCC 524 examined the concept of lien in government service and observed that a person can be said to acquire a lien on a post only when he has been confirmed and made permanent on that post and not earlier. The above position has been reiterated by the apex court in a recent judgment in S. Narayana v. MdAhmedulla Khan 2006 AIR SCW 2872.

14. We are of the view that the members who are absent from duty would render them ineligible to get the benefit of Clauses (a) to (c) of Rule 8 only by way of confirmation in another post in another department. The mere absence of members in service shall not render them ineligible in their turn to stake their claim

under Clauses (a) to (c). Members of service shall retain to their parent department their lien since they have not been confirmed to any other service while they were absent from the parent department. Above being the legal position, we are of the view the judgment in W.A. No. 1380 of 1994 rendered on 23rd February 1996 and WA No. 1437 of 2003, W.A. No. 1440 of 2003 do not lay down the law correctly in view of the principle laid down by the Full Bench in Balakrishnan Nair's case which was confirmed by the apex court in All's case and also on the basis of the decision of the apex court in Umadevi's case, Triveni Shankar Saxena's case and S. Narayanan's case. The Judgment rendered relating to the employees of Co-operative Societies stand on a different footing on facts and law. The judgment in O.P No. 13457 of 1997, in our view, lays down the law correctly.

15. Under such circumstances, we are inclined to allow both these Writ Petitions and we hold that the petitioner in W.P.(C) No. 34556 of 2004 still remains his lien in the Municipal Common Service and he is fully eligible to be considered for appointment to the post of Municipal Secretary Grade II (Departmental). Petitioner in W.P.(C) No. 34110 of 2005 also retains his lien in his parent department and hence he is also entitled to be considered for the post of Assistant Engineer (Civil).

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