
(1971) 07 MAD CK 0032
In the Madras High Court

L.K. Muthiah Pillai and Others

APPELLANT

Vs

The Panchayat Union Commissioner and Others

RESPONDENT

Date of Decision : 30-07-1971

Acts Referred:

Constitution of India, 1950 — Article 309

Citation : (1972) 85 LW 891 : (1972) 1 MLJ 110

Hon'ble Judges : T. Ramaprasada Rao, J

Bench : Division Bench

Judgement

T. Ramaprasada Rao, J.—In this batch of writ petitions a common question is involved, and it is" agreed that the facts in W.P. No. 4281 of 1970, may be noticed. The petitioner was appointed as a Social Welfare Worker by direct recruitment in proceedings issued by the Additional Development Commissioner, dated 25th April, 1962. His scale of pay was fixed and it is not disputed that it was a regular appointment made by the appointment authorities. At the time when the petitioner joined duty he was 48 years of age. His probation was declared to be satisfactory on 17th May, 1963. The case of the petitioner is that under G.O. No. 2341, Rural Development and Local Administration, dated 30th October, 1965, the Government issued an order that the age limit of superannuation should be enhanced from 55 to 60 years in the case of political sufferers who took part in the freedom struggle and that executive instruction was made applicable to the petitioner and persons similarly placed. Later, by a memo, dated 4th November, 1970, issued pursuant to G.O. No. 2161, Rural Development and Local Administration, dated 30th October, 1970 the age limit of superannuation was reduced from 60 years to 55 years. On the basis of this the petitioner was apprehensive that he will be superannuated on 15th December, 1970. Therefore, he came up to this Court for the issue of a writ of certiorari to quash G.O. No. 2161, Rural Development and Local Administration dated 30th October, 1970, stating that the respondent had no powers to issue such an executive instruction so as to divest vested rights in the petitioner which he secured not only under the earlier Government Order, dated 30th October, 1965,

but also under G.O. No. 2734, dated 28th December, 1963, which instruction was incorporated as a statutory rule under the Special Madras General Subordinate Service Rules as rules applicable to the Social Welfare Workers in the Madras General Subordinate Service. Excepting for the fact that in all cases the date of recruitment and the age would differ, the facts are similar and the contention is the same.

2. After hearing the learned Government Pleader I find that the relevant provisions to be perused in connection with the subject-matter are as follows:

Under G.O. No. 57, Rural Development and Local Administration, dated 6th January, 1961, age limit of superannuation was enhanced for Social Welfare Workers from 55 to 60 years in the case of political sufferers who took part in the freedom struggle and courted imprisonment and who have been subsequently appointed as Social Welfare Workers. Later, the Government apparently found that as the Social Welfare Workers form a cadre of service under the Madras General Subordinate Service, special rules relating to such services may be made and in this view while captioning the Social Welfare Workers' Services as Class III, they made the following special rule relating to the special class of service. Rule 4, age limit:

(a) No person shall be eligible for appointment to the post, if he has completed the age of fifty-three years on the first day of July of the year in which the selection for appointment is made.

(b) In the case of persons, who have themselves taken part in the freedom struggle and courted imprisonment and appointed as Social Welfare Workers, the age of superannuation shall be 60 years. This provision shall apply to those who are to be appointed up to the year 1965.

3. It is not in dispute that this rule is one framed under Article 309 of the Constitution of India, by the Governor of the State in exercise of the powers vested in him under the Constitution. Later G.O. No. 2341, Rural Development and Local Administration, dated 30th October, 1965, was issued. The substance of the Government Order is in accord with the letter and spirit of the rule as above. Under the above executive instruction certain concessions were extended to all political sufferers recruited up to the end of December, 1965. Thereafter the challenged Government Order has been passed as G.O. 2161, Rural Development and Local Administration, dated 30th October, 1970. This runs as follows:

Community Development - Social Welfare Workers - Political sufferers appointed as Social Welfare Workers - Age of superannuation - Age reduced to 55 - Orders issued.

RURAL DEVELOPMENT AND LOCAL ADMINISTRATION DEPARTMENT

G.O.Ms. No. 2161

Dated 30th October, 1970.

READ:

1. G.O.Ms. No. 57 R.D. & L.A., dated 6th January, 1961.
2. G.O.Ms. No. 2341 R.D. & L.A., dated 30th October, 1965.
3. G.O.Ms. No. 1198 R.D. & L.A., dated 24th June, 1970.

ORDER

1. In the Government Order first read above it was ordered that the age limit of superannuation be enhanced from 55 to 60 years in the case of political sufferers who had themselves taken part in the freedom struggle and courted imprisonment and who had been appointed as Social Welfare Workers. It was also ordered that the above concession would be applicable only to those political sufferers who had attained 48 years of age and above at the time of their first appointment as Social Welfare Workers. Subsequently, in the Government Order second read above this concession of continuing in service up to 60 years of age was extended to all the political sufferers who had themselves taken part in the freedom struggle irrespective of their age at the time of their first appointment as Social Welfare Workers.

2. The Government have been examining the question of the age of superannuation of the Social Welfare Workers employed under the Community Development Programme for sometime past. The age of retirement of Government servants including technical personnel is 55. It is therefore considered necessary to reduce the age limit for superannuation of the Social Welfare Workers from 60 to 55.

3. The Government now direct in supersession of all orders issued in this regard, that the age of superannuation of all Social Welfare Workers employed under the Community Development Programme is 55 as laid down in Fundamental Rules 56(a) with effect from the date of these orders, These orders will be applicable to all Social Welfare Workers who have already completed 55 years of age and such Social Welfare Workers will be given one month's notice of retirement. They will retire on the date of the expiry of the said notice period of one month.

4. The Director of Rural Development is requested to communicate a copy of this Government Order to each of the Social Welfare Workers referred to in para. 3 above within ten days of the date of issue of these orders and to obtain their acknowledgment individually. The period of one month referred to in paragraph 3 above shall be computed from the date of acknowledgment of the copy of Government Order by the Social Welfare Worker concerned.

5. The special rules issued in G.O.Ms. No. 2734, Rural Development and Local Administration, dated 28th December, 1963 in this regard will be amended separately.

6. This order issues with the concurrence of the Finance Department vide its U.O. Note 125321-A RDLA 1/70-1, dated 28th October, 1970.

(By Order of the Governor.)

(Sd.) E.C.P. Prabhakar, Secretary to Government.

4. The State claims that it has examined the question of the age of superannuation of the Social Welfare Workers employed under the Community Development Programme and they felt it expedient to reduce the age limit of superannuation of such workers from 60 years to 55 years. They therefore directed the appropriate authorities to implement the above order in supersession of all orders issued in that behalf earlier. But they made it clear in this very order that the special rules issued in G.O.Ms. No. 2734, Rural Development and Local Administration, dated 28th December, 1963, in this regard will be amended separately.

5. In the background of the above provisions applicable to the class of service, it is contended that once a service is governed by rules framed under the proviso to Article 309 of the Constitution of India, then no executive instruction S could supersede or override such a rule relating to such a class of service and any such rule or instruction given to the contrary would be ineffective in the eye of law. That this is the position is made clear by a judgment of this Court in *E. Balakrishnan v. The State of Madras represented by the Secretary to Government of Madras, Education and Public Health Department and Anr.* W.P. No. 1642 of 1968, *Kailasam, J.*, while dealing with the force and purport of such rules of service observed after referring to a decision of the Supreme Court in *Nallayya Gounder v. The State of Madras represented by the Secretary to Government. Home Department, Fort St. George, Madras* W.P. No. 96 of 1967. as follows:

The Supreme Court further observed that if the appropriate Legislature has passed an Act under Article 309 the rules framed under the proviso will have effect subject to that Act; but, in the absence of any Act of the appropriate Legislature on the matter, the Rules made by the President or by such person as he may direct are to have full effect prospectively and retrospectively.

The Government may also be right in its view that the interests of war candidates should be protected but these safeguards can only be provided for by proper Rules framed under Article 309 of the Constitution of India or by legislation as provided under Article 309. In the absence of such Rules the administrative instructions of the Government, however well motivated they may be, cannot have the effect of modifying the Rules under Article 309 of the Constitution of India. The Supreme Court also had occasion to consider the force of the rules made under the proviso to Article 309 of the Constitution vis-a-vis executive instructions given by the Government inconsistent thereto. In *I.N. Saksena Vs. State of Madhya Pradesh*, , the Supreme Court said:

We have already set out the relevant parts of the memorandum and the very

first sentence shows that the memorandum is merely an executive direction and not a Rule, for we cannot understand how a Rule could be in the following words, namely, "The State Government have decided that the age of compulsory retirement of State Government's servants should be raised to 58 years.

The very form of these Words shows that it is conveying an executive decision of the State Government to Collectors to be followed by them and is not a rule issued under Article 309 of the Constitution.

6. In the instant case such directions were issued to the Director of Rural Development to follow the executive instructions provided for in the challenged Government Order. But when the Government Order was passed the Executive was aware that it was imperative on their part to amend the rule relating to the service passed on 28th December, 1963, and incorporate it in the special Rules relating to the service. They had apparently in mind the Rules framed under the proviso to Article 309 which, in unequivocal terms laid down that the age of superannuation of Social Welfare Workers shall be 60 years. In the absence of any rule under Article 309 made for the purpose, interfering with the letter or spirit of the earlier rule which has a legislative potent in law an executive instruction cannot displace its application or enforceability even though such instruction is based on certain well-founded reason. The learned Government Pleader is unable to state that the executive instruction which is contained in the challenged Government Order could supersede the Rule relating to the service and embodied in the special rules for the purpose and based under the proviso to Article 309 of the Constitution. The petitioners therefore should succeed. The rule nisi in each of these cases is made absolute. In some of these writ petitions, the petitioners who were working as Social Welfare Workers were asked to surrender their posts on the foot of the challenged Government Order and the respective departmental authorities have given effect to it. The result is that some amongst the writ petitioners were obliged to leave the service. They have also come forward to this Court for appropriate directions to enable them to obtain relief and to be placed on a par with other Social Welfare Workers who are gaining an advantage by reason of the pronouncement of this Court. It would create an anomaly if such persons who have already left the service and who have sought necessary relief from this Court should not be provided with an effective relief but only a paper advantage. As directions also can be given even though the Rule asked for is one for certiorari and as such directions are issued to advance the remedy and to prevent the mischief, I direct that in such of those cases wherein the Social Welfare Workers were asked to quit the service on the strength and application of the impugned rule, they will be deemed to have continued in the service of the Government in spite of the impugned order. But in such of those cases where the petitioners have already reached the age of 60 pending disposal of these writ petitions as it is not possible to direct the Government to put them back in service, they will be entitled to such benefits as might have accrued to them by virtue of their success in the writ petitions. In the peculiar circumstances of these cases, there will be no order as to costs.