

Dr. K. Ramulu and Another

Vs

Dr. S. Suryaprakash Rao and Others

Civil Appeals Nos. 404-407 of 1997

(K. Ramaswamy, S. Saghir Ahmed, G. B. Pattanaik JJ)

15.01.1997

ORDER

1. Leave granted.
2. We have heard learned counsel for the parties.
3. These appeals by special leave arise from the Order of the Andhra Pradesh Administrative Tribunal, made on 5-6-1996 in OA No. 1224 of 1996 and Order made on 19-8-1996 in Review MA No. 2039 of 1996 in OA No. 1224 of 1996.
4. The facts are, very fairly, not in dispute. Respondent 1 in both sets of appeals is a Veterinary Assistant Surgeon in A.P. Animal Husbandry Department. He filed an OA seeking direction for preparation of a panel of candidates for promotion as Assistant Director under Rule 4 of the A.P. Subordinate Service Rules (for short "the General Rules"). The Tribunal directed the respondent-Government to prepare and operate the panel for the years 1995-96 for promotion to the post of Assistant Director in the A.P. Animal Husbandry Service. Calling that order in question, these appeals have been filed by the contesting respondents as well as by the State.
5. Shri L. Nageswara Rao, learned counsel for the appellants, has raised threefold contention. It is firstly submitted that the respondent has no right to be considered for promotion as Assistant Director. Secondly, even if he has got such a right to appointment to the post, the Government have power to revise its policy of appointment and appointment requires to be made in accordance with the revised policy. The direction given by the Tribunal is contrary to the policy decision taken by the Government, namely, to reconsider the policy of promotion in the Service and to make rules afresh in the place of the existing Rules. In this premise, the Tribunal has committed a manifest error in directing the Government to prepare, finalise and operate the panel for the years 1995-96 for promotion as Assistant Director of the A.P. Animal Husbandry Department. Shri H. S. Gururaja Rao, learned Senior Counsel appearing for the first respondent, in the main appeals, has contended that the first respondent has a right to be considered for promotion to the post in accordance with the Rules existing in the year 1995-96. The Rules made afresh do not take away the right of the first respondent to be considered in accordance with the existing Rules. Rule 4 read with Rule 3 of the General Rules gives mandate to the Government to prepare the panel by September 30 of every year to be operative till the end of December of the succeeding year or preparation of the fresh panel, whichever is earlier. In this case, since the process of the preparation of the panel has already been commenced for filling up the existing vacancies, the Government is required to complete the preparation of the panel, finalise the panel and operate the panel. The Tribunal, therefore, was right in giving the impugned direction. He also contended that the right given by the Tribunal cannot be

taken away by the Rules made prospectively w.e.f. 12-6-1996, the date on which the amended rules made in GPMs No. 54 of Animal Husbandry & Fisheries Department, Government of A.P. came into force.

6. In view of the rival contentions, the question that arises for consideration is whether the view taken by the Tribunal is correct in law. It is seen that the A.P. Animal Husbandry Service Rules, 1996 made in GOMs No. 54 of Animal Husbandry & Fisheries Department dated 6-6-1996 (for short "the Rules") came into force with effect from 12-6-1996. The Rules repealed the existing rules made in GOMs No. 729 dated 24-9-1997. The Rules prescribe four classes of services. Class 'A' consist of Category I, Director of Animal Husbandry, Category II, the Additional Director, Category III, the Joint Director, Category IV, the Deputy Director, Category V, the Assistant Director and Category VI, the Veterinary Assistant Surgeons. It is prescribed at the end that "all the posts in each category are interchangeable for the purpose of seniority, promotion, transfer and postings". It is not in dispute that prior to the Rules came into force, under the old Rules (for Short "the repealed Rules"), for the purpose of promotion in each category, each class of post was considered to be a separate unit. The Government had appointed a one-man Commission headed by Shri V. Sundaresan, IAS to go into the anomalies in the operation of the Rules. The report was submitted by Sundaresan Commission on 25-7-1990. It would appear from the record that even as on 22-11-1988, a decision was taken by the Government in the Animal Husbandry Department to amend the repealed Rules by making necessary changes. While the process was going on, after the receipt of the report of the Sundaresan Commission, the Government had called for the comments from the Director of Animal Husbandry Department. The Director had submitted his comments on 20-9-1995. Thereafter, several meetings were held to follow up the matter of amendment of the repealed Rules. The Rules ultimately came to be make. It is also clear from the record that the Government had taken a decision not to fill up any of the vacancies until the repealed Rules were duly amended. After the direction issued by the Tribunal, the Department was advised to make temporary promotion pending finalisation of the Rules. The Director submitted the proposal to prepare the panel and several sittings were fixed to consider the cases but the same could not materialise.

7. In this perspective, the question arises whether the omission on the part of the Government in preparing and finalising the panel for promotion of the Assistant Veterinary Surgeons to the post of Assistant Director is vitiated by any inaction on the part of the Government and whether it is in violation of Rule 4 of the General Rules. It is seen and is not in dispute that under Rule 4 of the General Rules all first appointments to the State Service and all promotions/appointments by transfer shall be made on grounds of merits and ability and shall be made in accordance with the special Rules. It also envisages that list of approved candidates required to be prepared in accordance with the Rules. It shall be prepared ordinarily during the month of September every year on the basis of estimated vacancies sent in terms of sub-clause (iv) and 30th of September shall be reckoned as the qualifying date of determine the eligibility of the candidate for such appointment, which shall cease to be in force on the afternoon of 31st December of the succeeding year or till the new panel is prepared, whichever is earlier. Second proviso to the Rule provides that if the vacancies are not available for the particular panel period, subject to the appointing authority recording a certificate to that effect; or "where the appointing authority does not consider it necessary", it is not necessary to prepare the panel. At this stage, it is necessary to emphasise that the opinion of the Government by the proviso would (sic) should not be arbitrary. As rightly pointed out by Shri L. Nageswara Rao, the decision not to prepare the panel should be on valid and relevant considerations and it should not be an arbitrary decision taken by the Government. The object of Rule 4 is that all eligible candidates should be considered in accordance with the Rules. Panel should be finalised and operated so as to give an opportunity to the approved candidates to scale

higher echelons of service which would augment the efficacy of service, inculcate discipline and enthuse officers to assiduously work hard and exhibit honesty and integrity in the discharge of their duties. Nonetheless, it is seen that clause (ii) of the second proviso gives power to the State Government not to prepare the panel and to consider the cases though the vacancies are available, as stated earlier, pending amendment of the Rules or recasting the Rules afresh. The Government have taken conscious decision not to fill up any of the pending vacancies until the process is completed which they had stated on "administrative grounds". As seen, the process was completed and the Rules have come into force w.e.f. 12-6-1996.

8. In the light of the above factual matrix and the legal setting, the question is whether the Tribunal was right in directing the Government to prepare and operate the panel in accordance with its directions. The Constitution Bench of this Court in *Shankarsan Dash v. Union of India* [(1991) 3 SCC 47 : 1991 SCC (L&S) 800 : (1991) 17 ATC 95] had considered the question in an analogous situation. Therein, pursuant to the selection made by the UPSC for appointment to the Civil Services, a list of IPS officers was prepared and the appellant was one of the candidates in the waiting list. The Government of India had taken a decision not to fill up the vacancies except to the extent of the Scheduled Tribe candidates who were selected and were in the waiting list. The appellant therein filed an OA which was dismissed by the Tribunal. On appeal, this Court held thus : (SCC pp. 50-51, para 7)

"It is not correct to say that if a number of vacancies are notified for appointment and adequate number of candidates are found fit, the successful candidates acquire an indefeasible right to be appointed which cannot be legitimately denied. Ordinarily the notification merely amount to an invitation to qualified candidates to apply for recruitment and on their selection they do not acquire any 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, it does not mean that the State has the licence of acting in an arbitrary manner. The decision not to fill up the vacancies has to be taken bona fide for appropriate reasons. And if the vacancies or any of them are filled up, the State is bound to respect the comparative merit of the candidates, as reflected at the recruitment test, and no discrimination can be permitted. This correct position has been consistently followed by this Court, and we do not find any discordant note in the decisions in *State of Haryana v. Subash Chander Marwaha* [(1974) 3 SCC 220 : 1973 SCC (L&S) 488], *Neelima Shangla v. State of Haryana* [(1986) 4 SCC 268 : 1986 SCC (L&S) 759], or *Jatinder Kumar v. State of Punjab* [(1985) 1 SCC 122 : 1985 SCC (L&S) 174]."

9. In para 8, this Court considered the ratio in *State of Haryana v. Subash Chander Marwaha* [(1974) 3 SCC 220 : 1973 SCC (L&S) 488] wherein though the vacancies were existing and select list candidates were available, pursuant to the recommendation made by the High Court not to appoint any candidate who had secured less than 55% marks, the Government acted upon it and did not appoint the candidates in the waiting list. When they claimed their right to appointment, and the order was issued by the High Court for filling up all the vacancies from persons in the waiting list, this Court had laid that though the candidates were in the waiting list, they had no right to be appointed. It was held that the plea of arbitrariness does not arise since the Government have taken a decision not to appoint any of the persons who secured less than 55% of the marks. This Court also has pointed out in *Shankarsan Dash* case [(1991) 3 SCC 47 : 1991 SCC (L&S) 800 : (1991) 17 ATC 95] that when the Government have taken a conscious policy decision not to fill up the vacancies, the decision must be reasonable and not arbitrary. Since it was a policy decision it could not be

interfered with. It was held that the vacancies for the Schedule Tribe candidates were being filled up for the reason that vacancies reserved for them were not being filled up due to non-availability of the select candidates. The decision to fill up the vacancies reserved for Scheduled Tribe candidates was justified on the ground that non-filling up of the vacancies belonging to the general candidates cannot be characterised as arbitrary decision. It was observed that "the fact that it was not for the Public Service Commission to take a decision in this regard was emphasised in this judgment. None of these decisions, therefore, supports the appellant". Thus it could be seen that if the decision of the Government is supported by valid reasons, it cannot be stated that the decision taken by the Government was arbitrary.

10. This position was reiterated by this Court in *State of Bihar v. Mohd. Kalimuddin* [(1996) 2 SCC 7 : 1996 SCC (L&S) 389 : (1996) 32 ATC 821]. Therein, the Government of Bihar also had taken a decision to revise the policy of reservation and pending decision the appointments of the wait-listed candidates were deferred. The High Court, however, approached the matter and gave a direction thus : (SCC p. 11, para 8)

"The panel thus does not appear to be violative of the reservation policy of the State. So far as the proposed rules of recruitment are concerned, the details of which have not been furnished from which it could be gathered as to whether any substantial or drastic deviation is sought to be made from the existing rules regarding the procedure of recruitment except that training is no longer to be a necessary qualification or condition of eligibility I do not want to go into the correctness of the policy of the State dispensing with the necessity of the training as a condition of eligibility. However, I have serious doubt whether appointment of untrained teachers in preference to the trained ones who are already in panel and available for appointment can be said to be in public interest."

This Court further held thus : (SCC p. 11, para 8)

"The ultimate outcome of that exercise is to fully brought out on record but it is obvious that the State Government was not acting mala fide and merely with a view to denying appointment to the respondents herein. Merely because notwithstanding the availability of trained personnel the State Government was inclined to change the rules in that behalf does not appear to be a valid ground for contending that the Government had acted mala fide. Without knowing the nature of change it was not open to the High Court to anticipate the policy and brand it as unreasonable."

11. In para 9 it was observed that "we are of the opinion that even if it is assumed that the panel or select list had not expired on the date of filling of the writ petition, the refusal on the part of the Government to make appointment from the panel or select list, vide letter dated 27-5-1993, could not be condemned as arbitrary, irrational and or mala fide".

12. The same ratio was reiterated in *Union of India v. K. V. Vijeesh* [(1996) 3 SCC 139 : 1996 SCC (L&S) 683] (SCC paras 5 and 7). Thus, it could be seen that for reasons germane to the decision, the Government is entitled to take a decision not to fill up the existing vacancies as on the relevant date. Shri H. S. Gururaja Rao, contends that this Court in *Y. V. Rangaiah v. J. Sreenivasa Rao* [(1983) 3 SCC 284 : 1983 SCC (L&S) 382] had held that the existing vacancies were required to be filled up as per the law prior to the date of the amended rules. The mere fact that Rules came to be amended subsequently does not empower the Government not to consider the persons who were

eligible prior to the date of amendment. It is seen that the case related to the amendment of the Rules. Prior to the amendment of the Rules two sources were available for appointment as Sub-Registrar, namely, UDCs and LDCs. Subsequently, Rules came to be amended taking away the right of the LDCs for appointment as Sub-Registrar. When the vacancies were not being filled up in accordance with the existing Rules, this Court had pointed out that prior to the amendment of the Rules, the vacancies were existing and that the eligible candidates were required to be considered in accordance with the prevailing Rules. Therefore, the mere fact of subsequent amendment does not take away the right to be considered in accordance with the existing Rules. As a proposition of law, there is no dispute and cannot be disputed. But the question is whether the ratio in Rangaiah case [(1983) 3 SCC 284 : 1983 SCC (L&S) 382] would apply to the facts of this case. The Government therein merely amended the Rules, applied the amended Rules without taking any conscious decision not to fill up the existing vacancies pending amendment of the Rules on the date the new Rules came into force. It is true, as contended by Mr. H. S. Gururaja Rao, that this Court has followed the ratio therein in many a decision and those cited by him are P. Ganeshwar Rao v. State of A.P. [1988 Supp SCC 740 : 1989 SCC (L&S) 123 : (1988) 8 ATC 957], P. Mahendran v. State of Karnataka [(1990) 1 SCC 411 : 1990 SCC (L&S) 163 : (1990) 12 ATC 727], A. A. Calton v. Director of Education [(1982) 3 SCC 33 : 1983 SCC (L&S) 356], N. T. Devin Katti v. Karnataka Public Service Commission [(1990) 3 SCC 157 : 1990 SCC (L&S) 446 : (1990) 14 ATC 688], Ramesh Kumar Choudha v. State of M.P. [(1996) 11 SCC 242 : (1996) 7 Scale 619]. In none of these decisions, a situation which has arisen in the present case had come up for consideration. Even Rule 3 of the General Rules is not of any help to the respondent for the reason that Rule 3 contemplates making of an appointment in accordance with existing Rules.

13. It is seen that since the Government have taken a conscious decision not to make any appointment till the amendment of the Rules, Rule 3 of the General Rules is not of any help to the respondent. The ratio in the case of Ramesh Kumar Choudha v. State of M.P. [(1996) 11 SCC 242 : (1996) 7 Scale 619] is also not of any help to the respondent. Therein, this Court had pointed out that the panel requires to be made in accordance with the existing Rules and operated upon. There cannot be any dispute on that proposition or direction issued by this Court. As stated earlier, the Government was right in taking a decision not to operate Rules 4 of the General Rules due to their policy decision to amend the Rules. He then relies on para 14 of the unreported judgment of this Court made in Union of India v. S. S. Uppal [(1996) 2 SCC 168 : 1996 SCC (L&S) 438 : (1996) 32 ATC 688]. Even that decision is not of any help to him. He then relies upon the judgment of this Court in Gajraj Singh v. STAT [(1997) 1 SCC 650 : (1996) 7 Scale 31] wherein it was held that the existing rights saved by the repealed Act would be considered in accordance with the Rules. The ratio therein is not applicable because the existing Rules do not save any of the rights acquired or accruing under the Rules. On the other hand, this Court had pointed out (in Scale para 23) thus : (SCC pp. 644-65, para 22)

"Wherever an Act is repealed it must be considered, except as to transactions past and closed, as if it had never existed. The effect thereof is to obliterate the Act completely from the record of Parliament as if it had never been passed; it never existed except for the purpose of those actions which were commenced, prosecuted and concluded while it was an existing law. Legal fiction is one which is not an actual reality and which the law recognises and the court accept as a reality. Therefore, in case of legal fiction the court believes something to exist which in reality does not exist. It is nothing but a presumption of the existence of the state of affairs which in actuality is non-existent. The effect of such a legal fiction is that a position which otherwise would not obtain is deemed to obtain under the

circumstances. Therefore, when Section 217(1) of the Act repealed Act 4 of 1939 w.e.f. 1-7-1989, the law in Act 4 of 1939 in effect came to be non-existent except as regards the transactions, past and closed or saved."

14. Cauvery Water Disputes Tribunal, In re [1993 Supp (1) SCC 96 (II)] also does not help the appellant. Therein when the judgment of this Court had become final, the Governor issued an ordinance not to implement the judgment of this Court. The Constitution Bench, therefore, had held that since the judgment was allowed to become final, it is not open to the Government not to implement the judgment by issuing an ordinance holding that it amounts to interference with power of judicial review of this Court.

15. Thus, we hold that the first respondent has not acquired any vested right for being considered for promotion in accordance with the repealed Rules in view of the policy decision taken by the Government which we find is justifiable on the material available from the record placed before us. We hold that the Tribunal was not right and correct in directing the Government to prepare and operate the panel for promotion to the post Assistant Directors of Animal Husbandry Department in accordance with the repealed Rules and to operate the same.

16. The appeals are accordingly allowed. The order of the Tribunal is set aside but, in the circumstances, without costs.