SUPREME COURT OF INDIA

Vice Chancellor, University of Allahabad

Vs.

Dr. Anand Prakash Mishra

(K. Ramaswamy and G.T. Nanavati JJ.)

16.12.1996

ORDER

Leave granted.

We have heard learned counsel on both the sides.

Prior to December 12, 1993, the appellant had initiated the process of selection to various posts in the appellant university. The UP Public Services (Reservation of Scheduled Caste, Scheduled Tribes and Backward Classes) Act 4 of 1994 (for short, the `Act') came into force with effect from March 22, 1994. By operation of Section 1(2), the Act came into force from December 11, 1993, i.e., the date on which ordinance was issued. Section 2(c) of Act defines "public services and posts" means the services and posts in connection with the affairs of the State and includes services and posts in clause (iv) which is as under:

"iv) an educational institution owned and controlled by the State Government or which receives grants in aid from the State Government, including a university established by or under a Utter Pradesh Act, except an institution established and administered by minorities referred to in clause (I) of Article 30 of the Constitution."

Section 3 of the Act applies reservation in favour of Scheduled Castes, Scheduled Tribes and other Backward Classes, at the stage of direct recruitment, the following percentage prescribed therein thus:

(a) in the case of scheduled Castes 21 per cent

(b) in the case of Scheduled Tribes 02 per cent

(c) in the case of other backward

classes of citizens 27 per cent

Section 4 of the Act casts responsibility on and thrust powers on specified offers for compliance of the provisions of the Act. The State Government may, by notified order, entrust the appointing authority or any officer or employee with the responsibility of ensuring compliance of the provisions of the Act. It is not in dispute that the State Government had issued a notification dated may 5, 1995 entrusting the responsibility for implementation of the provisions of the Act, in relation to the appointment and services of the posts in the university, on the Vice-Chancellor. Thus, the Vice-Chancellor is empowered and made responsible to implement the provisions of the Act.

Section 6 gives power to the Government to call for the records and direct enforcement of the provisions of the Act.

It reads thus:

"6. Power to call for record.– If it comes to the notice of the State Government, that any persons belonging to any of the categories mentioned in sub-section (1) of Section 6 has been adversely affected on account of non- compliance of the provisions of this Act or the rules made thereunder or the Government order in this behalf by the appointing authority, it may call for such records and take such action as it may consider necessary."

Section 15 which is relevant for the purpose of this case is as under:

"15. Savings.-(1) the provisions of this Act shall not apply to cases in which selection process has been initiated before the commencement of this Act and such cases shall be dealt with in accordance with the provisions of law and Government orders as they stood before such

commencement. Explanation.- For the purposes of this sub-section the selection process shall be deemed to have been initiated where, under the relevant service rules, recruitment is to be made on the basis of -

(i) written test or interview only, the written test or the interview, as the case may be, has started, or

(ii) both written test and interview, the written test has started.

(2) The provisions of this Act shall not apply to the appointment, to be made under the Uttar Pradesh Recruitment of Department of Government Servant Dying in Harness Rules, 1974."

It is not in dispute that on the basis of the aforesaid implementation of the provisions of the Act, in February 1995, fresh advertisement came to be made for appointment of two Readers in Chemistry. On a representation made by the respondents, the Chancellor, exercising the power under Section 68 of the U.P. State Universities Act, 1973, by order dated June 6, 1995 gave directions to the vice- Chancellor to appoint the respondents as Readers in the Chemistry Department. On receipt of the above direction, on June 15, 1995, the Vice-Chancellor by the letter to the Chancellor (Governor) on the same date sought guidance as to how, in the face of the Act, the directions issued by him could be implemented. The Chancellor had referred the matter to the Law Department for opinion and the above communication was informed to the appellant on July 8, 1995. The respondent filed the writ petition on July 17, 1995 for a Mandamus to implement the directions issued by the Chancellor dated June 6, 1995. The respondent filed the counter-affidavit pleading the above facts. The Governor, exercising the powers under Section 6 of the Act, cancelled the appointments made in respect of other persons, who came to be selected and appointed in violation of the Act. It would, appear that those affect persons filed the writ petition in the High Court which are pending disposal. We make it clear that we are not concerned with the above cancellation in this appeal. Therefore, controversy thereof is kept at large.

The only question is whether the Chancellor (Governor) is right in directing the appellant to appoint the respondents to the posts of Readers in the Chemistry Department of the Allahabad University. It is already seen that the Act has come into force with effect from December 11, 1993. Shri Sharan, learned counsel for the respondent, has contended that once the process of selection was started by screening the candidates eligible for consideration by the Selection Committee, the process was started prior to the Act has come into force and, therefore, all the selections and appointments should be made in accordance with law applicable prior to the Act has come into force. We are unable to agree with the learned counsel. Legislative intentions is clear from Section 15(1) that the provisions of this Act shall not apply to cases in which selection process has been initiated before the commencement of the Act. Initiation of process of selection has been explained in the Explanation that: For the purpose of this sub-section the selection process

shall be deemed to have been initiated where, under the relevant service rules, recruitment is to be made on the basis of- (i) written test or interview only, the written test or the interview, as the case may be, has started. It is not in dispute that in this case, the process of selection to the post of Readers is only by interview. Admittedly, the process of selection is to decide the merit of the candidates by an interview which was started on and from December 12, 1993. Thereby, the process of selection was initiated after the Act has come into force without applying the provisions of sub-section (1) of Section 3 of the Act. Therefore, the process of selection and preparation of merit list was in violation of the provisions of the Act. The Governor when acted as Chancellor, he discharged statutory duty under section 68 of University Act, it was in his ex officio capacity. When he acts under the Act, he exercises his constitutional function under Article 163 with aid and advice of the Council of Ministers. In the later capacity, the order of the Chancellor issued under Section 68 was cancelled, as it was in violation of the Act.

In Shankarsan Dash v. Union of India [(1991) 2 SCR 567], on the basis of combined examination by the Union Public Service Commission for appointment to civil services, the appellant name was kept in the select list for appointment as Group `B' Police Service. The vacancies arose for subsequent year, though he was occupying higher rank in the general category, the Government did not appoint him. They implemented the policy, appointing candidates in the lower candidates belonging to reserved categories and the vacancies arose for general candidates were not filled up. He filed the application in the Tribunal for direction to appoint him to the post. The Constitution Bench had held that even for vacancies notified for appointment and adequate number of candidates are found fit, the successful candidates do not acquire any indefeasible right to be appointed which was dismissed. On appeal, the notification notifying applications for recruitment nearly amounts to a notification to qualified candidates to apply for recruitment. On their selection they do not acquire any vested right to the post unless the relevant recruitment rules so indicate, the State is under no legal duty to fill up all or any of the vacancies. However, the State has to act fairly. The decision not to fill up the vacancy has to be taken bona fide for appropriate reasons. The State is to respect the comparative merit of the candidates reflecting in the relevant test and no discrimination is permitted in that behalf and normally to be appointed. It does not create any right to an appointment. It was held that the appellant therein had not acquired any right to be appointed against the vacancies arising later on the basis of any rules. Therefore, it was held that he was not entitled to be appointed. This Court also had held that there was no arbitrariness whatsoever on the part of the State in not filling up the vacancies. The process of final selection was held to have been properly taken not to fill up any further allotment of any vacancy arising subsequently. The ratio therein applies to the facts in this case on all force. In State of Andhra Pradesh v. T. Ramakrishna Rao and Ors. [(1972) 4 SCC 830], the constitution bench had held that an application for appointment had not acquired any right, by merely applying for the post either under the rule or otherwise to be selected for the post. Therein, the facts were that Rule 5 of the A.P. Subordinate Service Rules made under Articles 234 and 237 read with proviso to Article 309 of the Constitution was declared ultra vires. After making amendment to the rules, recruitment was made.

The applications/respondents who made an application earlier have challenged the subsequent recruitment. The Public Service Commission made two examinations:(1) to the existing vacancies under the amended rules while setting aside earlier notification; and (2) by selection. This Court

had held that single examination for all the vacancies would not violate Articles 14 and 16 of the Constitution. In that behalf the above ratio came to be laid. In State of Harvana v. Subash Chander Marwaha & Ors. [(1974) 1 SCR 165], the facts were that under the Punjab Civil Service (Judicial Branch) Service Rules, recruitment was made for the posts of subordinate judges. Rule provides 55% of the marks. A list was prepared of the candidates upto 45% of the marks in aggregate under Rule 10, after the list was published in the Gazette, the Government was bound to make the selection of the candidates strictly in the order in the lists, and intimate the selection to the High Court. When vacancies were to be filled up, the High Court was to send in the names in accordance with, and in the order in, the list, for appointment. The appellant selected the first seven who had secured more than 55% marks and above in the first instance. The respondent who secured less than 55% marks and ranked 8, 9 and 13 in the list were filed a writ petition on the ground that 15 vacancies are existing and that they were entitled to be appointed from the list prepared by the Public Service Commission. Though that contention was found favour with the High Court, this Court had held that a mandamus could be issued only to compel an authority to do legal duty under a statute and the aggrieved party must have a legal right under the statute to enforce its performance. Mere inclusion in the list did not given any right to a candidate to be appointed to a post of a subordinate judge. The mere existence of the vacancy does not give a legal right to a candidate for appointment. It is open to decide how many appointment shall be made. The mere fact that a candidate's name appears in the list will not entitle to a mandamus that he be appointed. The appeal was accordingly allowed. The ratio therein was approved by this court in Shankarsan Dash's case. In Union Territory of Chandigarh v. Dilbagh Singh & Ors. [(1993) 1 SCC 154], a bench of three Judges following Shankarsan Dash's case had held that the selectee in the list is not entitled to appointment. Mere inclusion in the list will not have any indefeasible right to be appointed, in the absence of any rule to that effect. In that case the selection was found to be not according to rules. The Government had cancelled their select list. When it was questioned it held by this court that the cancellation of the list was bona fide and for valid reason and was not arbitrary. In Nagar Mahapalika, Kanpur v. Vinod Kumar Srivastava & Ors. [AIR 1987 SC 847], the Government issued a memo superseding all the circulars and canceling the select list made for appointment. The High Court issued mandamus that the previous list will be exhausted and fresh recruitment be made. This court by a bench of two judges have reversed the mandamus and held that a list which has a current force for one year would be valid and all the lists made earlier were not intended to be revived under the circular. Accordingly the appeal was allowed and the order was set aside. The mandamus issued by the High Court was reversed and the list for that current year 1978 was sustained. In N.T. Bevin Katti v. Karanataka Public Service Commission & Ors. [AIR 1990 SC 1233], the Public Service Commission notified on May 23, 1975 inviting applications from in service candidates for recruitment to 50 posts of Tehsildars. Para 3 of the Notification specified details of the posts reserved for candidates belonging to Scheduled Castes and Scheduled Tribes and other Backward classes including posts set apart for Ex-Military Personnel. In case of non-availability of sufficient number of candidates for reserved categories vacancies were to be filled up as per rules in force. Subsequently notification was issued amending the pre-existing rules, 1966. Rule 11 of the amended rules provided that in the matter of reservation already made in the case of post and services for which advertisement had been issued prior to the coming into force of the rules on July 9, 1975 would be applicable. The Government had not accepted the recommendation made by the Public Service Commission and directed them to prepare a fresh merit list taking into consideration all the amended rules giving reservation to the candidates. Accordingly, it was made which came to be challenged. This Court had held that the

Government order shows that the reservation already made for any category and the post or service and advertisement published by issue of the Government order shall be deemed to have been validly made and would clearly indicate that the selection made in accordance with the previous rules was valid and the merit list prepared in accordance with the rules was legal and valid one. The State Government wrongly refused to approve the same and curtailed the scope of it. This case is an authority on the proposition that recruitment should be made in accordance with the rules as indicated in the amended rules. Accordingly, the appeal was allowed and the order of the Government set aside. In Babita Prasad and Ors. v. State of Bihar and Ors. [1993 Supp. (3) SCC 268], this Court had held that the panel of indefinite life, the right of the candidate including such a panel do not create any indefeasible right when the Government had discontinued the select list for valid reason. It was held in paragraph 25 that the purpose of the panel prepared in the instant case was only to finalise a list of eligible candidates for appointment. The panel was too long and was intended to last indefinitely barring the future generations for decades from being considered in the vacancies arising much later. In fact the future generations would have been kept out for a very long period had the panel been permitted to remain effective till exhausted. A panel of the type prepared in the present case cannot be equated with a panel which is prepared having co-relation to the existing vacancies for anticipated vacancies arising in the near future and for a fixed time and prepared as a result of some selection process.

It is, thus, settled law that the process of selection must be in accordance with the law existing as on the scale of selection. Keeping candidate in the waiting list does not confer any vested right in his favour much less indefeasible right. The appropriate appointing authority is not obliged to fill up the vacancies or to appoint any candidate/candidates waiting in the list to any resultant vacancy, due to the operation of law under the Act.

The vice-Chancellor, therefore, was obliged under the Act and vested with duty and right in taking action to have the vacancies notified applying Section 3(1) of the Act for recruitment in accordance with law.

It is then contended that the retrospective operation cannot be given to the vacancies existing prior to the Act has come into force. We are unable to agree with the learned counsel. It is settled legal position that legislature is competent to make law with retrospective effective. The Act was applied to existing vacancies as on the date of the Act came into force and the process of selection was not started as on that date. There is no vested right to a vacancy of a post. Only a person has right to be considered according to rules in force as on the date of consideration. The process of selection started prior to that date requires to be dealt with as per pre-existing law. The selection after the Act came into force be made by applying Section 3(1). In the face of Section 3 read with Section 15(1) of the Act, any process for selection initiated after the commencement of the Act, be in conformity with the provisions of the Act. Necessarily, the vacancies existing as on that date shall require to be filled up, applying sub-section (1) of Section 3 of the Act and the selection should be made in accordance therewith. Any selection made in a pipe could be roughly calculated from the pipe diameter and the knowledge of maximum steam velocities used to avoid excess issued by the

Chancellor to make appointment of the respondents is, though under the provisions of Section 68 of the Universities Act, is in violation of the Act since Section 3(1) has been made applicable with retrospective effect from December 11, 1993. The direction issued by the Chancellor in that behalf is in contravention of Section 3(1) of the Act.

It is settled legal position that the mandamus cannot be issued to violate the law or to act in violation of the law. In this case, the direction issued by the High Court tentamounts to a direction to the appellant to appoint the respondents as per the order issued by the Chancellor, in violation of the Act. The mandamus was, therefore, clearly illegal. The incumbent Vice-Chancellor cannot be found fault with the implementation of the Act as per directions contained in it and the comments and the strictures made against the appellants by the High Court are unwarranted and uncalled for.

The appeals are allowed and the High Court's judgment and orders stands set aside but, in the circumstances, without costs. The writ petition is, consequently, dismissed. No costs.