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CORRECTED

IN THE SUPREME COURT OF INDIA
CIVIL APPELLATE JURISDICTION

CIVIL APPEAL NO. 4205 OF 2007

M.I. KUNJUKUNJU & ORS.

... APPELLA

NTS

VERSUS

STATE OF KERALA & ORS.

... RESPOND

ENTS

WITH

CIVIL APPEAL NOS.4206 & 4207 OF 2007

O R D E R

These appeals have been preferred by the appellants against the judgment and orders dated 16.09.2004 and 3.06.2005 passed by the High Court of Kerala at Ernakulam in O.P.No.30458/2001, etc. By the impugned judgment and order, the Division Bench of the High Court dismissed all the writ petitions preferred by the appellants and held that the posts of Industries Extension Officers shall be filled up in accordance with the Special Rules and not from the rank lists prepared by the Commission in terms of the Government Order dated 23rd August, 1962 (for short 1962 G.O.)

The factual matrix of the case is as follows:

Signature Not Verified

Digitally signed by

Respondent No.2-Kerala Public Service Commission

Rajni Mukhi
Date: 2014.12.20
12:26:56 IST
Reason:

(hereinafter referred to as 'Public Service Commission')

Industries Extension Officers in the Department of Industry and Commerce, State of Kerala, in the then scale of pay Rs.1,330 - 2,555/- in accordance with the 1962 G.O. Total 33

posts were advertised. The appellants of C.A.No.4205/2007 were already in the service of the State, working on lower post of Village Extension Officers. They were eligible for appointment and, therefore, applied pursuant to Notification dated 26.05.1992. The appellants in two other appeals being C.A. No.4206 & 4207 of 2007, who were not in the service of the State of Kerala, were also eligible, and applied pursuant to the said advertisement. The written test was conducted by the Public Service Commission on 4th March, 1995. By that time 86 vacancies were reported.

According to the appellants, a short list was prepared by Public Service Commission. On 16th November, 2000, names of the appellants were included in the said short list. Interviews were notified to be held between 26.12.2000 to 30.12.2000. Some of the employees who had been temporarily promoted under Rule 31 of Kerala Industrial Subordinate Service Rules, 1958, filed Writ Petition O.P.No.34827 of 2000, challenging the interview wherein interim order restraining the Commission from conducting interviews was passed on 13 th December, 2000. In view of the stay order, the interviews could not be conducted on 26th - 30th December, 2000.

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During the pendency of the said selection, the State of Kerala introduced Special Rules, i.e., Kerala Industrial Subordinate Service Rules, commonly known as "Special Rules". They were notified in the Official Gazette on 17 th February, 2001 giving retrospective effect from 1st July, 1983. Rule 1, which is relevant, reads as under:

- "1. Short title and commencement -(1) These rules may be called the Special Rules for the Kerala Industries Subordinate Service 2001.
- (2) They shall be deemed to have come into

force with effect from 1st July, 1983:

Provided that these rules shall not affect the appointments already made till 30.6.1983."

The appellant-M.I. Kunjukunju and others filed Writ Petition O.P.No.30458 of 2001. It was pleaded that their names were figured in the second list at Serial Nos. 6, 10, 17, 33 and 47. They pleaded that they were entitled for appointment by transfer as per Government order dated 23 rd August, 1962, wherein provision was made to appointment (a) by direct recruitment; (b) by promotion from the Kerala Industries Subordinate Service; and (c) by transfer from the Gram Sevaks in the Development Department. According to learned counsel for the appellants, these appellants also challenged the Special Rules of 2001 as being invalid. There were other writ petitions being O.P. No. 18047 and 38589/2001 which were also preferred by some of the employees who had been temporarily posted to the post of Industries Extension Officer seeking a mandamus directing the Public Service Commission not to proceed³ with the Selection Proc ess, commenced in pursuance to the Notifications dated 26.5.1992 and 27.10.1998 since Special Rules had been promulgated and method of appointment and qualification for the post had substantially changed. Those writ petitions were dismissed against which two separate writ appeal Nos. 256 and 277 of 2002 were preferred. All the aforesaid writ petitions including O.P. No. 30458/2001 filed by the appellant M.I. Kunukunju and others and Writ Appeal nos.256 and 277 of 2002 other writ petitions preferred by the other appellants were heard altogether. The aforesaid writ petitions were dismissed and the Writ Appeal nos. 256 and 277 of 2002 were allowed by the impugned common judgment dated 16th September, 2004.

It is not clear as to whether the appellant-M. I.

Kunjukunju and others in C.A. NO. 4205/2007 have challenged Special Rules dated 17th February, 2001 and if so challenged, which particular Rule was under challenge.

Neither the copy

of the writ petition nor the copy of the Advertisement dated

26.5.1992 is annexed on the record. In absence of the advertisement, it is not clear whether the appellant-M. I.

Kunjukunju and others of C.A. No. 4205/2007 applied for

appointment by transfer or by direct recruitment. It is also

not clear whether this advertisement was for direct

recruitment or appointment by promotion or transfer, as

pursuant to earlier order dated 23.8.1962 there were three

ways of recruitment-⁴ (a) by direct recruitment; (b) by

promotion from Kerala Industries Subordinate Service; and (c)

by transfer from Gram Sewak of the Development Department.

From the impugned judgment, we find that the learned counsel appearing on behalf of the appellants-M.I. Kunjukunju in C.A. No. 4205/2007 who were the petitioners in O.P. No.

30458/2001, urged that since the selection process had

commenced on 26th May, 1992 when the Commission invited application and prescribed the method of appointment and

qualification for the posts of Industries Extension Officer,

the petitioners (appellants herein) had a right to be

considered for selection in accordance with the method and qualification so prescribed and such a right could not be

taken away by the special rules retrospectively.

His argument

was that such a right of appellants to be considered as per

old G.O. cannot be taken away by a Special Rule, and

therefore, the Special Rules, are invalid and unconstitutional.

The learned counsel appearing on behalf of the appellant has taken similar plea before this Court and in support of his claim referred to certain decisions which would be referred at an appropriate stage.

According to learned counsel for the respondents- the State Government was empowered to frame Regulation of f

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Recruitment and Condition of Service from retrospective date in terms of Section 2 of Kerala Public Service Act, 1968 (hereinafter referred to as, 'the Act, 1968'). Section 2 of the Act, 1968 relates to Regulation of Recruitment and Condition of Service Rules which is as follows:

"(2)Regulation of recruitment and conditions of service."(1) The Government may make rules either prospectively or retrospectively to regulate the recruitment, and conditions of service of persons appointed, to public services and posts in connection with the affairs of the State of Kerala.

(2)Every rule made under this section shall be laid as soon as may be after it is made before the Legislative Assembly while it is in session for a total period of fourteen days which may be comprised in one session or in two successive sessions, and if before the expiry of the session in which it is so laid or the session immediately following, the Legislative Assembly agrees that the rule should be either modified or annulled, the rule shall thereafter have effect only in such modified form or be of no effect, as the case may be; so however that any such modification or annulment shall be without prejudice to the validity of anything previously done under that rule."

From the record, we find that the recruitment to the posts of Industries Extension Officers was not governed by any Statutory Rule framed under Section 2 of the Act, 1968 or proviso to Article 309 of the Constitution of India.

The State Government by its order dated August 23, 1962 in

consultation with Kerala Public Service Commission prescribed the methods of appointment and qualification for the said posts, the relevant portion of which reads as follows:

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"Method of appointment

(a) By direct recruitment

(b) By promotion from the Kerala Industries Subordinate Service.

(c) By transfer from the Gram Sevaks in the Development Department.

Note :- (i) 50% of the vacancies shall be filled up by direct recruitment; 25% by promotion and 25% by transfer.

(ii) Appointment by transfer of Gram Sevaks will also be made by the Public Service Commission on the basis of merit to ensure the best candidates.

(iii) Promotion from the Kerala Industries Subordinate Service will be made by the Director of Industries and Commerce.

2. Qualification:

(i) For direct recruitment

(a) Degree or Diploma in any branch of Engineering ; OR

(b) Diploma in Rural Services with Village Industries as optional subject awarded by the National Council of Rural Higher Education; OR

(c) Degree in Arts, Science, Commerce or Business Management; OR

(d) Diploma in Textile Technology; OR

(e) Diploma in Food Technology

(ii) For promotion and Transfer

Same qualification as for direct recruitment but with not less than five years services."

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The process of selection pursuant to Notification dated 26th May, 1992 proceeded in terms of order dated 23rd August, 1962, as aforesaid. When the matter relating to interview was pending, the State of Kerala in exercise of the powers conferred by sub-Section 1 of Section 2 of the Act, 1968 (19

of 1968) and in suppression of all the existing Rules and orders on recruitment for the Kerala Industries Subordinate Service, made special Rules known as "The Special Rules for the Kerala Industries Subordinate Service, 2001". It was given effect from 1st July, 1983. The Rules provided that the said rules shall not affect the appointments already made till 30.06.1983.

The Special Rules of 2001 relates to different class and category of services including Industries Extension Officers, a Class-I service. In view of the said Special Rules, 2001, the process of selection which was initiated pursuant to the Notification dated 26th May, 1992, was taken up for consideration as per the Special Rules.

The learned counsel for the appellants submitted that Special Rules cannot take away the vested right of the appellants. If they are eligible as per the Government Order dated 23rd August, 1962, their vested right to be considered against the post, cannot be taken away. They placed reliance on the decisions of this Court in A.A. Calton Vs. Director of Education & Another, (1983) 3 SCC 33; N.T. Devin Katti and

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others Vs. Karnataka Public Service Commission and others, (1990) 3 SCC 157; T.R. Kapoor and others Vs.State of Haryana and others, 1986 Supp. SCC 584; Union of India and others Vs. Tushar Ranjan Mohanty and others, (1994) 5 SCC 450 and Chairman, Railway Board & others Vs. C.R. Rangadhamaiah and others, (1997) 6 SCC 623.

In A.A. Calton, the writ petitioner-appellant had questioned the validity of appointment of Respondent No.2. In the said case the earlier Act was amended by U.P. Act 26 of 1975 which came into force on 18th August, 1975 taking away the power of the Director to make an appointment under section 16-F of the Act in case of minority institutions. In the said case, this Court held as follows:

"At every stage in that process certain rights are created in favour of one or the other of the candidates. Section 16-F of the Act cannot, therefore, be construed as merely a procedural provision. It is true that the Legislature may pass laws with retrospective effect subject to the recognised constitutional limitations. But it is equally well settled that no retrospective effect should be given to any statutory provision so as to impair or take away an existing right, unless the statute either expressly or by necessary implication directs that it should have such retrospective effect. In the instant case admittedly the proceedings for the selection had commenced in the year 1973 and after the Deputy Director had disapproved the recommendations made by the Selection Committee twice the Director acquired the jurisdiction to make an appointment from amongst the qualified candidates who had applied for the vacancy in question. At the instance of the appellant himself in the earlier writ petition filed by him the High Court had directed the Director to exercise that power. Although the Director in the present case exercised that power subsequent to August 18, 1975 on which

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date the amendment came into force, it cannot be said that the selection made by him was illegal since the amending law had no retrospective effect. It did not have any effect on the proceedings which had commenced prior to August 18, 1975. Such proceedings had to be continued in accordance with the law as it stood at the commencement of the said proceedings. We do not, therefore, find any substance in the contention of the learned counsel for the appellant that the law as amended by the U.P. Act 26 of 1975 should have been followed in the present case."

From the aforesaid decision it is clear that the Legislature may pass laws with retrospective effect subject to the recognized constitutional limitations; no retrospective effect should be given to any statutory provision so as to impair or take away an existing right, unless the statute either expressly or by necessary implication directs that it should have such retrospective effect.

In N.T. Devin Katti, this Court held:

"There is yet another aspect of the question. Where advertisement is issued inviting applications for direct recruitment to a category of posts, and the advertisement expressly states that selection shall be made in accordance with the existing Rules or Government Orders, and if it further indicates the extent of reservations in favour of various categories, the selection of candidates in such a case must be made in accordance with the then existing Rules and

Government Orders. Candidates who apply, and undergo written or viva voce test acquire vested right for being considered for selections in accordance with the terms and conditions contained in the advertisement, unless the advertisement itself indicates a contrary intention. Generally, a candidate has right to be considered in accordance with the terms and conditions set out in the advertisement as his right crystallises on the date of publication of advertisement, however

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he has no absolute right in the matter. If the recruitment Rules are amended retrospectively during the pendency of selection, in that event selection must be held in accordance with the amended Rules. Whether the Rules have retrospective effect or not, primarily depends upon the language of the Rules and its construction to ascertain the legislative intent. The legislative intent is ascertained either by express provision or by necessary implication, if the amended Rules are not retrospective in nature the selection must be regulated in accordance with the Rules and orders which were in force on the date of advertisement. Determination of this question largely depends on the facts of each case having regard to the terms and conditions set out in the advertisement and the relevant Rules and orders. Lest there be any confusion, we would like to make it clear that a candidate on making application for a post pursuant to an advertisement does not acquire any vested right for selection, but if he is eligible and is otherwise qualified in accordance with the relevant Rules and the terms contained in the advertisement, he does acquire a vested right for being considered for selection in accordance with the Rules as they existed on the date of advertisement. He cannot be deprived of that limited right on the amendment of Rules during the pendency of selection unless the amended Rules are retrospective in nature."

Therefore, it is clear that a candidate on making application for the post pursuant to an advertisement does not acquire any vested right for selection. If he is eligible and is otherwise qualified in accordance with the relevant rules, he does acquire right for being considered for selection as per existing Rules.

In N.T. Devin Katti the Court made clear that if the recruitment Rules are amended with retrospective effect during the pendency of the selection, in that event the selection

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must be held in accordance with the amended Rules.

Alteration in Rules regarding conditions of service was

considered in T.R. Kapoor. In the said case while dealing with the right of a person to be considered for promotion and the effect of an amendment of the Rule on the said right, this Court held as follows:

"It is well-settled that the power to frame rules to regulate the conditions of service under the proviso to Art.309 of the Constitution carries with it the power to amend or alter the rules with a retrospective effect: B.S. Vadhera v. Union of India, [1968] 3 SCR 575, Raj Kumar v. Union of India, [1975] 3 SCR 963, K. Nagaraj & Ors. v. State of A.P. & Anr., [1985] 1 SCC 523 and State Of J & K v. Triloki Nath Khosla & Ors., [1974] 1 SCR 771. It is equally well-settled that any rule which affects the right of a person to be considered for promotion is a condition of service although mere chances of promotion may not be. It may further be stated that an authority competent to lay down qualifications for promotion, is also competent to change the qualifications. The rules defining qualifications and suitability for promotion are conditions of service and they can be changed retrospectively. This rule is however subject to a well-recognised principle that the benefits acquired under the existing rules cannot be taken away by an amendment with retrospective effect, that is to say, there is no power to make such a rule under the proviso to Art. 309 which affects or impairs vested rights. Therefore, unless it is specifically provided in the rules, the employees who are already promoted before the amendment of the rules, cannot be reverted and their promotions cannot be recalled. In other words, such rules laying down qualifications for promotion made with retrospective effect must necessarily satisfy the tests of Arts. 14 and 16(1) of the Constitution."

That was a case where the Rule was framed and were given retrospective effect by the Governor of the State under

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proviso to Article 309 of the Constitution of India. As a consequence of the amendment of the Rules with the retrospective effect the promotions already made were rendered invalid. In said case, the Court held that there is no power to make such Rules under the proviso to Article 309, the employees who had already been promoted, their promotions cannot be invalidated.

In the present case, the Rules have not been framed under proviso to Article 309 of the Constitution of India. The Legislature has framed the Act, 1968 in exercise of power

conferred under Article 309 of the Constitution of India.

Under the Act, 1968, the State Government was empowered to make Rules either prospectively or retrospectively to regulate the recruitment and condition of Service of persons appointed to Public Services and posts in question with the Department of Industry and Commerce of the State of Kerala.

In view of such delegation of power of the Legislature to the State under the Act, 1968, Special Rules framed by the State Government giving retrospective effect from 1st July, 1983 cannot be held to be illegal or invalid.

The power under Article 309 to make laws with retrospective effect was considered by this Court in Tushar
Ranjan Mohanty, therein the Court held :

"The legislatures and the competent authority under Article 309 of the Constitution of India have the power to make laws with retrospective effect.

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This power, however, cannot be used to justify the arbitrary, illegal or unconstitutional acts of the Executive. When a person is deprived of an accrued right vested in him under a statute or under the Constitution and he successfully challenges the same in the court of law, the legislature cannot render the said right and the relief obtained nugatory by enacting retrospective legislation."

As noticed, the Legislature under Article 309 of the Constitution of India has the power to frame laws relating to condition of service and hence the State is empowered to frame Rules with retrospective effect and therefore, it cannot be held that the Authority was not empowered to frame such Rules from retrospective date.

In C.R. Rangadhamaiah, this Court noticed that retrospective effect amendment affects the right of Government employees who were already retired and also adversely affected their pension. In the said case the Court held:

"In many of these decisions the expressions "vested rights" or "accrued rights" have been used while striking down the impugned provisions which had been given retrospective operation so as to

WITH
C.A. No. 4207/2007
(With C.A. No. 4206/2007
(With
Date : 28/08/2014 These appeals were called on for hearing today.

CORAM :
HON'BLE MR. JUSTICE SUDHANSU JYOTI MUKHOPADHAYA
HON'BLE MR. JUSTICE PRAFULLA CHANDRA PANT

For Appellant(s) Mr. Robin V.S., Adv.
Ms. Neelam Saini, Adv.
Mr. M. P. Vinod, Adv.

For Respondent(s) Mr. Jogya Scaria, Adv.

Mr. John Mathew, Adv.

Mr. Vipin Nair, Adv.
Mr. P.B. Suresh, Adv.
Mr. Udayaditya Banerjee, Adv.
M/s. Temple Law Firm, Adv.

Mr. R. Sathish, Adv.

UPON hearing the counsel the Court made the following
O R D E R

The appeals are dismissed in terms of the Signed Order.

(Rajni Mukhi)
Sr. P.A.

(Usha Sharma)
Court Master

(Signed Order is placed on the file)