

State of J. and K.

Vs

A. R. Zakki and others

Civil Appeal No. 4879 of 1991

(L. M. Sharma, J. S. Verma, S. C. Agrawal JJ)

06.12.1991

JUDGEMENT

S. C. AGRAWAL, J.:-

1. Special leave granted.
2. Heard learned counsel for the parties.
3. This appeal arises out of the judgment and order dated February 22, 1991 of the High Court of Jammu & Kashmir. It relates to insertion of certain provisions, by way of amendment, in the Jammu & Kashmir Civil Services (Judicial) Recruitment Rules, 1967 (hereinafter referred to as 'the rules').
4. Section 110 of the Constitution of Jammu & Kashmir provides that appointment of persons other than District Judges to the judicial service of the State shall be made by the Governor in accordance with the rules made by him in that behalf after consultation with the Public Service Commission (hereinafter referred to as 'the Commission') and with the High Court. In exercise of the aforesaid power, the Governor of Jammu & Kashmir has framed the rules which make provision for recruitment to the K.C.S. (Judicial) Service (hereinafter referred to as 'the Service'). Under Rule 4 of the Rules, selection for appointment to the service is made by direct recruitment on the basis of competitive examination conducted by the commission.
5. The readers and librarians employed in the High Court of Jammu & Kashmir submitted a representation to the Chief Justice of the High Court wherein it was submitted that they do not have any prospects of future promotion in their service and it was prayed that a fixed quota may be reserved for the employees of the High Court for recruitment to the Service. The said representation was considered by the Judges of the High Court at a full Court meeting and it was resolved that the rules may be amended in a way as to provide for reservation of 25% vacancies in the Service by way of promotion/transfer of the following employees of the High Court:

- 1) Assistant Registrar
- 2) Reader
- 3) Court Officer
- 4) Librarian

The High Court proposed that Rule 4 of the Rules may be substituted by the following provision:

"Rule 4. (1) Notwithstanding anything contained in these rules recruitment to the service shall be made:

(a) on the basis of the competitive examination conducted by the Commission.

(b) by promotion/ transfer of persons holding or who have held for about four years and above any of the following posts:

(i) Assistant Registrar

Grade : Rs. 1050-1700/-

(ii) Readers to Hon'ble Judges

Grade : Rs. 680-1240/-

(iii) Court Officer

Grade : Rs. 680-1240/ -

(iv) Librarian

Grade : Rs. 680-1240/-.

Provided, however, that candidates of (i) to (iv) above shall be law graduates.

(2) The percentage for recruitment from each of the above source shall be: Source:

(a) 75% and Source (b) 25%."

6. In order to give effect to the said proposal, a new Chapter, [Chapter IV-A] was also proposed to be inserted in the Second Part of the rules to prescribe the procedure for recruitment by promotion/ transfer.

7. The aforesaid proposal for amendment of the rules made by the High Court was sent by the State Government to the Commission for its opinion. The views of the Commission in the proposed amendments were communicated by the Deputy Secretary to the Commission, in his letter, dated July 25, 1984, addressed to the Secretary to the Government of Jammu & Kashmir, Law Department. The said letter was forwarded by the State Government to the High Court and the matter was referred by the High Court to the Vigilance Commissioner (Judicial) for examination. The Vigilance Commissioner (Judicial) submitted his report which was considered by the High Court at a full Court meeting held on March 16, 1985 wherein it was resolved as under:

"Considered the proposal of the Public Service Commission and the Report of the Vigilance Commissioner (Judicial). The Court did not agree with the proposal of Public Service Commission and sticks to the amendment already proposed. However, the Court has no objection if independent Part V after the existing Part IV, is inserted in the Draft Amendment."

8. The Registrar of the High Court, vide his letter dated March 3, 1985, informed the Law Secretary to the Government of Jammu & Kashmir about the said resolution of the Court. Since no action was

taken by the State Government on the proposal for amendment of the rules, the respondents, who were employed as Readers and Librarians in the High Court, filed a writ petition in the High Court wherein it was prayed that a writ of mandamus be issued commanding the State Government to implement and give effect to the recommendations of the High Court and to direct them to reserve quota for the service as recommended by the High Court. The said writ petition was allowed by a learned single Judge of the High Court by his judgment dated December 6, 1990 whereby a direction was issued to the appellant herein to consider effectively the amendments proposed by the High Court in the rules and to carry the process of amending the rules to its logical conclusion within a period of three months. A Letters Patent appeal was filed by the appellant against the said judgment of the learned single Judge. It was dismissed summarily by a Division Bench of the High Court by order dated February 22, 1991.

9. The aforesaid direction given by the High Court has been assailed by the appellant on the ground that it has the effect of requiring the State Government to amend the rules in the manner as proposed by the High Court and that such a direction by way of mandamus, could not be issued under Article 226 of the Constitution in the matter of exercise of the rule making power under Section 110 of the Jammu & Kashmir Constitution which is legislative in character.

10. In our opinion there is considerable merit in this submission. A writ of mandamus cannot be issued to the legislature to enact a particular legislation. Same is true as regards the executive when it exercises the power to make rules, which are in the nature of subordinate legislation. Section 110 of the J. & K. Constitution, which is on the same lines as Article 234 of the Constitution of India, vests in the Governor, the power to make rules for appointments of persons other than the District Judges to the Judicial Service of the State of J & K and for framing of such rules, the Governor is required to consult the Commission and the High Court. This power to frame rules is legislative in nature. A writ of mandamus cannot, therefore, be issued directing the State Government to make the rules in accordance with the proposal made by the High Court.

11. In *State of Andhra Pradesh v. T. Gopalakrishna Murthi*, (1976) 1 SCR 1008: (AIR 1976 SC 123), this Court was construing the provisions of Clause (2) of Article 229 of the Constitution of India which empowers the Chief Justice of the High Court or some other Judge or Officer of the Court authorised by the Chief Justice to make rules for the purpose of prescribing conditions of service of officers and servants of a High Court and further prescribes that the said rules shall so far as they relate to salaries, allowances, leaves or pensions require the approval of the Governor of the State. The question was whether a writ of mandamus could be issued to the Governor to give his approval to the rules made by the Chief Justice. This Court answered the said question in the negative. After holding that although on the facts and circumstances of the case and in the background of the conditions which are prevalent in the other States, the Government could have been well advised to accord approval to the suggestion of the Chief Justice as the suggestion was nothing more than to equate the pay scales of the High Court staff with those of the equivalent posts in the Secretariat, this Court observed that merely because the Government is not right in accepting the Chief Justice's view, and in refusing to accord approval is not ground for holding that by a writ of mandamus the Government may be directed to accord the approval.

12. The same view, was reiterated in the *Supreme Court Employees' Welfare Association v. Union of India*, (1989) 4 SCC 187 (AIR 1990 SC 334), wherein it has been laid down:

"There can be no doubt that no Court can direct a legislature to enact a particular law. Similarly, when an executive authority exercises a legislative power by way of subordinate legislation pursuant

to the delegated authority of a legislature, such executive authority cannot be asked to enact a law which he has been empowered to do under the delegated legislative authority." (p. 219 of SCC) : (at p. 353 of AIR).

13. Shri D. D. Thakur, the learned counsel appearing for the respondents, has, however, submitted that in the present case, the High Court has not issued a writ of mandamus to the State Government to make the amendments in the rules in accordance with the proposal made by the High Court but has only directed the State Government to consider effectively the amendments proposed by the High Court in the rules. We are unable to construe the judgment of the High Court in this manner. The learned single Judge in the ultimate paragraph of the judgment has observed:

"This petition, therefore succeeds and is allowed by issuance of a direction to the respondents to consider effectively the amendments proposed by the High Court in the J & K Civil Services (Judicial) Recruitment Rules of 1967 and to carry, the process of amending the Rules thus to its logical conclusion within period of three months from today."

14. The aforesaid direction that the appellant should consider effectively the amendments proposed by the High Court in the rules and to carry the process of amending the rules to its logical conclusion can only mean that the State Government should make the necessary amendments in accordance with the proposal made by the High Court. This is also clear from the earlier paragraph in the judgment wherein it has been observed:

"..... It is also a pity that since then, the Government has not moved a step further in the direction of framing the Rules based on the consultation of the High Court and has been sleeping over the matter. It was the duty of the Government to have acted upon the recommendations of the High Court with reasonable despatch and to have incorporated the amendments in the Rules, in accordance with the principles governing the framing of such rules in the light of the law laid down in Section 110 of the State Constitution and in the light of the well established principles on the subject,"

15. The aforesaid observations leave no room for doubt that the purport of the direction that has been given by the High Court is that the amendments that have been recommended by the High Court should be incorporated in the rules. In our opinion, such a direction was impermissible and cannot be upheld.

16. We may at this stage indicate that Section 110 of the J & K Constitution has to be read along with Section 109, which relates to appointments of District Judges, and Section 111 relating to control over Subordinate Courts. The object underlying these provisions is to secure and maintain the independence of the subordinate judiciary. With the same end in view Section 110 prescribes that rules relating to appointments of persons other than the District Judges to the Judicial Service of the State shall be made by the Governor in consultation with the High Court. Consultation with the High Court is insisted because it is the High Court which has been primarily entrusted with the judicial administration in the State and for efficient and due discharge of its responsibility, the High Court needs to have proper officers. The High Court would be the best judge of the requirements for proper and efficient judicial administration. Consultation with the Commission is also required for the reason that the Commission is envisaged by the Constitution of Jammu & Kashmir as an expert body to advise the Government on matters relating to public services. It has been entrusted with the

task of selecting suitable persons for appointments to the service of the State, and is required to be consulted on all matters relating to methods of recruitment to civil services and for civil posts, on the principles to be followed in making appointments to civil services and posts as well as promotions and transfers and on all disciplinary matters (Section 133). In relation to judicial service, the Commission has a limited role, viz., consultation at the stage of making of rules under Section 110. Whether and to what extent the Commission is to be associated with the process of selection of personnel for appointment would depend on the provisions of the rules so made.

17. While construing the expression "consultation" this court has laid down that though consultation does not mean "concurrence", it postulates an effective consultation which involves exchange of mutual view points of each other and examination of the relative merits of the other point of view. Consultation or deliberation is not complete or effective before the parties thereto make their respective points of view known to the other or others and discuss and examine the relative merits of their views. (See Chandramouleshwar Prasad v. Patna High Court, (1970) 2 SCR 666 : (AIR 1970 SC 370) and M. M. Gupta v. State of Jammu & Kashmir, (1983) 1 SCR 593: (AIR 1982 SC 1579). In the context of Article 233 of the Constitution of India which requires that appointments of persons to be, and the posting and promotion of, District Judges in any State shall be made by the Governor of the State in consultation with the High Court exercising jurisdiction in relation to such State this Court in M M. Gupta's case (supra) has observed as under:

" ..... normally, as a matter of rule the recommendations made by the High for the appointment of a District Judge should be accepted by the State Government and the Governor should act on the same. If in any particular case, the State Government for good and weighty reason find it difficult to accept the recommendations of the High Court, the State Government should communicate its views to the High Court and the State Government must have complete and effective consultation with the High Court in the matter. There can be no doubt that if the High Court is convinced that there are good reasons for the objections on the part of the State Government, the High Court will undoubtedly reconsider the matter and the recommendations made by the High Court. Efficient and proper judicial administration being the main object of these appointments, there should be no difficulty in arriving at a consensus as both the High Court and the State Government must necessarily approach the question in a detached manner for achieving the true objective of getting proper District Judges for due administration- of justice." (p. 626 of SCR) : (at pp. 1593-94 of AIR).

18. The above approach indicated by this Court would apply equally in the matter of making of rules under Art. 234 of the Constitution of India and Section 110 of the J & K Constitution. Although normally the recommendations made by the High Court for any amendment in the rules should, be accepted by the State Government, but, if in any particular case, the State Government, for good and weighty reason, find it difficult to accept the recommendations of the High Court and the State Government communicates 'its views to the High Court, the High Court must undoubtedly reconsider the matter. The High Court as well as the State Government must approach the question in a detached manner for achieving the true objective of framing rules which would secure appointment of proper persons to Judicial Service of the State for proper and efficient administration of justice. If the matter is thus approached, there should not be any difficulty. It need hardly be emphasised that while considering the recommendations of the High Court the State Government would proceed on the basis that in such matters the opinion of the High Court is entitled to the highest regard.

19. In the present case, we find that the High Court had recommended reservation of 25% vacancies in the Service to be filled by way of promotion/ transfer from amongst the following employees of the High Court:

- 1) Assistant Registrars
- 2) Readers
- 3) Court Officers
- 4) Librarians

20. With that end in view, the High Court has suggested substitution of Rule 4 of the Rules and addition of Chapter IV-A prescribing procedure for recruitment by promotion/ transfer in the Second Part of the rules. In the letter of the Deputy Secretary to the Commission dated July 25, 1984 addressed to the Secretary to the Government of Jammu & Kashmir, Law Department, the Commission has adverted to the following aspects:

- 1) The officers in whose favour 25% reservation is to be made fall in two categories :  
(i) Assistant Registrars who were in the scale of Rs. 1050-1710,\*and (ii) Readers, Court Officers and Librarians who were in the scale of Rs. 680-1240. Since recruitment was to be made from two different categories in two different scales of pay, would it not be desirable to fix the proportion for the category of Assistant Registrars (Rs. 1050-1710) and other officers in the pay scale of Rs. 680-1240?
- 2) It has to be stated whether the three categories of Officers in the scale of Rupees 680-1240 have a combined or a separate seniority?
- 3) There is another category of posts in the scale of Rs. 680-1240 called Public Law Officers which also apparently require to be clubbed with the aforesaid three categories of posts in the same scale. It has to be seen whether another post called Investigation Officer in the scale of Rs. 825-1240 should also not be added on the eligible category provided the incumbents are law graduates.
- 4) Instead of inserting Chapter IV-A and Rule 37A, there should be an independent Part V after the existing Part IV and the subsequent parts and rules be renumbered.
- 5) Whether any similar provisions exist in the Judicial Rules of other States so far as they relate to promotions,/transfers to the post of Munsiffs?

21. After receipt of the said communication from the Commission, the High Court referred the matter to the Vigilance Commissioner (Judicial) for examination. The Vigilance Commissioner submitted a report to the Registrar of the High Court wherein he has primarily referred to the lack of promotional avenues for Assistant Registrars, Readers, Court Officers and Librarians in the High Court and the necessity of providing promotional avenues for them. He has also dealt with the suggestion made by the Commission for clubbing Public Law Officers and Investigation Officers with the category of posts in respect of which reservation was proposed and has pointed out that such a move would not be in the interest of the judiciary and furthermore those persons have already got chances of promotion in their respective cadres inasmuch as Public Law Officers have been promoted as CPOs of the Dy. Superintendent Police Rank and as Naib Tehsildars or as Prosecuting

Officers. The report of the Vigilance Commissioner does not, however, deal with the other matters raised by the 'Commission with regard to fixing of proportion for the two categories of officers, viz., Assistant Registrars who were in a higher scale and other officers who were in the lower scales and about there being a combined or separate seniority for the three categories of the officers in the scale of Rs. 680-1240. There is also no reference in the said report to the question whether any similar provision exists in the judicial rules of other States.

22. The resolution passed at the full Court meeting held on March 16, 1985 is cryptic. After referring to the proposal of the Commission and the report of the Vigilance Commissioner all that is stated in the said resolution is that "the Court did not agree with the proposal of the Commission and sticks to the amendments already proposed. However, that the Court has no objection if independent Part V after the existing Part IV, is inserted in the Draft Amendment". This would indicate that the only matter which was considered by the High Court was the suggestion by the Commission to include the posts of Public Law Officers and Investigation Officers in the eligible category to which reference was made by the Vigilance Commissioner in his report. There was no consideration by the High Court of the other matters raised in the communication by the Commission to which no reference has been made in the report of the Vigilance Commissioner.

23. We are of the view that before intimating its views on the communication sent by the Commission on the proposed amendments, the High Court should have considered, in depth, the various points that were raised in the said communication. This does not appear to have been done in the facts of the present case. In this context, it may be mentioned that the object of recruitment is to select the most meritorious from those available amongst eligible candidates. Provision of promotional avenues avoids stagnation and also gives incentive for improvement to those who are holding lower posts having similar functions. For that reason persons from one service may be promoted to another if the nature of functions is similar and if they satisfy the conditions of eligibility. On such promotion, their earlier experience in the lower service may be taken into account for granting benefits such as relaxation in the upper age limit prescribed for eligibility or weightage may be given for the past experience in that service. This will ensure that the quality of merit in recruitment is not diluted while an avenue for better prospects is available for persons who are suitable to derive the benefit of entering into a better service with the advantage of some weightage against fresh graduates. This object would not be fulfilled if, for the purpose of recruitment to a service, certain proportion of posts is reserved for persons working in a different cadre where the nature of the functions of the said cadre and the service to which recruitment is made are not similar. In order that a particular proportion of posts may be reserved for persons belonging to a different service it is also necessary that the nature of functions of the posts which are clubbed together and from which such recruitment is to be made is not dissimilar or unequal. These are some of the relevant aspects which have to be taken into consideration before a recommendation is made for reservation of a particular proportion of posts from amongst the categories of Asst. Registrars, Readers, Court Officers and Librarians for appointment to the Service. It would also be relevant to examine the practice prevalent in the other High Courts in this regard. It may also be considered whether reservation in the judicial service is the only mode for providing the avenue for promotion for these officers or some other mode can be devised which can provide an avenue for promotion for them on the administrative side in the Court. In some High Courts, avenues for promotion for such officers exist on the administrative side i.e. as Deputy Registrar (Admn.), Additional Registrar . (Admn.). Since these are matters which require a more careful examination, it would be appropriate if a Committee of Judges is constituted which can go in the matter in greater detail and the matter is considered by the full Court in the light of the report of such a committee. We hope and trust that the recommendations that are made by the High Court after such

consideration would receive due weight and regard from the State Government and a solution would be devised which would meet the aspirations of the staff and would also be acceptable to the Government.

24. The appeal is, therefore, allowed, the judgment and order of the Learned single Judge and the order of the Division Bench of the High Court are set aside and the Writ Petition filed by the respondents is dismissed. The High Court, on its administrative side, may reconsider the matter relating to amendment of the rules in the light of the observations made above, There will be no order as to costs. Appeal allowed.

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