

(1996) 08 KAR CK 0016

In the Karnataka High Court

Case No : WA No"s. 2047-2050, 2057, 2298, 2306 and 2308/92 and 894/93

B. Shamasundar and Others

APPELLANT

Vs

University of Mysore

RESPONDENT

Date of Decision : 06-08-1996

Acts Referred:

Constitution of India, 1950 — Article 14, 16, 226
Karnataka State Universities Act, 1976 — Section 2 (7), 2 (8), 49

Citation : (1996) ILR (Kar) 2533 : (1996) 6 KarLJ 628

Hon'ble Judges : R.P. Sethi, C.J.;S. Rajendra Babu, J

Bench : Division Bench

Advocate : Chaitanya Hegde, for A.G. Holla in W.A. 2047-2050/92, M.V. Seshachala, M.V. Vedachala and D. Kambaiah, in W.A. 2057/92, T.N. Raghupathy, in W.A. 2306/92, W.A. 894/93 and W.A. 2308/92 and B. Veerabhadrapa, in W.A. 2298/92, for the Appellant; V.C. Brahmarayappa, for the Respondent

Final Decision : Dismissed

Judgement

R.P. Sethi, C.J.—Alleging discrimination the appellants filed Writ Petitions praying for issuance of direction to the respondent to retire them only after the completion of the age of 60 years as they claim to be included in the expression of "teacher" in Clause 3(1) of the Mysore University Employees (Conditions of Service) Statutes, 1984 of the University of Mysore. In the alternative it is prayed that the aforesaid Clause of the University Statute be declared unconstitutional, being violative of Article 14 & 16 of Constitution of India. Relying upon a Division Bench judgement of this Court in University of Mysore Vs. P. Maribasavaradya, , the learned Single Judge dismissed the Writ Petitions vide the judgment impugned in these appeals.

2. The appellants in these appeals who are Humanities Editor, Sub-Editor, Deputy Editor, Epigraphical Assistant, Deputy Librarian, Assistant Librarian and Library Assistants, employed in the respondent-University claimed that in view of their qualifications, duties, functions and responsibility discharged they belong to the

Academic staff of the University. Some of them even claimed to be "teacher" within the meaning of the definition under the Act and the Statute. It was submitted that vide the impugned Statute the University prescribed 60 years of age for superannuation of teachers of the University and 58 years of age for others. It was alleged that the classification made was unreasonable, unjust and without any nexus which required to be quashed. As the petitioners and the teachers were similarly situated, they claimed their right to remain in service of University upto 60 years of age. The action of the respondent was held to be violative of Article 14 & 16 of the Constitution. It was contended that having regard to the qualification, nature of work and other functions being performed by the appellants they fall in the same class as that of teachers of the University and could not be termed to be administrative staff or other ministerial staff for the purposes of retiring them at the age of 58 years. It was contended that the expression "teacher" in Clause 3(1) of 1984 Statute ought to have included the academic staff of the University within the definition of "teacher" entitling them to retire after attaining the age of sixty years. The appellants claim that they were entitled to declaration to the effect that their age of retirement was sixty years. Reliance was placed on the principle of "Industry-cum-region" applicable to the Industrial employees. It was contended that the judgment of this Court in UNIVERSITY OF MYSORE v. P. MARIBASAVARADYA'S case (supra) required reconsideration.

3. It has been argued before us that the appellants have not been grouped with those who were similarly situated and that the respondent-University wrongly deprived them to remain in service till the attainment of age of 60 years. It is submitted that by virtue of the impugned statute the service conditions of the petitioners have been altered to their disadvantage. As the classification was unreasonable, unjustified and without any nexus the same required to be quashed.

4. In dealing with such a plea this Court in UNIVERSITY OF MYSORE v. P. MARIBASAVARADYA'S case held:

"13. The only point that arises for consideration is:-

Whether the impugned order dated 28.1.1989 (Annexure - E) permitting the respondents to retire from service is valid and sustainable in law?

In view of the dear definition contained in Section 2(7) and 2(8) of the Act and Statute No. 3 of 1984 Statutes, there is no scope to construe the respondents as Teachers of the University. We need not stretch or strain the definition of the "Teachers of the University" so as to include the respondents when the only particular class of persons are included in the said definition without leaving any scope to include other class of persons. In other words the respondents stood excluded from the definition of the University Teachers and fit in the category of other employees.

14. The qualifications prescribed for the post of Research Assistants Class-I and

II and also indicate that they are not intended for the purpose of teaching. The appellants in their return filed in the Writ Petitions have categorically stated that the job of the respondents was to copy the old scripts in the form of the new manuscripts so as to edit them and print them in the form of modern books. They were not assigned any teaching work and as a matter of fact they have never taught any subject as such in the University. Thus, even on facts they were never considered as Teachers of the University. Further, the respondents were not the persons appointed for the purpose of imparting instructions within the meaning of "Teachers of the University" as defined in Section 2(8) of the Act.

15. The respondents were also not appointed as Teachers u/s 49 of the Act. The method of recruitment of teaching staff is entirely different from the non-teaching staff. The post of Research Assistants are filled up as per the provisions of Section 50 of the Act. Having regard to the nature of work, mode and manner of the recruitment, classification of their category and conditions of service, the respondents cannot be placed on par with the Teachers. When the respondents constitute separate class, they cannot complain of any discrimination. The Research Assistants who are unequal to the Teachers of the University cannot contend that they are discriminated as such. They cannot be considered as equals in the matter of attaining the age of superannuation. Any such attempt in view of the definitions contained in Section 2(7), 2(8) and Statute No. 3, would amount to re-writing them to that extent. When the academic body dealing with the affairs of the University in its wisdom has framed these Statutes 1984, probably taking into consideration all aspects of the matter in exercise of the power conferred under the statute, it is not open to add, amend or abridge such statute particularly when the Statutes in question are framed in accordance with law, as observed by the learned Single Judge himself in para-12 of the order."

5. The learned Counsel appearing for the appellants submitted that as the impugned Statute was not tested on the touchstone of reasonable classification as mandated by the provisions of Article 14 of the Constitution, the ratio was not applicable in the case and in the alternative as the judgment in the case has been rendered without having regard to the provisions of Articles 14 & 16 of the Constitution of India, the same required reconsideration.

6. Equality before law and equal protection of laws is the heart and soul of the Constitutional system adopted by this country. The right to equality and equal protection of laws under Article 14 are genus and the right to non-discrimination are the species. Equality as contemplated under the Constitutional scheme means equality among equals. The doctrine of equality is considered to be a corollary to the concept of Rule of Law which postulates that every executive action, if it is to operate to the prejudice of any person must be fair and referable to legal authority. What Article 14 prohibits is the class legislation and not reasonable classification. If classification is based upon reasonable criteria and the persons belonging to well-defined class are treated equally, the vice of discrimination would not be attracted. In order to pass the test of reasonable

classification the impugned Statute, order or notification is required to pass the twin tests of permissible classification viz.,

(i) that the classification must be founded on an intelligible differentia which distinguishes persons or things that are grouped together from others left out of the group and;

(ii) that, that differentia must have a rational relation to the object sought to be achieved by the impugned statute or order.

7. It is not conceived that the classification should be scientifically perfect or logically complete. The Court would not interfere unless it is shown that the classification resulted in inequality amongst the persons similarly situated. The reasonable classification expected to stand the test of the Constitutional guarantees requires that such classification was real and substantial which contemplated some just reasonable relation to the job of the legislation. The Courts have not to determine as to whether the impugned action has resulted in inequality but have to decide whether there was some differentia which had an object to be achieved by the impugned action. Mere differentiation per se does not amount to discrimination attracting the operation of the guarantee of equality. The purpose and object of the impugned action has to be ascertained from the attending circumstances in each case.

8. The Supreme Court in *Lachmandas Kewalram Ahuja and Another Vs. The State of Bombay*, held that:

"In applying the dangerously wide and vague language of the equality clause to the concrete facts of life, a doctrinaire approach should be avoided".

9. In *Bachan Singh, Sher Singh and Another and Ujagar Singh and Another Vs. State of Punjab and Others*, , the Supreme Court held that, where a provision is challenged as arbitrary and discriminatory, normally the initial burden to prove it as such lies upon the petitioners. In exceptional cases the initial burden may be placed upon the State. Elaborating the legal position the Supreme Court in the case held:

"35. So far as the question of burden of proof in a case involving a challenge under Article 14 is concerned, I must concede that the decisions in *Ram Krishna Dalmia Vs. Shri Justice S.R. Tendolkar and Others*, and *Mohd. Hanif Quareshi and Others Vs. The State of Bihar*, and several other subsequent decisions of this Court have clearly laid down that there is a presumption in favour of constitutionality of a statute and the burden of showing that it is arbitrary or discriminatory lies upon the petitioner, because it must be presumed "that the legislature understands and correctly appreciates the needs of its own people, that its laws are directed to problems made manifest by experience and that its discriminations are based on adequate grounds." Sarkaria, J. has pointed out in the majority judgment that underlying this presumption of constitutionality "is the rationale of judicial restraint, a recognition of the limits of judicial review, a

respect for the boundaries of the legislative and judicial functions and the judicial responsibility to guard the trespass from one side or the other." The learned Judge with a belief firmly rooted in the tenets of mechanical jurisprudence, has taken the view that "the primary function of the Courts is to interpret and apply the laws according to the wilt of those who made them and not to transgress into the legislative domain of policy making." Now there can be no doubt that in adjudication upon the constitutional validity of a statute, the Judge should show deference to the legislative judgment and should not be anxious to strike it down as invalid. He does owe to the legislature a margin of tolerance and he must constantly bear in mind that he is not the legislator nor is the Court a representative body. But I do not agree with Sarkaria, J. when he seems to suggest that the judicial role is as it was for Francis Bacon, "jus dicere and not jus dare; to interpret law and not to make law or give law". The function of the Court undoubtedly is to interpret the law but the interpretative process is a highly creative function and in this process, the Judge, as pointed out by Justice Holmes, does and must legislate. Lord Reid ridiculed as "a fairytale" the theory that in some Aladdin's cave is hidden the key to correct judicial interpretation of the law's demands and even Lord Diplock acknowledged that "The Court may describe what it is doing in tax appeals as interpretation. So did the priestess of the Delphic Oracle. But whoever has final authority to explain what Parliament meant by the words that it used, makes law as if the explanation it has given were contained in a new Act of Parliament to reverse it." Unfortunately we are so much obsessed with the simplicities of judicial formalism which presents the judicial role as jus dicere, that, as pointed out by David Pannick in his "Judicial Review of the Death Penalty", "we have, to a substantial extent, ignored the Judge in administering the judicial process. So heavy a pre-occupation we have made with the law, its discovery and its application by independent agents who play no creative role, that we have paid little, if any, regard to the appointment, training, qualities, demeanour and performance of the individuals selected to act as the mouth of the legal oracle." It is now acknowledged by leading jurists all over the world that Judges are not descrutinised and passionless instruments which weigh do on inanimate and impartial scales of legal judgment, the evidence and the arguments presented on each side of the case. They are not political and moral eunuchs able and willing to avoid impregnating the law with their own ideas and judgment. The judicial exercise in constitutional adjudication is bound to be influenced, consciously or subconsciously by the social philosophy and scale of values of those who sit in judgment. However, I agree with Sarkaria, J. that ordinarily the judicial function must be characterised by deference to legislative judgment because the legislature represents the voice of the people and it might be dangerous for the Court to trespass into the sphere demarcated by the constitution for the legislature unless the legislative judgment suffers from a constitutional infirmity. It is a trite saying that the Court has "neither force nor will but merely judgment" and in the exercise of the judgment, it would be a wise rule to adopt to presume the constitutionality of a statute unless it is shown to be invalid, but even here it is necessary to point out that this rule is not a rigid

inexorable rule applicable at all times and in all situations. There may conceivably be cases where having regard to the nature and character of the legislation, the importance of the right affected and the gravity the injury caused by it and the moral and social issues involved in the determination, the Court may refuse to proceed on the basis of presumption of constitutionality and demand from the State justification of the legislation with a view to establishing that it is not arbitrary or discriminatory. There are times when commitment to the values of the Constitution and performance of the constitutional role as guardian of fundamental rights demands dismissal of the usual judicial deference to legislative judgment."

10. It is expected from the petitioners to plead and place on record the relevant facts which according to them amounted to the denial of the equality before law and equal protection of laws. Once the initial burden of proof is discharged, it is obligatory for the State or the authorities to satisfy the Court that the action impugned did not amount to discrimination and that the classification contemplated by the impugned action was reasonable. As and when it is shown that the executive has been responsible for non-observance of doctrine of equality and equal protection of laws, the Constitutional Courts are under an obligation to immediately interfere and protect the rights of the aggrieved by granting the appropriate relief. To discharge the burden of proof the citizen is not required to prove the alleged violation in the manner and to the extent as expected in the Civil or Criminal trial. The citizen is required only to show prima-facie that the rule of law postulated by the Constitution had been violated and that the action impugned was prima-facie discriminatory which deprived the similarly situated persons the right of equality.

11. Applying the tests noted herein above it is apparent that the appellants did not discharge the initial onus of proof of prima facie satisfying the Court that the impugned statute was violative of Article 14 & 16 of the Constitution of India. The mere fact that the statute provided a different age of retirement for the teachers of the University was by itself not sufficient to conclude that the same was discriminatory or that the classification contemplated was not reasonable. It has been conceded before us that that classification was made in favour of a specified class i.e., the teachers as defined u/s 2(7) and 2(8) of the Karnataka State Universities Act 1976 (hereinafter called the "Act"). The classification thus made in favour of teachers cannot be held to be discriminatory. Such classification was held permissible in *State of Madhya Pradesh Vs. Hari Datt Sharma*, . In *Life Insurance Corporation of India and Others Vs. S.S. Srivastava and Others*, , it was held that while determining the question regarding the fixation of age for retirement the Court can take judicial notice of different age of retirement prevailing in several services in the Country. The discrimination as regards the age of retirement between Employees belonging to different classes though in the same service could not be termed to be discriminatory. The teachers within the meaning of the Act include Professors, Readers, Lecturers and other persons imparting instructions in any affiliated college. Even though

the definition is inclusive, yet it is only for the University to consider and decide as to who were the persons appointed for the purpose of, imparting instructions in the University or in the colleges maintained by the University. This Court cannot embark upon the task of deciding as to who was a teacher within the meaning of the Act. The Division Bench of this Court in *University of Mysore v. Martbasavaradya*'s case supra considered this aspect of the matter as well and rightly came to the conclusion that the appellants therein who were the Research Assistants could not be held to be teachers on the basis of the performance of their duties. Clause (d) of statute 2 of the impugned statutes defined the teacher of the University to mean such persons who were appointed for the purposes of imparting instructions in University or in any college maintained by the Universities. It is admitted that none of the appellants before us was appointed as teacher of the University for being entitled to the benefit of the Statute 3 which is impugned before us. Whether all the appellants or any one of them was imparting instructions is a question which can properly be appreciated and adjudicated by the University, the employer of the appellants. This Court cannot embark upon deciding the academic question on the basis of assumptions and presumptions. The appellants have not been in a position to persuade us to disagree with the earlier judgment of this Court in the *UNIVERSITY OF MYSORE v. P. MARIBASAVARADYA*'S case. We are also of the opinion that the classification contemplated by the impugned statute is neither unreasonable nor without any basis.

12. In their petitions the appellants have in fact prayed for the issuance of a declaration in their favour entitling them also to the benefit of the impugned statute. While exercising the Writ Jurisdiction the High Court would not normally grant merely a declaratory relief. A five Judges bench of Punjab and Haryana High Court in CWP 11694/1994 16.5.96, *M.C. SHARMA v. PUNJAB UNIVERSITY, CHANDIGAR AND ORS.*, held;

"The principles underlying the grant of specific relief to be granted by declaratory decrees and injunctions can be said to be applicable in the cases for the grant of relief of Writs under Article. 226 of the Constitution of India with certain limitations and conditions as spelt out under the constitution and circumscribed by legal pronouncements.

Upon consideration of various aspects of the matter, it can be said that the Courts would normally not grant or issue more declaratory Writs unless the person aggrieved has asked for the consequential reliefs available to him. This rule, however, cannot be held to be absolute and is subject to exceptions that where despite declaration in terms of Article 226, the petitioner is not entitled to the further consequential relief on account of some legal bar or circumstances beyond his control and in that event he cannot be non-suited or deprived of the relief as prayed for by him in terms of Article 226 of the Constitution of India. In exceptional cases, the High Court may be justified to grant the relief merely in a declaratory form after being satisfied that the person approaching the Court was

prevented from praying for any other consequential relief on account of the legal impediment or bar of jurisdiction created by some statute."

13. The present case cannot be termed to be an exceptional case requiring the issuance of direction only in declaratory form as prayed for by the appellants.

14. The appellants have alternatively prayed that a direction be issued to the respondents to make the provision of the impugned statute applicable in their case as well. In effect and in the sense the appellants want us to issue a direction for enactment and modification of the Rules to redress the grievances of the appellants. The High Court, in exercise of its Writ Jurisdiction under Article 226 of the Constitution cannot ordinarily issue directions either for making of the rules or making them applicable to a certain class of citizens. The power of making the rules and directing its application is within the domain of the executive or the rule making authority regarding which no direction can be issued under the normal circumstances. In this behalf we are fortified in our views by the judgment of the Supreme Court in case of State of Jammu and Kashmir Vs. A.R. Zakki and others, :-

"10. 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."

15. The appellants have also not been in a position to satisfy us to declare the impugned statute as unconstitutional and to hold that its benefit could not be given to the teachers as defined under Clause (d) of Statute 2 of the Mysore University Employees (Conditions of Service Statute 1984. Depriving the benefit of the statute to the teacher, who we have already held to be a separate class in themselves is neither warranted nor desired particularly when the classification has been held to be reasonable and not violative of Article 14 & 16 of Constitution of India.

16. The appellants have not canvassed any other point which could have persuaded us either to set-aside the judgement of the learned Single Judge or to arrive at a different conclusion than the one arrived in UNIVERSITY OF MYSORE v. P. MARIBASAVARADYA's case. We are also of the opinion that the earlier judgments of this Court does not require any reconsideration by a larger bench.

17. Before parting with the judgment we would however like to observe that the respondent-University may, in its discretion consider the grievance of the

appellants and other employees like them for conferment of the benefit of the retirement age as has been done in the case of teachers. While considering the desirability of raising the age of retirement with respect to employees other than the teachers, the University may keep in mind the existing conditions in the Society, the average age of the citizens and the hardships to which other employees apprehend to be subjected to on account of their retirement at the age of 58 years under the existing statutes.

18. There is no merit in these appeals which are dismissed without any order as to costs but with the observations as noted herein above.