SUPREME COURT OF INDIA

Cmd/Chairman,. B.S.N.L. & Ors.

Vs.

Mishri Lal & Ors.

C.A.No.1405 of 2007

(Markandey Katju and Gyan Sudha Misra,JJ.,)

15.04.2011

JUDGMENT

Markandey Katju,J.,

Civil Appeal No. 1405 of 2007

1. This appeal has been filed against the impugned judgment and order dated 16.12.2005 in Civil Misc. Writ Petition No. 73843 of 2005 of the Division Bench of the Allahabad High Court.

2. Heard learned counsel for the parties and perused the record.

3. The respondents 1 to 9 herein, filed a writ petition before the High Court praying for quashing of the Recruitment Rules 2005 as well as the letters by which the writ petitioners were told to appear in the Limited Internal Competitive Examination for promotion to the post of Raj Bhasha Adhikari AD(OL) which was to be held under the supervision of the CGMT UP(East), Circle , Lucknow as well as issuing a writ of mandamus restraining the appellants herein from interfering in the working of the respondents as AD(OL) on their respective posts and to continue to pay them their salaries. The aforesaid writ petition was allowed by the impugned judgment and hence this appeal.

4. It was pointed out by learned counsel for the appellants that the impugned Raj Bhasha Adhikari Recruitment Rules 2005 were quashed by the High Court without service of any notice of the writ petition on the appellants (respondents 3 to 6 in the writ petition) and that too at the preliminary stage of admission on the basis of an alleged submission of a counsel who did not have any authority and Vaklatnama in his favour by the appellants and who had not been given any instruction to appear on their behalf. We agree with this submission.

5. When rules are challenged it is necessary to have the matter gone into in depth by inviting a counter affidavit and examining the matter in detail.

A summary disposal of a writ petition by allowing it without even calling for a counter affidavit and quashing the rules, in our opinion, is totally against any established procedure of law.

6. Apart from the above, on merits also we are of the opinion that the writ petition deserved to be dismissed and was wrongly allowed.

7. Article 343(1) of the Constitution of India states that the official language of the Union of India shall be Hindi in Devnagari script. To fulfill the mandate of this provision the Government of India, Ministry of Communications, decided to have a Hindi Cell in each Central Government department and Central Government instrumentality with the object of promoting progressive use of Hindi in the official notings and communications. Accordingly, it framed Rules in 1983 under Article 309 of the Constitution. In 1983, there were 43 posts of Hindi Officers in the department and it was provided that 50% of the posts will be filled up by direct recruitment, 30% by promotion and 20% by transfer on deputation. The essential qualification for holding the post was Masters Degree in the concerned subject and 5 years' experience of teaching, research, writing or journalism in Hindi. As far as promotions were concerned, it was stipulated that Hindi Translator Grade-I with 3 years' regular service in the grade could be selected by a Departmental Promotion Committee in consultation with the Union Public Service Commission.

8. In April 1994, the Department of Telecommunications decided that since the subordinate units (Telecom Circles) were facing difficulties in filling up the posts as per the existing provisions, the posts of Hindi Officers may be filled up amongst the cadre of Hindi Translator Grade-I/Grade-II/Grade-III with 3, 5 or 8 years' service respectively in the Circle/District concerned, failing which the posts may be filled up from amongst the Group `C' cadres based on length of service possessing the qualifications in the Recruitment Rules.

9. On 1.10.2000, the Department of Telecommunications was reorganized with the formation of Bharat Sanchar Nigam Limited (in short `BSNL') as a Government Company to take charge of the operations and maintenance of telecom and telegraph network of the entire country. The respondents herein after formation of BSNL were given option for absorption in the Corporation in the level of Junior Hindi Translators, which option they exercised and they were absorbed accordingly.

10. There were some objections to the Recruitment Rules of 2002 which had been circulated departmentally, but allegedly these Rules were never in operation at any point of time. Accordingly, the revised Recruitment Rules 2005 were formulated and issued on 5.8.2005 whereby 120 posts were classified as Executive with the nomenclature of Raj Bhasha Adhikari. While the educational qualifications remained the same as before, the mode of recruitment was totally changed in the Recruitment Rules of 2005. The entire cadre was to be filled up by a Limited Internal Competitive Examination. It is these Rules which have been struck down by the High Court.

11. It may be mentioned that the respondents herein were never regularly promoted as Hindi Officer at any point of time either under the 1984 Rules or Recruitment Rules, 2002. They had never been appointed on the basis of the recommendation of the Departmental Promotion Committee duly approved by the Union Public Service Commission. In fact, they were appointed purely on a local officiating basis under the powers delegated to the Heads of Telecom Circles on the basis of administrative instructions dated 28.4.1994. Thus, they were never regular appointees and hence had no vested rights for promotion to the post of Hindi Officer under the Recruitment Rules of 2002, which, in fact, were never in operation at any point of time. Besides this, when the revised Recruitment Rules 2005 were formulated, 120 posts were classified as Executive, and for the Executive cadre posts, the mode of recruitment was changed and it was now to be filled up by a Limited Internal Competitive Examination. It cannot now be allowed to be filled up by promotion of persons working on officiating basis. In our opinion there was nothing illegal in this change of policy.

12. Rules under Article 309 can be changed even during the subsistence of the old Rules. As held in Raj Kumar vs. Union of India, AIR 1975 SC 1116 (vide para 7), "Rules made under the proviso to Article 309 of the Constitution are legislative in character, and therefore can be given effect to retrospectively." Thus, rules under the proviso to Article 309 are Constitutional rules, not like rules under a statute. Hence they have the same force as a Statute, though made by the executive.

13. It is well settled that the legislature can legislate retrospectively vide M.P.V. Sundararamier & Co. vs. State of Andhra Pradesh, AIR 1958 SC 468, J.K. Jute Mills vs. State of Uttar Pradesh, AIR 1961 SC 1534, Jadao Bahuji vs. Municipal Committee, AIR 1961 SC 1486, Government of Andhra Pradesh vs. Hindustan Machine Tools Ltd., AIR 1975 SC 2037 (para 8), Nandumal Girdharilal vs. State of Uttar Pradesh, AIR 1992 SC 2084, etc.

14. Hence, the approach of the High Court, in our opinion, was totally incorrect. In State of Punjab and others vs. Arun Aggarwal and others (2007) 10 SCC 402, it was observed (in para 30):

> "There is no quarrel over the proposition of law that the normal rule is that the vacancy prior to the new Rules would be governed by the old Rules and not the new Rules. However, in the present case, we have already held that the Government has taken a conscious decision not to fill the vacancy under the old Rules and that such decision has been validly taken keeping in view the facts and circumstances of the case".

15. In the present case, a conscious decision was taken in 2005 providing that all the posts in question should be filled up by Limited Internal Competitive Examination. This was a policy decision and we cannot see how the High Court could have found fault with it. It is well settled that the Court cannot ordinarily interfere with policy decisions.

16. No doubt in some decisions it was held that a vested right cannot be taken away by amendment of the rules. But what does this really mean? Since a rule under the proviso to

Article 309 is legislative in character vide Raj Kumar vs. Union of India (supra) the rule can be amended, even with retrospective effect, just as a legislation can be amended with retrospective effect.

17. In our opinion the expression `vested right' could only mean a vested Constitutional right, since a Constitutional right cannot be taken away by amendment of the rules.

18. This is evident from the Constitution Bench decision of this Court in Chairman, Railway Board vs. C.R. Rangadhamaiah (1997) 6 SCC 623. It was held therein that pension is no longer treated as a bounty but was a valuable Constitutional right under Articles 19(1)(f) and 31(1) of the Constitution, which were available on 1.1.1973 and 1.4.1974 (that is before the 44th Constitution Amendment). Since this was a Constitutional right it could not be taken away by amendment of the rules. The Constitution is the supreme law of the land, and hence a Constitutional right can only be taken away by amending the Constitution, not by amending the rules or even by amending the statute.

19. Hence in view of the aforesaid Constitution Bench decision the other decisions of this Court of smaller benches must be understood to mean that a vested Constitutional right cannot be taken away by amendment of the rules. It follows that if the vested right is not a Constitutional right it can be taken away by retrospective amendment of the rules. A legislative act can destroy existing rights, (unless it is a Constitutional right). Thus, even a taxing statute can be made retrospectively, and this usually affects existing rights vide Union of India vs. Madangopal, AIR 1954 SC 158, Jawaharlal vs. State of Rajasthan, AIR 1966 SC 764(770), Tata Iron & Steel Co. Ltd. vs. State of Bihar, AIR 1958 SC 452, D.G. Gouse & Co. vs. State of Kerala, AIR 1980 SC 271 (para 16), Shetkari Sahkari Sakhar Karkhana Ltd. vs. Collector, AIR 1979 SC 1972 (para 6-7), etc.

20. A rule made under the proviso to Article 309 is a legislative act (though made by the executive). It is not a piece of delegated legislation like a rule made under a statute. Hence it can be amended retrospectively.

21. In para 8 & 9 of the impugned judgment, the High Court has observed:

> "The main and the central contention from the side of the petitioners is that since the Old Rules specifically stated that since these Rules will remain effective for three years, it was not for the respondent No. 3 to change these Rules before three years, and to formulate new set of rules, changing the basic structure of promotion, as petitioners who were already working on the post of AD (OL) as far back as since 10.7.1995 on local officiating basis. We agree with the contention of the learned counsel for the petitioner, because, Law and Equity as well as Honesty and Fair Play jointly provide support of the petitioners' contention, that once it has been laid down in the old Rules (Rule 10(iv) that they will not be changed for three years, respondent No. 3 BSNL, who is a Government of India enterprise, cannot change the Rules before expiry of three recruitment years, and cannot formulate a new set of Rules detrimental to the interests of the petitioners. This undertaking given by the

respondent No. 3 in the earlier Rules, is sacrosanct, and the respondent No. 3 is bound to honour the same. They cannot and should not be allowed to say, a good-bye from the same. If they wanted to retain the right to change the Rules, they should not have given an undertaking by framing sub-rule(iv) of Rule 10 of the Old Rules. But once they have given this assurance in the Rules, they respondents cannot and should not be allowed to turn around and resile from the same".

22. We are of the opinion that the above observations are not sustainable. When Rules are framed under Article 309 of the Constitution, no undertaking need be given to anybody and the Rules can be changed at any time. For instance, if the retirement age is fixed by rules framed under Article 309, that can be changed subsequently by an amendment even in respect of employees appointed before the amendment. Hence, we cannot accept the view taken by the High Court. There is no question of equity in this case because it is well settled that law prevails over equity if there is a conflict. Equity can only supplement the law, and not supplant it. As the Latin maxim states "Dura lex sed lex"' which means "The law is hard, but it is the law".

23. For the aforementioned reasons, the appeal is allowed. The impugned judgment and order of the High Court is set aside. There shall be no order as to costs.

24. In view of the decision in Civil Appeal No. 1405 of 2007, this appeal is allowed. The impugned judgment and order of the High Court is set aside. No costs.