

P. Mariappan Vs. the Government of Tamil Nadu, Represented by the Secretary to Government, Forest and Fisheries Department and ors.

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Court : Chennai

Decided On : Jun-18-1985

Reported in : (1985)2MLJ426

Appellant : P. Mariappan

Respondent : The Government of Tamil Nadu, Represented by the Secretary to Government, Forest and Fisheries Depar

Judgement :

Chandurkar, C.J.

1. This appeal highlights yet another instance of how the State Government has gone out of its way to accommodate temporarily appointed persons and regularising their services retrospectively prejudicing the rights of direct appointees who have been regularly appointed through the Tamil Nadu Public Service Commission in clear vacancies. We are concerned with appointments to the posts of Assistant Statistical Investigators. Regular recruitment rules made by the Governor under Article 309 of the Constitution of India on 17th of May, 1966 provided for appointment of Assistant Statistical Investigators in the Department of Statistics by direct recruitment by promotion and recruitment by transfer.

2. On 4th September, 1971, the Director of Statistics made temporary appointments by transfer to the category of Assistant Statistical Investigators under Rule 39(a) of the General Rules for the Tamil Nadu State and Subordinate Service. There is one order of appointment in respect of 77 persons. These 77 persons are at serial numbers 86 to 164 in the seniority list at page 55 of the paper book. The appellant is a direct recruit to the post of Assistant Statistical Investigator, having been appointed through the Tamil Nadu Public Service Commission with effect from 5th February, 1972. Apart from the appellant there were several other persons who were also appointed as direct recruits. Their names are to be found in the seniority list from serial numbers 166 to 250.

3. The recruitment rules made under Article 309 of the Constitution of India were amended on 19th October, 1973 and they were given retrospective effect from 15th of November, 1968 in so far as two amendments were concerned, and the third amendment was given retrospective effect from 15th of July, 1969. We are concerned with the amendment relating to the post of Assistant Statistical Investigators. The first amendment which is relevant is that while retaining the three modes of appointment to the post of Assistant Statistical Investigators, that is, by direct recruitment or by promotion from the category of Supervisors in the Department of Statistics or by recruitment by transfer from the category of Junior Assistants in the Department of Statistics, a percentage was fixed to be filled up by direct recruit and by promotion or by recruitment by transfer. 75% of the vacancies was to be filled up by direct recruitment and 25% by promotion or recruitment by transfer. We are not concerned with the rule relating to direct recruitment. While providing for promotion or recruitment by transfer, the new rule provided that the person concerned must possess a degree with statistics, mathematics, or economics as the main subject and must have put in a service of not less than two years in the category of Supervisor or Junior Assistant, as the case may be. A proviso was then introduced as follows:

Provided that the qualification specified in item (1) above shall not be insisted upon in the case of Supervisors and Junior Assistants who entered into service in the Department of Statistics prior to 15th November, 1968 and who possess the minimum general educational qualification.

There is now no doubt that this proviso was introduced and reservation of 25% posts for promotees as was made in expressly for the purpose of facilitating the absorption of the temporarily appointed persons in substantive vacancies. These rules having been given retrospective effect the Government lost no time in regularising the services of all the persons who were originally appointed under Rule 39 (a) of the General Rules by the order dated 4th September, 1971. The effect of this regularisation, according to the State Government was that they became part of the cadre of Assistant Statistical Investigators with effect from their date of initial appointment, namely 4.9.1971 with the inevitable result that they became seniors to the persons like the appellant who were appointed as direct recruits with effect from 1.2.1972.

4. A seniority list came to be made giving these 77 persons placements higher to the appellant and others like and all these 77 regularised persons found their places in the seniority list between two groups of directly recruited persons. This seniority list is now challenged by the appellant. The contention is very simple. The appellant contends that he having been appointed by direct recruitment through the Public Service Commission he cannot become junior to those who were on the date of his appointment wholly unqualified and could not have been appointed to the post of Assistant Statistical Investigator. In the petition the appellant has also challenged the validity of the amended rules and has asked for quashing of the recruitment rules dated 19th October, 1973 and the seniority list based as a result of the implementation of these recruitment rules.

5. The learned single Judge, while rejecting the petition, took the view that if the respondents whose placement in the seniority list was challenged were entitled to promotion then the date on which they were promoted or should be deemed to have been promoted shall naturally be the date for the purpose of ascertaining the seniority. In view of the amended rules, according to the learned Judge, persons who were only temporarily appointed earlier were validly appointed from the date of their initial appointment and the appellant could not therefore, make a grievance against the seniority list.

6. Mr. Peter Francies appearing on behalf of the appellant has contended that by an administrative order of regularisation of the employees who were originally appointed by promotion the appellant's rights by virtue of his having been appointed as a direct recruit cannot be affected even assuming that the recruitment rules could be validly made retrospectively. The learned Government Pleader appearing on behalf of the State has contended that by the amended rules a percentage was fixed between direct recruits and promotees and in the 25% of posts to which promotees could admittedly be appointed, the State Government in view of the amended rules under Article 309 of the Constitution of India, was competent to regularise the promotions of all the Junior Assistants and Supervisors who were originally appointed under Rule 39 (a) of the General Rules by the order dated 4th September, 1971.

7. Having heard the learned Counsel for the appellant and the learned Government Pleader, we are satisfied that there is a clear infirmity in the seniority list which is impugned in this appeal. We may, however, add at this stage and make it clear that the appellant has no grievance in respect of serial numbers 86 (V. Kalidoss), 87 (P. Povas), 88 (C.S. Sarangapani) and 92 (T. Jagannathan). These are respondents Nos. 3, 4, 5 and 9. This is because according to the appellant they were qualified even according to the old rules and were entitled to be appointed under the old rules....

8. Now it has to be noticed in this case that when temporary appointments were made by the Director of Statistics on 4th September, 1971 they were purely, temporary appointment under Rule 39 (a) of the General Rules. This Court had occasion to point out in an earlier judgment that Rule 39 (a) contemplates only an appointment where there is an emergency, which means that regular appointments are likely to take time and the power under Rule 39 (a) is a power to make a purely temporary appointment. We had also occasion to point out that Rule 39(c) clearly provided that temporarily appointed persons shall be replaced as soon as possible by the member of the service who is entitled to the promotion under the rules. Even under Rule 39(a)(ii) it is provided that if a person does not have the necessary qualification, he shall be replaced as soon as possible by promoting a person possessing such qualification. Now, while these temporarily

promoted persons were performing the functions of the Office of the Assistant Statistical Investigator the appellant and 76 other persons like him were appointed by the Public Service Commission. These appointments were made in February, 1972. The fact is that these appointments were for 77 vacancies out of the total number of vacancies and those vacancies were immediately filled up by these 77 persons. Any appointment made thereafter would be only in respect of vacancies which are available after these 77 vacancies are excluded. Necessarily persons who are appointed after these persons are appointed will be junior to these persons who are appointed by direct recruitment. When these persons were appointed in February, 1972 fictionally 77 of the vacancies must be taken to have been filled up.

9. Undoubtedly rules under Article 309 of the Constitution of India can be made with retrospective effect. Making the rules retrospective in operation and making appointments in accordance with such rules are two different things. The power to make rules is a legislative power and, therefore, can be exercised retrospectively. When in the light of such rules some appointments are being made with retrospective effect, it is purely an administrative act and such an administrative act, if it prejudicially affects vested rights of other Government employees then to that extent such administrative act will become unfair and arbitrary. It is this that has happened in the present case. When the rules were given retrospective effect and a proviso was introduced to the effect that the qualification of possessing a degree with statistics, mathematics and economics shall not be insisted upon in the case of Supervisors and Junior Assistants who entered service in the Department of Statistics prior to 15.11.68, that did not have the effect of enabling the State Government to make appointments retrospectively to the prejudice of those who were already appointed in clear vacancies through the Public Service Commission. The effect of the amended rules and the introduction of the proviso was that those of the Junior Assistants and Supervisors who were promoted temporarily by the order dated 4th September, 1971 and who were not qualified originally merely became qualified for being considered for appointment. Becoming qualified for being considered for appointment cannot be equated with getting a right to be appointed retrospectively with effect from the date on which all the temporary appointments were made. 77 of the vacancies having been filled up

by direct recruitment and those 77 vacancies being the first available vacancies, any appointment made even in accordance with the rule would have effect only after 1.2.74. The Director of Statistics was, therefore, clearly not entitled to give seniority to the persons whose appointments have been regularised so as to adversely affect the vested rights of the directly recruited persons who held the posts in a substantive capacity. They could not have, therefore, become junior to those whose appointments were regularised merely because by way of temporary arrangement they were appointed on 4th September, 1971, under Rule 39(a) of the General Rules. We are, therefore, of the considered view that the Director of Statistics was clearly in error in making the seniority list relying upon the amended rules dated 14th October, 1978 so as to give the originally temporary appointed persons seniority over the directly recruited persons. Accordingly to this limited extent we quash the seniority list and direct the State Government not to disturb seniority of the appellant and the other persons who have been appointed directly and the benefits of regularisation would be given to those persons only after the date of appointment of the directly recruited Assistant Statistical Investigators. The appeal is therefore allowed. The State Government will pay the costs of the appellant. (Rs. 250/- Counsel's fee).