

(1988) 09 P&H CK 0136
In the Punjab And Haryana At Chandigarh
Case No : Civil Writ Petition No. 2351 of 1985

Dev Raj Vohra and Others

APPELLANT

Vs

State of Haryana and Others

RESPONDENT

Date of Decision : 15-09-1988

Acts Referred:

Constitution of India, 1950 — Article 12, 15, 16, 16(4), 309
Punjab Financial Commissioners Office (State Service Class III) Rules, 1957 — Rule 20, 7(2)

Citation : (1989) 2 ILR (P&H) 19

Hon'ble Judges : J.V. Gupta, J; Amarjeet Chaudhary, J

Bench : Division Bench

Advocate : R.K. Malik, for the Appellant; M.S. Jain, Addl. A.G. Haryana and Viney Jain, for the Respondent

Judgement

J.V. Gupta, J.—This petition was admitted by the Division Bench at the time of motion hearing since it involves consideration of the policy decision of the State Government, affecting a large number of employees.

2. The Petitioners and Respondents Nos. 3 to 10 were appointed Clerks in the office of the Financial Commissioner, Haryana, and were promoted as Assistants. On 9th February, 1979, the State of Haryana issued instructions, Annexure P-2, in which it was provided, inter alia, that in the case of posts to be filled up by promotion, the benefit of reservation should be given where the basis of promotion is seniority-cum-merit and the benefit of reservation should not be made available where promotion is to be given on the basis of seniority-cum-fitness. According to the Petitioners, Respondents Nos. 3 to 8, though junior to them, were promoted as Deputy Superintendents and Superintendents, by giving them the benefit of reservation in view of the instructions, Annexure P-2. It is these instructions Annexure P-2 which are under challenge in this writ petition primarily on the ground that the Punjab Financial Commissioner's Office (State Service Class III) Rules, 1957 (hereinafter referred to as the Rules), by which the Petitioners and Respondents Nos. 3 to 8 are governed, do not provide any

reservation as such and, therefore by executive instructions the Rules cannot be amended.

3. In the return filed on behalf of Respondents Nos. 1 and 2, it is admitted that Respondents Nos. 3 to 8 were promoted as Deputy Superintendents, *inter alia*, by giving them the benefit of reservation as laid down in Government instructions Annexure P-2. In paragraph 8 of the return, it has been averred that for the purpose of promotion by selection as provided in Rule 7(2) of the Rules, the Government has evolved a method of seniority-cum-merit by virtue of instructions dated 14th/17th September, 1956 and 13th April, 1972, attached as Annexure "A" and "B" to the return. According to the return, under Rule 7(2) of the Rules, promotion from the post of Clerk to the post of Assistant is to be made strictly by selection and, as selection for the purpose of promotion entails chances of abuse, the Government has, therefore, evolved a method of seniority-cum-merit as per instructions Annexure "A" and "B" on the basis of which the officials are to be selected to the higher posts. In other words, since the selection contemplated under Rule 7(2) of the Rules is to be made on the basis of seniority-cum-merit because of instructions Annexure "A" and "B", instructions Annexure P-2 dated 9th February, 1979 are applicable to these posts and, therefore, the reservation has been rightly made¹ by the State Government Respondents Nos. 3 to 8 have been promoted accordingly.

4. Learned Counsel for the Petitioners contended that when the statutory rules provide for selection, as referred to in Rule 7(2), instructions Annexure P-2 cannot override the said statutory rules. In support of this contention he referred to a judgment of the Andhra Pradesh reported as P.V.S. Janardhan Rao and Ors. v. Union of India and Ors. 1981 (3) S.L.R. 614, in which reliance is placed on the judgments of other High Courts as well. He also cited a Full Bench judgment of the Himachal Pradesh High Court rendered in Shri Hari Datt Kainthla, Chief Judicial Magistrate and Anr. v. The State of Himachal Pradesh and Ors. 1974 (1) S.L.R. 208, wherein the scope of seniority-cum-merit and seniority-cum-fitness has been discussed. On the other hand, learned Additional Advocate-General, Haryana, submitted that the executive instructions reserving posts for members of Scheduled Castes were valid as the same did not violate the statutory rules. In support of this contention, he referred to a Full Bench judgment of this Court in Kanwal Parkash etc. v. The State of Punjab etc. ILR (1977) 1 P&H 40.

5. It may be observed at the outset that Rule 20 of the Rules contemplates power of relaxation and it reads as under:

Where the Government is of the opinion that it is necessary or exigency to do so it may, by or, for the reasons to be recorded in writing, relax any of the provisions of these Rules with respect to any class or category of persons.

It may also be observed that the instructions Annexures "A" and "B" filed with the return, in which it has been provided that the selection is to be made on the basis of seniority-cum-merit, are not being challenged in this writ petition. It is,

therefore, evident that the selection under Rule 7(2) of the Rules is to be made on the basis of seniority-cum-merit. The argument raised on behalf of the Petitioners that, by executive instructions, reservation could not be made by the State Government, has been answered by the Full Bench judgment of this Court in Kanioal Parkash (supra). The observations made in paragraph 32 thereof read as under:

We may now consider the argument whether the executive instructions reserving posts for the members of scheduled castes/tribes and backward classes run counter to the Punjab Civil Secretariat (State Service Class III) Rules, 1952, or not. These Rules have been promulgated by the Governor of Punjab in exercise of powers under Article 309 of the Constitution. There is no provision in these Rules debarring the Government to make reservation of post for the members of scheduled castes/tribes. The opening words of Article 309 are "subject to the provisions of this Constitution." This implies that the rules framed under Article 309 of the Constitution would give way to the other provisions of the Constitution if and when a question regarding their conflict inter se is raised. The instructions issued under Article 16(4) read with Articles 46 and 335 have been described as constitutionally sanctified instructions by Krishna Iyer, J., in N. M Thomas's case (supra). It is not necessary that for affording relief to the members of the backward classes, the State should introduce legislative measures. So far as this Court is concerned, this matter stands concluded by a string of precedents. In Hira Lal v. Chief Conservator of Forests, Punjab CW No 271 of 66 decided on 29th November, 1966, Division Bench of this Court held as under:

The point before us, however, is not whether any statutory Services Rules, which might be governing promotions in the various departments, are contravened by any executive instructions, but whether provision for reservation of appointment or posts in favour of any Backward Classes of citizens can, under Clause (4) of Article 16, be made by an administrative order or whether legislation is necessary. Clause (4) itself does not speak of any legislation required for the purpose and in this respect it may be considered with Clauses (3) and (5) of Article 16. In M.R. Balaji v. State of Mysore AIR 1968 S.C. 649, it was laid down that the argument that provision under Clause (4) of Article 15 can be made by the State only by legislation must be repelled. It was observed that under Article 12 the State includes the Government and Legislature of each of the States, and so, it would be unreasonable to suggest that the State must necessarily mean the Legislature and not the Government. Besides, where the Constitution intended that a certain action should be taken by legislation and not by executive action, it has adopted suitable phraseology in that behalf, and in this connection reference was made to Clauses (3) and (5) of Article 16. In this stands precisely in the same position as Clause (4) of Article 15;.

6. Again in paragraph 35, the observations made are as follows:

The Government is the final authority to order that provisions of the Rules should be relaxed with respect to any class or category of persons. The instructions

have been issued by the Government itself and the reason why the issuance of these instructions was considered necessary is also contained therein. The learned Counsel for the Petitioners argued that for making a relaxation there should be an express declaration by the Government in that behalf. We see no force in this contention. In *P. Balakotaiah Vs. The Union of India (UOI) and Others*, , it was held that when an authority passes an order which is within its competence, the same cannot fail merely because it purports to have been made under a wrong provision if it can be shown to be within its powers under any other rule, and that the validity of an order should be judged on a consideration of its substance and not its form. This principle applies with full vigour to the instant case. If the Rules enable the Government to relax their provisions in favour of any class of persons, the relaxation made cannot be declared as illegal merely because the orders passed or the instructions issued do not expressly state that the relevant Rules should stand relaxed* in the case of the field covered by the instructions.

Similarly, in the present case also, the afore-quoted Rule 20 of the Rules contemplates power of relaxation and enables the State Government to relax the provisions of the Rules. That being so, it could not be seriously argued on behalf of the Petitioners that reservation made by the executive instructions, vide Annexure P-2, is in any way violative of the Rules framed under Article 309 of the Constitution of India. The judgment in *P.V.S. Janardhan Rao's case* (supra) relied upon by the learned Counsel for the Petitioners is distinguishable as it does not stem from the judgment whether the Rules therein provided any relaxation or not. There in the finding was ; "In effect, therefore, the administrative instructions have substantially amended the Rules". In the present case, it could not be successfully argued that the administrative instructions have amended the Rules in any manner. Rather, the Rules in the present case are silent as regards reservation and by executive instructions, the same has been provided and, according to the judgment of the Full Bench of this Court in *Kanwal Parkash's case* (supra), the executive instructions reserving posts for Scheduled Castes have been validly issued pursuant to a command of the highest order contained in the Constitution and their effect cannot be whittled down by the Rules framed under Article 309 of the Constitution. Moreover Rule 20 of the Rules authorizes the State Government to relax the rules with respect to any class or category of persons as was the case before the Full Bench of this Court and, therefore, reservation of posts for Scheduled Castes could be made by an executive order and it was not necessary for the State Government to have recourse to legislative measures.