

(2009) 03 AP CK 0015

In the Andhra Pradesh High Court

Case No : Writ Petition No. 7726 of 1999

Dr. S. Mahabub Basha

APPELLANT

Vs

The Government of A.P. and Others

RESPONDENT

Date of Decision : 06-03-2009

Acts Referred:

Andhra Pradesh Subordinate Service Rules — Rule 3, 4
Constitution of India, 1950 — Article 14, 16, 21

Citation : (2009) 5 ALD 670(1)

Hon'ble Judges : Ghulam Mohammed, J;G. Bhavani, J

Bench : Division Bench

Judgement

Ghulam Mohammed, J.—This Writ Petition has been filed challenging the orders of the Andhra Pradesh Administrative Tribunal in O.A. No. 1924 of 1997 dated 2-3-1998.

2. The brief facts of the case leading to filing of the writ petition are that the petitioner was originally appointed as Veterinary Assistant Surgeon on 23-12-1985 having Post Graduate Degree in Veterinary Science with Genetics and Animal Breeding. The petitioner passed all the departmental tests. It is stated that the post of Assistant Director (Statistics) is to be filled by direct recruitment and by promotion among Veterinary Assistant Surgeons according to Special Rules issued vide G.O. Ms. No. 729 dated 24-9-1977 in the Animal Husbandry Department.

3. The Government of Andhra Pradesh in supersession of the Special Rules issued vide G.O. Ms. No. 729 dated 24-9-1977 amended the service Rules of Animal Husbandry Department vide G.O. Ms. No. 54 dated 6-6-1996 and the same was published in the Gazette with effect from 12-6-1996. According to the amended Rules, the structure of all the posts were categorized into four classes. The posts that are in existence in Statistical line in pre-revised rules were classified under Class-C. In pre-revised Special rules there was no post of Veterinary Assistant Surgeon (Statistics), whereas in the new rules the post of Veterinary Assistant

Surgeon (Statistics) was created under category (4) of Class C. For the first time the post of Veterinary Assistant Surgeon (statistics) was created. Under the old rules there were posts of Assistant Director, Animal Husbandry (Statistics) likewise Deputy Director of (Statistics). According to the amended Rules, the post of Assistant Director, Animal Husbandry (Statistics) has to be filled by promotion of Veterinary Assistant Surgeon in category (4) of Class-C service. i.e. VAS Statistics.

4. The case of the petitioner is that by virtue of new rules the petitioner was made in-eligible for promotion to the post of Assistant Director (Statistics), Animal Husbandry. According to the new rules the post of Veterinary Assistant Surgeon (Statistics) shall be filled by direct recruitment and by transfer among Veterinary Assistant Surgeons from Class-A or Class-B services, provided they must possess Post Graduate Diploma or Degree in Bio- Statistics. The method of appointment, according to the amended rules, to the post of Veterinary Assistant Surgeon is by direct recruitment and qualifications prescribed is one must possess a Bachelors Degree in Veterinary Sciences and Animal husbandry or its equivalent qualification from among recognized University/Institutions in India or abroad and also Post-Graduate Diploma in Microbiology /Parasitology/ Epidemiology/ Virology/Immunology/ Pathology and further promotions to the post of Assistant Director (Animal Husbandry) shall be made from the persons of category 4 of Class B service. In case of Mr. Narsimha Rao Deshpandey, B. Devaraj and K. Ramasingh who were possessing only B.V.SC(AH) Degree were given promotions in the VBRI branch by following the old rules and their promotions were effected after issuing the new rules issued in G.O.Ms. No. 54 dated 6-6-1996, and when his turn came the authorities are insisting for new rules and qualification. It is further case of the petitioner that his name was included in the panel year 1995-96 but the same was not materialized and several promotions were made in the department in other categories except in Statistics category because of non-availability of candidates with Bio-Statistics degree.

5. The respondents filed a counter inter alia stating that in the year 1997, Dr. S. Mahaboob Basha, Veterinary Assistant Surgeon filed O.A. No. 1924 of 1997 before the Tribunal to consider his case for posting as Veterinary Assistant Surgeon (Statistics) and also to promote him as Assistant Director of Animal Husbandry (Statistics), by declaring Rule 3 of the Rules issued in G.O. Ms. No. 54 dated 6-6-1996 insofar as it prescribes the qualifications of post Graduate Diploma or degree in Bio-Statistics for transfer of Veterinary Assistant Surgeon from Class A or Class B to the post of Veterinary Assistant Surgeon (Statistics) in Class C. The Tribunal by its judgment dated 2-3-1998 dismissed the O.A. holding that the petitioner cannot be considered for promotion under old rules in view of the decision of the Supreme Court in C.A.Nos. 404-405 of 1997 and batch dated 15-1-1997.

6. It was also stated in the counter affidavit that during the panel year 1995-96

the petitioner's name was included in the proposals for promotion to the post of Assistant Directors of Animal Husbandry (Statistics) in accordance with the pre-revised Special Rules for A.P. Animal Husbandry Service. But those proposals could not be materialized pending revision of the special Rules for A.P. Animal Husbandry Service. Thereafter, revised Special Rules for A.P. A.H. Service were issued in G.O.Ms. No. 54 dated 6-6-1996 and according to the new rules, the petitioner is not eligible for promotion as Assistant Director of Animal Husbandry (Statistics).

7. It is also further stated that one Dr. S. Surya Prakasa Rao, filed OA No. 1224 of 1996 before the Tribunal to promote him as Assistant Director of Animal Husbandry in accordance with the Special Rules for A.P.A.H. Service issued Vide G.O. Ms. No. 729 dated 24-9-1977. Since the vacancy to which he sought promotion arose prior to issuance of new rules, and these rules were superseded and a fresh set of Special Rules for A.P. A.H. Service were issued vide G.O. Ms. No. 54 dated 6-6-1996 which were published in A.P. Gazette No. 258 dated 12-6-1996. The Tribunal vide its judgment dated 5-6-1996 in O.A. No. 1224 of 1996 directed the Government to consider the promotion of Dr. S. Surya Prakash Rao, in accordance with the Special Rules issued vide G.O. Ms. No. 729 dated 24-9-1997 the Government thereafter filed Review Petition and the same was dismissed. Aggrieved by the judgment of the Tribunal Dr. K. Ramulu and another filed SLP (C) Nos. 17073 of 1996 and 17074 of 1996 before the Supreme Court. After hearing both the sides, the Apex Court by its judgment reported in K. Ramulu v. S. Suryaprakash Rao AIR 1987 SC 1803 set aside the order of the Tribunal holding that that the first respondent therein 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 is justifiable on the material available on from the record. Thus, it is stated in the counter that from 12-6-1996 onwards, the promotion to the posts of Assistant Director of Animal Husbandry (Statistics) in category (3) of Class C also has to be dealt within accordance with the revised special rules for A.P. Animal Husbandry service issued in G.O. Ms. No. 54 dated 6-6-1996 and the petitioners is not eligible for such promotion.

8. It is further stated in the counter that as per revised Special Rules for A.P. A.H. Service issued vide G.O. Ms. No. 54 dated 6-6-1996 the method of appointment to the post of Assistant Director of Animal Husbandry (Statistics) in category (3) of Class shall be by promotion of Veterinary Assistant Surgeon in Category (4) of Class C, (2) by appointment by transfer from Statistical Investigator in Animal Husbandry Department. As the category of Veterinary Assistant Surgeon (Statistics) could not be formulated, the contention of the petitioner to promote him to the post of Assistant Director of Animal Husbandry (Statistics) as per the qualifications and method of appointment prescribed under the repealed rules, does not stand for any reason.

9. Sri A. Suryanarayana Murthy, learned Counsel for the petitioner by taking us

through the material produced before this Court, vehemently contended that the Government filled up 4 posts of Assistant Director (Statistics) by taking into consideration of amended Rule issued in G.O.Rt. No. 23 dated 21-5-2005 wherein 1st, 2nd and 3rd vacancies were filled up by Statistical Investigators and the 4th vacancy was given to one N. Sadasiva Reddy, respondent No. 4 in this writ petition, without following the roster prescribed in the amended rule. According to the learned Counsel for the petitioner the official respondents have deliberately not filled up the post under roster point No. 2 and the petitioner being senior and fully eligible ought to have been considered for the said post.

10. Learned Government Pleader for Services, while supporting the judgment of the Tribunal, would submit that the petitioner has not been put to loss of any of his promotion as he was in fact promoted in his regular channel as Assistant Director and the said services in such promoted post could not be regularized till now due to the pendency of the above writ petition only and that the writ petitioner will be considered for regularization of his services as Assistant Director in regular channel in post in which he was occupying as on today after disposal of the present writ petition.

11. On the other hand, Sri K. Ram Reddy, learned Counsel for the unofficial respondents contends that the Tribunal on adjudication of the matter rightly declined to entertain the O.A. and hence, no interference is warranted in this Writ Petition. In support of his contention, learned Counsel relied on the decisions reported in Dr. Ramulu and another, etc. Vs. Dr. S. Suryaprakash Rao and others, , T.R. Kothandaraman and Others Vs. Tamil Nadu Water Supply and Drainage BD and Others, , Punjab State Electricity Board and Others Vs. Malkiat Singh, . There is no dispute with regard to the propositions laid down in these judgments.

12. In Ramulu's case (supra), the respondent No. 1 therein in was a Veterinary Assistant Surgeon in A. P. Animal Husbandry Department. He filed O. A. 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, the appeals have been filed by the contesting respondents as well as by the State. It was contended before the Apex Court that the respondent therein 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 and 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. The Apex Court in those circumstances, while allowing the appeals, held that the Government has taken a conscious

decision not to form and operate panel for considering promotions till the rules are amended. The relevant portion of the judgment reads as under:

(5) SHRI L. Nageswara Rao, learned Counsel for the appellants, has raised three-fold 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 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 to 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 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. . 12/06/1996, the date on which the amended Rules made in G. P. Ms. No. 54 of Animal Husbandry and Fisheries Department, Government of A. P. came into force.

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 appointment 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 requires 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 to determine the eligibility of" the candidate for such appointment, which shall cease to be in force on the afternoon of the 31st December of the succeeding year or till the new panel is prepared, whichever is earlier. Second proviso to the Rules 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 not be arbitrary. As rightly pointed out by Shri L. Nageshwara Rao, the decision not to prepare the panel should be on valid and relevant considerations and it should not be 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 vacancy until the process is completed which they had started on "administrative grounds. " As seen, the process was completed and the Rules have come into force w. e. f. 12/06/1996....

(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 Vs. Union of India*, , 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 I. P. S. 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 O. A. , which was dismissed by the Tribunal. On appeal, this Court held thus (Para 7 of AIR) . . .

...

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 amounts 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, *The State of Haryana Vs. Subash Chander Marwaha and Others*, , *Miss Neelima Shangla, Ph. D. Candidate Vs. State of Haryana and Others*, , or *Jatinder Kumar and Others Vs. State of Punjab and Others*,

(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 of Assistant Director of Animal Husbandry Department in accordance with the repealed Rules and to operate the same.

13. In *T.R. Kothandaraman's case* (supra), it was inter alia held by the Supreme Court that promotion can be restricted on the basis of higher educational qualification, but total restriction cannot be imposed so as to block the chances of promotion. While determining the validity of the classification historical background, efficiency in service, need for higher education and social justice have to be kept in mind and a proper balancing of the same be made having regard to the object of the classification and that approach should be in consonance with Articles 14, 16 and 21 of the Constitution of India.

14. In *Malkiat Singh's case* (supra) it was held by the Apex Court as follows :

...It is settled law that mere inclusion of name of a candidate in the select list does not confer on such candidate any vested right to get an order of appointment. This position is made clear in para 7 of the Constitution Bench judgment of this Court in *Shankarsan Dash Vs. Union of India*, which reads:

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 amounts 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 *The State of Haryana Vs. Subash Chander Marwaha and Others*, , *Miss Neelima Shangla, Ph. D. Candidate Vs. State of Haryana and Others*, , or *Jatinder Kumar and Others Vs. State of Punjab and Others*, .

(5) THE same position is reiterated and followed by this Court in All India SC and

ST employees" Assn. and Anr. v. A. Arthur Jeen and Ors. (2001) 6 SCC 3801 and State of Orissa and Others Vs. Bhikari Charan Khuntia and Others etc., .

15. Having heard the learned Counsel on either side, the point that arises for consideration is as to whether the petitioner is eligible for promotion as Assistant Director (Statistics), from the date when the juniors were promoted.

16. The petitioner herein filed O.A before the Tribunal to consider his case for posting as Veterinary Assistant Surgeon (Statistics) by considering his qualification and for further promotion to the post of Assistant Director (Statistics) in Animal Husbandry Department by declaring Rule 3 of the new Rules issued in G.O.Ms. No. 54 dated 6-6-1996, insofar as prescribing qualification of Post Graduation Diploma or degree in "Bio-Statistics" for transfer of Veterinary Assistant Surgeon from Class-A/Class-B to the post of Veterinary Assistant Surgeon (Statistics) under Class C as illegal and arbitrary.

17. According to the new Rules, the method of appointment to the post of Veterinary Assistant Surgeon (Statistics), which was included in Category-4 of Class-C Service, was defined as (1) by direct recruitment and (2) by transfer of Veterinary Assistant Surgeon from Class-A or Class-B, provided he possess a P.G. Diploma or Degree in Bio-Statistics. The method of appointment to the posts of Assistant Director of Animal Husbandry (statistics) is (1) by promotion of Veterinary Assistant Surgeon in category (4) of Class C, and (2) by appointment by transfer from Statistical Investigators in Animal Husbandry Department. Under the above new rule the entire service got divided into 4 classes. Since the category of Veterinary Assistant Surgeon (Statistics) could not be formulated, promotions to the post of Assistant Director of Animal Husbandry (statistics) in category 3 of Class C was not taken up from the category of Veterinary Assistant Surgeon (statistics) till the amendment was issued to the special rules. Subsequently, the Government issued amendment to the special rules issued in G.O.Ms. No. 54 dated 6-6-1996 vide G.O.Rt. No. 23 dated 21-5- 2005. According to the amendment issued in G.O.Rt. No. 23, the ratio between the Veterinary Assistant Surgeon and Statistical Investigator for appointment to the post of Assistant Director (Statistics) is

18. As stated above, for the first time the post of Veterinary Assistant Surgeon (Statistics) was created. Under new Rules the post of Veterinary Assistant Surgeon (statistics) has to be filled by way of direct recruitment and by transfer of Veterinary Assistant Surgeon from Class-A or Class-B. But they prescribed two different qualifications for direct recruitment and for transfer candidates. For direct recruitment a Bachelor Degree in Veterinary Science is sufficient, whereas for appointment by transfer for in service candidates, higher qualification was prescribed i.e., a Bachelor Degree and P.G. Diploma or Degree in Bio-Statistics, which itself, in our considered view, is impermissible as it offend the Article 16 of the Constitution of India. It is stated that P.G. Diploma or Degree in Bio-Statistics is not being offered in any of the Universities in India. The Government too filed counter before the Tribunal accepting that there is no Veterinary Assistant

Surgeon available in the department with the qualification of P.G. Degree or Diploma in Bio- Statistics and also no such course is available in any Universities in India. Vide G.O. Rt. No. 23 dated 21-5-2005 the Government issued amendment to the Special rules issued vide G.O. Ms. No. 54 dated 6-6-1996. The relevant portion of the amendment reads as under :

G.O.Rt. No. 23 dt: 21-5-2003. ...

I) In Rule 2, under Class-C the expression Category (4) Veterinary Assistant Surgeon (Statistics) shall be omitted.

II) in the table under Clause (a) of Rule 3, under Class-C

(a) Against category-3, Assistant Director of Animal Husbandry (Statistics) under column (2) for item (i) the following shall be substituted namely "by promotion veterinary Assistant Surgeon in category 6 of Class-A.

(b) The category-4 "Veterinary Assistant Surgeon (Statistics)" and the corresponding entries in column (2) and (3) thereof shall be omitted.

(c) the following note (1) and (2) shall be added.

Note: 1) the ratio between Veterinary Assistant Surgeon and Statistical Investigators for appointment to the post of Assistant Director of Animal Husbandry (Statistics), the 1 and 3 and 5 vacancies shall be filled by promotion of the qualified Statistical Investigators and 2 and 4 the vacancies shall be filled by Veterinary Assistant Surgeons.

19. From the above amendment, it is clear that 1st, 3rd and 5th vacancies shall be filled up by promotion of qualified statistical investigators and 2nd and 4th vacancies shall be filled by Veterinary Assistant Surgeons. The contention of the learned Government Pleader that the petitioner has not been put to loss of his promotion as he was promoted in his regular channel as Assistant Director cannot be countenanced for the reason that the petitioner was not considered for promotion though his juniors were promoted. Though the policy decision taken by the Government in introducing the educational qualification rendering some existing employees ineligible for promotion cannot be questioned, the fact remains is that no such course is offered by any of the Universities in India. From a perusal of the record it is also seen that one N. Sadasiva Reddy and others were promoted vide proceedings dated 2-4-2006, pursuant to the issuance of G.O.Rt. No. 23. The Statistical Investigator in Animal Husbandry Department is eligible for appointment by transfer to the post of Assistant Director under the old Rules and under the new rules also the same position is maintained. The Statistical Investigator, which is a feeder category to the State wide post of Assistant Director (Statistics) comes in Class-C and their status and conditions both under old and new rules, there is no change. A veterinary Assistant Surgeon in general category who is eligible for appointment by transfer to the post of Assistant Director (Statistics) under the old Rules was completely made ineligible and he has to be converted as Veterinary Assistant Surgeon (Statistics)

that too with a qualification which is not available in any of the Universities in India, thus eliminating the entire feeder category to be considered for the said post.

20. As stated above, during the pendency of the litigation 5 posts in the cadre of Assistant Directors were available for promotion, and as per the roster fixed in G.O.Rt. No. 23 dated 21-5-2005, 2nd and 4th vacancies have to be filled up with the feeder category of Veterinary Assistant Surgeon and that similarly situated person one Mr. Sadasiva Reddy, Veterinary Assistant Surgeon was promoted as such vide roster point No. 4. The 2nd vacancy belong to Veterinary Assistant Surgeon was not filled up, to which the petitioner was in fact eligible for promotion at the relevant point of time.

21. For the foregoing discussion, we are of the view that the impugned order of the Tribunal is unsustainable and the writ petition is liable to be allowed with a direction to the respondents to consider promotion of the petitioner as Assistant Director (Statistics) from the date when his juniors were considered and promoted i.e. from 2-4-2006 by including his name in the panel prepared at roster point No. 2 above the name of Sri Jagan Mohan Rao, with all consequential benefits flowing from the said post. It is ordered accordingly.

22. Subject to above directions, the writ petition stands allowed. No costs.