

(1970) 04 DEL CK 0030

In the Delhi High Court

Case No : Civil Writ Appeal No. 560 of 1968

D.S. Sharma

APPELLANT

Vs

Union of India and Others

RESPONDENT

Date of Decision : 14-04-1970

Acts Referred:

Citation : AIR 1970 Delhi 250 : (1970) ILR Delhi 593

Hon'ble Judges : V.S. Deshpande, J;Hardayal Hardy, J

Bench : Division Bench

Advocate : P.P. Rao, K.C. Dua, Deepak Chaudhary and S.P. Aggarwal, for the Appellant;

Judgement

V.S. Deshpande, J.

(1) A constitutional question of first impression as to the nature and meaning of executive power of the President under the Constitution has arisen among other questions in this case.

(2) The accounts work of the main Department of Posts and Telegraphs used to be done by the petitioners designated as Senior Accountants governed by the Posts and Telegraphs Accountants' Service (Recruitment) Rules, 1958 at Annexure R-2 of the written statement as amended on 29th March 1963 at Annexure R-3. The accounts work in the Telecommunications Branch of the Department of Posts and Telegraphs was, on the other hand, done by the personnel of the Audit department called the Sas Accountants. The recruitment to the grade of Accounts Officers used to be made under the General Central Service Class Ii (Accounts/Administrative Officers) Recruitment Rules, 1968, dated 15th February 1968 at Annexure R-5 to the written statement. Under these rules, the Senior Accountants of the Posts and Telegraphs Department with five years' approved service in the grade were alone eligible for promotion as Accounts Officers.

(3) On 27th March 1968, as per letter at Annexure C to the writ petition, the

Government decided that the accounts work of the Telecommunications Branch of the Posts and Telegraphs Department should be transferred to the Accounts Department of the Posts and Telegraphs Board. Along with this work, the Sas Accountants belonging to the Audit department were also to be transferred to the Posts and Telegraphs Department. The terms and conditions of the transfer were settled by the Government on 16th May 1968 as per letter at Annexure D to the writ petition. The Sas Accountants formerly of the Audit department were equated with the Senior Accountants of the Posts and Telegraphs department and were to be designated as Senior Accountants. As per para (II) of Annexure D the inter-se seniority of the Sas Accountants formerly of the Audit department vis-a-vis the Senior Accountants of the Posts and Telegraphs department was to be fixed according to the length of the approved continuous service in the corresponding grades. Acting on this basis, on 6th July 1968, as per Annexure H, the Posts and Telegraphs department appointed Survashri S. Jayaraman and V. S. Srinivasan who were formerly Sas Accountants in the Audit department but who were since then transferred to the Posts and Telegraphs Department along with the accounts work of the Telecommunications Branch of the Posts and Telegraphs Department were on promotion as Accounts Officers.

(4) The petitioners who have been Senior Accountants of the Posts and Telegraphs Department from before the integration have filed these writ petitions (Civil Writ Petitions 560 and 561 of 1968) challenging the promotion of Survashri S. Jayaraman and V. S. Srinivasan as Accounts Officers on the following grounds namely:-

(1) The promotion was contrary to the statutory rules, namely. General Central Service Class Ii (Accounts; Administrative Officers) Recruitment Rules, 1968, dated 15-2-1968 at Annexure R-5 which provided for the promotion of only the Senior Accountants of the Posts and Telegraphs Department to the grade of Accounts Officers;

(2) The promotion could not be retrospectively validated by the two sets of statutory rules subsequently made by the Government, namely, (a) the Indian Audit and Accounts Department (Accountant General, Posts and Telegraphs) Transfer of Officers and Other Staff Rules, 1968 dated 30-8-1968 at Annexure R-6 and (b) the Indian Posts and Telegraphs Accounts and Finance Service Class Ii (Recruitment) Rules, 1968, dated 23-11-1968 at Annexure R-7;

and (3) The equation of the Sas Accountants formerly of the Audit department with the Senior Accountants of the Posts and Telegraphs Department for the purpose of promotion to the grade of Accounts Officers is discriminatory against the petitioners contrary to Articles 14 and 16 of the Constitution.

(5) Let us consider the above contentions in the order in which they have been set out.

(6) On 6th July 1968, the Posts and Telegraphs Accounts Officers (Recruitment) Rules, 1968 at Annexure R-5 were in force. The Government could not Therefore

legally appoint Survashri Jayaraman and Srinivasan as Accounts Officers inasmuch as their transfer to the Posts and Telegraphs Department, their designation as Senior Accountants and the fixation of their seniority vis-a-vis the pre-existing Senior Accountants of the Posts and Telegraphs department was all done by administrative orders at Annexures C and D to the writ petition. These administrative orders were strictly speaking inconsistent with the statutory rules at Annexure R-5. They could not have the effect of amending the statutory rules. They could not, Therefore, prevail against the statutory rules. The result was that strictly speaking the promotion of Survashri Jayaraman and Srinivasan, being contrary to the statutory rules, was illegal and, Therefore, initially invalid.

(7) The Government had however made the promotion only on a purely ad hoc and temporary basis. Apparently the Government did not have time to amend the existing statutory rules before actually making the promotion. But the Government soon put the administrative orders at Annexures C and D to the writ petition on statutory footing by promulgating the Indian Audit and Accounts Department (Accountant General, Posts and Telegraphs), Transfer of Officers and Other Staff Rules, 1968, on 30-8-1968 as per Annexure R-6 to the written statement. Under rule 1(2) thereof, these rules shall be deemed to have come into force on the first day of March 1968. It is now settled by the Supreme Court decision in B.S. Vadera Vs. Union of India (UOI) and Others, that the President acting under the proviso to Article 309 can give retrospective operation to the rules relating to the conditions of service. Shri P. P. Rao, learned counsel for the petitioners, relied upon the Supreme Court decision in The State of Mysore Vs. Padmanabhacharya etc., , to urge that the rules at Annexure R-6 are not rules relating to the conditions of service at all but were made only to validate the promotion made on 6th July 1968 which was ab initio void. A look at the content of the rules at Annexure R-6 however shows that they genuinely related to conditions of service. Rule 2 authorises the transfer to the Posts and Telegraphs Department of all persons who had been previously engaged in the accounting work relating to the Telecommunications Branch. The selection of persons for such a transfer was to be made by the Comptroller and Auditor General of India. Shri P. P. Rao attacked this rule as giving unfettered discretion to the Comptroller and Auditor General. But the discretion is subject to the guidelines contained in rule 2 itself. The transfer is to be effected according to the decision of the Government contained in the letter dated 1st March 1968. Secondly the transfer is to be of such officers and staff which shall, as far as possible, be persons who at the time of the transfer were engaged in the accounting work relating to the Telecommunications Branch which work itself was being transferred to the Posts and Telegraphs Department, Thus only those persons who were actually doing the work of the Telecommunications Branch were transferred along with the work itself. The Comptroller and Auditor General had thus little or no discretion left in choosing the persons to be transferred. Further, the terms and the conditions of the transfer were to be agreed upon by the Comptroller and Auditor General of India on the one hand and the Secretary to the Government of India in the

department of Communications (Posts and Telegraphs) on the other hand. These being two departmental heads representing the two sets of employees to be integrated by the transfer. Rule 3 says that the transfers effected from 1st March 1968 onwards before the date of the publication of these rules (30-8-1968) shall be deemed to have been made in pursuance of these rules. The decision in Padmanabhacharyas case is, Therefore, inapplicable to the present case just as it was held inapplicable to the rules framed in Vaderas case in paragraph (26) of the report in B.S. Vadera Vs. Union of India (UOI) and Others, .

(8) Shri P. P. Rao, however, strongly attacked the transfer rules dated 30-8-1968 at Annexure R-6 as being mala fide. He argued that the sole purpose of these rules was to defeat the writ petitions which had already been filed. He argued that the Government should have first cancelled the promotion made on 6th July, 1968 and passed fresh orders of promotion after the promulgation of the transfer rules dated 30-8-1968. We are unable to agree. The course of action suggested by Shri P. P. Rao was certainly open to the Government. But it would have been inconvenient and round about. The officers promoted would have been reverted for no fault of theirs and the action of the Government in promoting them would have had to be admitted to be illegal. The Government, Therefore, chose an alternative method of achieving the same result by making the transfer rules retrospective. In Madhya Pradesh vs. Vishnu Prasad Sharma A.L.R. 1966 S.C. 1593, the administrative action of the Government in acquiring certain lands was struck down as being contrary to the provisions of the Land Acquisition Act 1894. Thereupon, the Land Acquisition Act was amended and the administrative action consisting of acquisition of land was retrospectively validated. The legality of such retrospective validation was upheld by the Supreme Court in Udai Ram Sharma and Others etc. Vs. Union of India (UOI) and Others, after a review of the case law. Mitter, J.. speaking for the majority of the Court pointed out that the Legislature may adopt either of the following two methods to validate an invalid administrative action, namely, (1) to give retrospective effect to the legislation under which the administrative action would have been valid and (2) to declare that invalid action shall be deemed to have been validly taken. We see no reason why the same principle should not apply to the making of rules by the President to validate an invalid administrative action retrospectively. In the present case, the Government has adopted the first method, namely, of giving retrospective effect to the rules at Annexure R-6. The learned Chief Justice of India speaking for the Court in Shri Prithvi Cotton Mills Ltd. and Another Vs. Broach Borough Municipality and Others, , made the following observations about validating statutes in general:

" WHEN a legislature sets out to validate a tax declared by a Court to be illegally collected under ineffective or invalid law, the cause for ineffectiveness or invalidity must be removed before validation can be said to take place effectively."

(9) The validation can, Therefore, be not only of invalid administrative action but also of an invalid statute and both can be done retrospectively. The Government

was, Therefore, justified in validating its invalid administrative action by giving retrospective effect to the rules at Annexure R-6. The question of mala fides simply does not arise. It would not be proper to insist that the Government should not exercise the power of giving retrospective affect to the rules though the Government undoubtedly possessed such power. The obvious reason for giving retrospective effect to the rules was to validate the promotions made by the Government in anticipation of the promulgation of the rules. It cannot be doubted that the legal Advisers of the Government must have advised the Government that statutory rules must be amended soon to regularise the ad hoc and temporary promotions made on 6th July, 1968. They must have also pointed out to the Government that in the absence of such new statutory rules, the promotions were invalid in the eye of law. The application by the petitioners that the respondents be asked to produce the files containing the deliberations and decisions to promulgate the new rules on 30-8-1968 was intended to expose the mistake committed by the Government and the admissions which may have been contained in the files that the action of the Government was legally wrong and had Therefore to be validated. But we are prepared to assume all this to be true. The mere exposure of the mistake made by the Government would not help the petitioners, because the Government subsequently validated their action retrospectively. We Therefore disallow the application made by the petitioners for the production of these documents as they are not relevant for our purpose. We also hold that the retrospective validation of their action by the Government does. not in any way amount to had faith.

(10) Shri Rao then advanced a novel argument against the validity of the transfer rules at Annexure R-6 as also the subsequent rules dated 23-11-1968 at Annexure R-7 which formally superseded the rules dated 15th February 1968 and provided for the promotion of both the transferred personnel as well as the preexisting personnel as Accounts Officers. These rules were framed by the President under the proviso to Article 309 of the Constitution. In *Jayantilal Amrit Lal Shodhan Vs. F.N. Rana and Others*, , Shah J. speaking for the majority of the Court at pages 307 and 308, drew a distinction between two kinds of powers exercised by the President, namely, (1) powers of the Central Government which may be entrusted to a State Government or an officer of the State or to other officers; and (2) powers which are not powers of the Union Government but are vested in the President and which are incapable of being delegated or entrusted to any other body or authority. The power to make rules under the proviso to Article 309 was placed in the second category to be exercised by the President and not to be entrusted or delegated to any other body or authority. Shri P. P. Rao points out that the rules at Annexures R-6 and R-7 are not signed by the President himself. They are expressed to be made by the President but purport to be authenticated by officers of the Central Government apparently under Article 77(2) of the Constitution. But, says Mr. Rao, Article 77 like the preceding Articles 53(1) and 73(1) apply only to exercise of executive power of the Government of India. These articles do not authorise the authentication of the rules at

Annexures R-6 and R-7 firstly because the rules are not made by the President as the head of the Union of India but as the President and secondly because the authentication under Article 77(2) can be made only of executive orders and instruments but not of rules which are legislative in character.

(11) The rules at R-6 and R-7 are undoubtedly an exercise of legislative power i.e. rule-making or subordinate legislation by the President. These rules govern the "conditions of service of persons appointed to public services and posts in connection with the affairs of the Union" within the meaning of Article 309. Article 309 itself is a part of Chapter XIV of the Constitution which deals with "Services under the Union and the State".

(12) These services are Therefore of the Central Government and not of the President as such. It would appear Therefore, with respect, that the point emphasised by Shah J. is that this power of the President was not such as could be entrusted or delegated by him to some other authority. His lordship did not say that the services for whom the rules under the proviso to Article 309 are made do not belong to the Union and belong to the President as such. It "would appear, Therefore, that these rules are made by the President as the head of the Union of India for the Services of the Union of India though on principle this function of the President, being legislative in character, could not be entrusted or delegated by him to any other authority except insofar as the proviso to Article 309 expressly provides that the President may direct some other person to make such rules.

(13) The legal position may be considered from two points of view, namely, (1) that the President acts as the head of the Union Government in making these rules or (2) that he does so as a persona designata. If he acts as the head of the Central Government in making these rules, then the provisions of Chapter I Part V of the Constitution would be applicable to the exercise of this function by the President. Shri Rao, however, argues against this on the ground that the rule-making is a legislative function and Therefore these provisions do not apply to the exercise of this function by the President. We appreciate this argument. It is necessary to consider the scheme of Part V of the Constitution. The title of Part V is "The Union" namely, the Union of India. It is divided into four chapters. Chapter I deals with the "Executive", Chapter II with the "Parliament" and Chapter IV with the "Union Judiciary". The legislative powers proper i.e., the sovereign power to make ordinances equal in status to parliamentary statutes is dealt with separately in Chapter III. The power of the President to make rules either under the Constitution or under a parliamentary legislation is not covered by Chapter III. It is an administrative power though given by a statute. This is why rules are called by some authors "administrative quasi legislation" or "subordinate legislation". The power to make such rules is not covered by Chapter III. This power is covered by Chapter I as it is analogous to administrative power in the sense that it is a power exercised by the executive. The division of the Union of India is made into three departments or branches of

the State, namely, the executive department, the legislative department and the judicial department-all three Constituting the State or the Union of India. Such a division is different from the separation of powers exercised by the different branches of the State, namely, executive power, legislative power and judicial power. This latter division rests on the nature or quality of the function performed by the Government or the department concerned. The distinction between legislative, administrative, judicial and quasi-judicial powers may be relevant in a totally different context, such as judicial review, etc. But Part V is not concerned with the nature or the quality of the powers exercised by the Executive, the Parliament and the Union Judiciary as observed by the Supreme Court at page 306 of Jayantilal's case referred to above as follows -"it cannot however be assumed that the legislative functions are exclusively performed by the Legislature and executive functions by the Executive and judicial functions by the Judiciary alone. The Constitution has not made an absolute or rigid division of functions between the three agencies of the State. To the Executive exercise of functions legislative or judicial are often entrusted".

(14) Under Article 53(1) "the executive power of the union shall be vested in the president and shall be exercised by him either directly or through officers subordinate to him in accordance with the Constitution. Under Article 73 "subject to the provisions of this constitution, the executive power of the union shall extend to the matters with respect to which Parliament has power to make laws". Under Article 77(1) "all executive action of the Government of India shall be expressed to be taken in the name of the President". What is the meaning of the expressions "executive power" and "executive action" in the above provisions of the constitution? They can mean only one of the following two things, namely:- (1) the power or the action exercised or taken by the executive department of the state, or (2) only such power as is administrative in nature as distinguished from legislative or judicial power exercised by the Executive.

(15) The latter meaning could be placed on these provisions only if chapter I of part V of the constitution were concerned with the distinction between different kinds of powers such as judicial, legislative and executive according to the quality or the content of the power. But such a distinction has no relevance to chapter I of part V of the constitution inasmuch as the only division contemplated by part V is between the three great departments of the State, namely, the Executive, the Legislature and the Judiciary, irrespective of the kinds of powers which may be exercised by each of them. It would follow, Therefore, that the expressions "executive power" and "executive action" in this context mean the power or the action of the Executive. The adjective "executive" denotes that part of the state which is exercising the power. It is the source of the power which is designated thereby and not the nature or the quality of it. Therefore, so long as the source or the author of the power is the Executive, the provisions of chapter I of part V of the constitution would apply whether the nature of the power is strictly administrative or not. Therefore, when Article 77(2) says that "orders and other instruments made and executed in the name of the President

shall be authenticated in such manner as may be specified in rules to be made by the President" all orders and instruments made by the President are contemplated, it is immaterial if a particular order or instrument is administrative or rule making that is, subordinate legislative in character. The very purpose of Article 77(2) is to enable certain authorised officers to authenticate the orders and instruments on the sole ground that they are made in exercise of the executive power of the Government of India. All that the officers have to see is that the order is made by the Executive as distinguished from the Legislature or the Judiciary. They do not have to scrutinize the nature or the contents of the order. In fact, they would not have the power to sit in Judgment over such orders of the Government. It is not open to these authorised officers to refuse to authenticate an order of the Government on the ground that the contents of the order are not administrative but are legislative in character. Article 77 would be unworkable if every order and instrument would have to be scrutinized by the authorised officers with a view to determine if it is administrative in nature. In fact, some orders would be partly administrative and partly legislative and it would be impossible for anyone to decide whether it should be regarded as executive or legislative only. The provisions of Article 77(2) are fundamental and have to be broadly construed. To construe them narrowly would be to defeat their very purpose and to subject action taken there under to the uncertainty of challenges and litigation. This is why Article 77(2) further enacts that "the validity of an order or instrument which is so authenticated shall not be called in question on the ground that it is not an order or instrument made or executed by the President". We are, Therefore, of the view that the executive power or the executive action of the President in Chapter I of Part V of the Constitution is not restricted to the exercise of powers which are entirely administrative in nature but is broad enough to include rule-making are distinguished from the power to issue ordinances which are sovereign legislation and not subordinate legislation like rule making. Therefore, the authentication of a statutory instrument made by the President in exercise of the powers conferred on him by the proviso to Article 309 has to be authenticated under Article 77(2) of the Constitution in the same way as an administrative order made by him has to be authenticated there under.

(16) Let us now assume that the rules made under the proviso to Article 309 are made by -the President not as the head of the Central Government but as a persona designata. There is no provision either in the Constitution or outside as to" how orders made by the President as such are to be authenticated. The only provision is Article 77(2). It would be reasonable to conclude, Therefore, that all orders made by the President whether acting as the head of the Central Government or otherwise have to be authenticated under Article 77(2) of the Constitution.

(17) Shri Rao says that, except according to the proviso to Article 309, the power of the President to make rules there under cannot be delegated by him to any person or authority. As the President has not delegated this power to any other authority, the rules at R-6 and R-7 could not be issued under the signatures of

the officers inasmuch as these officers have not been delegated the power to make these rules by the President. This argument proceeds on a misconception. There is a basic distinction between authentication of the order made in the name of the President by an authorised officer and action taken by a person or an authority to whom the President has delegated any of his powers. Article 77(2) deals with authentication of the powers of the President and not with orders made by the delegates of the President. This is why the orders are expressed to be made by the President. Instead of being signed by the President personally they are authenticated by officers who are also a part of the Government of India to show that they are executed by the President himself.

(18) This is the significance of the provision in Article 77(2) that "the validity of an order or instrument which is so authenticated shall not be called in question on the ground that it is not an order or instrument made or executed by the President".

(19) In AIR 1945 156 (Privy Council) , the Judicial Committee of the Privy Council had to consider section 49(1) of the Government of India Act, 1935, which in the sphere of Provinces (now States under the Constitution) corresponded with Article 154(1) of the Constitution. In the Union field, it corresponds to Article 53(1) of the Constitution, In connection with this provision, their Lordships observed at page 162 column 2 of the report as follows :

" THEIR Lordships would also add, on this contention, that sub-section (5) of section 2 (of the defense of India Act) provides a means of delegation in the strict sense of the word, namely, a transfer of the power or duty to the officer or authority defined in the sub-section, with a corresponding divestiture of the Governor of any responsibility in the matter, whereas u/s 49(1) of the Act of 1935 the Governor remains responsible for the action of his subordinates taken in his name".

(20) The implication is that there is no delegation when the Governor remains responsible for the action of his subordinates taken in his name. In Bejoy Lakshmi Cotton Mills Ltd. Vs. State of West Bengal and Others, it was held by the Supreme Court that unless Rules of business required the Minister to deal with a matter himself, an Assistant Secretary could deal with it on behalf of the Government. The personal satisfaction of the Governor was not needed.

(21) To sum up, Therefore, when we have an order or an instrument before us which is expressed to be made in the name of the President and which is duly authenticated then, in our view, the order or instrument "shall not be called in question on the ground that it is not an order or instrument made or executed by the President" in view of Article 77(2) of the Constitution. Since the order is thus established to have been made by the President, it is neither necessary nor permissible to enquire whether the President was acting as the head of the Union Government or as President as such.

(22) The terms and conditions on which the Audit personnel doing the accounts work of the Telecommunications Branch has been integrated with the pre-existing Posts and Telegraphs department's Senior Accountants are eminently just and fair. The basis for the fixation of the seniority between the Sas Accountants and the pre-existing P & T Senior Accountants is simple, namely, the length of approved continuous service in the corresponding grades which carried the same pay scales. Shri Rao pointed out to the representation made by the P & T Senior Accountants at Annexure I to the writ petition. In our view, it would not be relevant to look into the previous history of the personnel belonging to these two different Services. The only relevant consideration is the position occupied by the Sas Accountants vis-a-vis the P & T Senior Accountants at the time of the integration. At that time, they were both enjoying the same pay scale. The Sas Accountants were actually doing the accounts work of the Telecommunications Branch. This work has been transferred to the Posts and Telegraphs department. Necessarily Therefore the Sas Accountants doing that work had to be transferred to the Posts and Telegraphs department along with the work. They have also to be equated with the P & T Senior Accountants who are doing equivalent work in the Posts and Telegraphs department. It is because the Sas Accountants were doing the work now transferred to the Posts and Telegraphs department that the Sas Accountants are entitled to promotion as Accounts Officers in the same way that the P & T Senior Accountants are so entitled. Therefore, the same criteria have been applied to both these sets of employees for promotion, namely, five years of approved service in the grades which have had the same pay-scale. It is not permissible to enquire any further into the history of the services. The Sas Accountants themselves may have a grievance against their transfer to the Posts and Telegraphs department as their prospects in the Indian Audit and Accounts department may have been better and we understood during the argument that some of them had actually filed a writ petition in the Punjab and Haryana High Court complaining against their transfer to the Posts and Telegraphs department. But that writ petition failed. The present writ petitions by the P & T Senior Accountants would also fail inasmuch as the past history of the Services is not material at all. Whatever may be the previous history and whatever may be the reasons by which the Sas Accountants and the P & T Senior Accountants came to occupy their present position at the time of the integration, once they occupied the posts of Sas Accountants and the P & T Senior Accountants which had the same scales of pay and which had the same work, they are bound to be equated by the integration. If the integration in any way affected their chances of promotion or even resulted in the reversion of some of them, the chances of promotion are not conditions of service and the reversion is not a reduction in rank. [State of Mysore v. G. N. Purohit, 1967 SLR 753 ; State of Orissa Vs. Durga Charan Das, ; and State of Punjab Vs. Jagdip Singh and Others, approving the decision in N. Devasahayam Vs. The State of Madras and Others,]. We Therefore find that the integration did not involve any discrimination against the petitioners.

(23) During the course of argument, the rules promulgated by the Government

on 23rd November 1968 were produced by the learned counsel for the respondents. We took judicial notice of the same and exhibited them as Annexure H-7 to the written statement. Even in the absence of these rules, the decision of these writ petitions would have been the same. For the sake of completeness of the record, however, we have taken them on record as we are convinced that no prejudice is caused to the petitioners thereby.

(24) The writ petitions are Therefore dismissed but in the circumstances of the case we make no order as to costs.