
(1966) 07 AP CK 0004

In the Andhra Pradesh High Court

Case No : Writ Petition No. 1457 of 1964

P. Radhakrishna and Others

APPELLANT

Vs

State of Andhra Pradesh and Others

RESPONDENT

Date of Decision : 01-07-1966

Acts Referred:

Constitution of India, 1950 — Article 226, 309

Citation : AIR 1968 AP 350 : (1969) 2 LLJ 615

Hon'ble Judges : Gopal Rao Ekbote, J

Bench : Single Bench

Advocate : C.V. Dikshitulu, V. Jogaiahsaing and C.N. Babu, for the Appellant; G. Suryanarayana Murthy, for Principal Govt. Pleader, for the Respondent

Final Decision : Dismissed

Judgement

1. This is a petition under Article 226 of the Constitution of India for the issue of a writ of mandamus directing the respondents to implement and enforce G.O.Ms. No. 2674, Public Works Department, dated 4-11-1960 and to issue orders of promotion of the petitioners as Assistant Engineers (Electrical) with effect from 10-9-1963 with all the benefits of salary, rank and other rights and privileges consequential thereto.

2. The facts, which are not in dispute, may briefly be stated. From the time of the composite Madras State, a convention had grown that promotion to the posts of Assistant Engineers from the category of Junior Engineers (Electrical) and the category of Supervisors (Electrical), Grade I would be according to the ratio of 4 : 1. The State Government or Andhra Pradesh, however, issued G.O.Ms. No. 2674, Public Works Department, dated 4-11-'60 prescribing the ratio of 2:1 on the advice of the State Public Service Commission. Some representation was made by the junior Engineers (Electrical). The Government re-examined the issue and went back to the original ratio of 4:1 and issued G.O.Ms. No. 2570, P.W.D., dated 8-11-1961.

3. The petitioners, who belong to the category of Supervisors (Electrical) Grade I were promoted as Assistant Engineers (Electrical) under emergency provisions of the rules and subsequently were reverted because there were no vacancies on which they could be continued. The grievance of the petitioners is that the petitioners ought to have been again promoted following the ratio prescribed by G.O.Ms. No. 2674 dated 4-11-1960. Since the Government have been promoting from the Junior Engineers" category to the detriment of the petitioners, the petitioners are seeking the issue of a writ of mandamus to oblige the Government to maintain the ratio of 2:1 and since the petitioners plead that under this ratio they would have got the promotion, they should be promoted with effect from the date mentioned earlier.

4. It is not in dispute that the temporary promotions, which were made, in so far as the petitioners were concerned were made under the emergency rules. The petitioners therefore had no right to the posts. According to the provisions of the rules, they were reverted and that reversion is not questioned in this writ petition. It is therefore unnecessary to go into the question whether their reversion has been proper or not.

5. It is now a firmly established rule of law that in order to successfully obtain a writ of mandamus, it is necessary for the petitioners first to establish that a legal duty is cast upon the respondents to do or forbear from doing a particular thing in the discharge of a public duty, and secondly that in spite of a request made in that behalf the respondents are not discharging or refraining from discharging the statutory duty cast upon them. The petitioners consequently have to first establish that there is a statutory duty on the part of the Government to maintain the ratio of 2:1 between the two sets of services as is laid down in G.O.Ms. No. 2674 dated 4-11-1960. That naturally turns upon the question whether the said G.O. is a rule made under Article 309 of the Constitution of India and it casts a legal duty on the Government to make promotions only according to the ratio prescribed in that G.O.

6. Now, Article 309 authorises the appropriate Legislature to regulate the recruitment, and conditions of service of persons appointed, to public services and posts in connection with the affairs of the Union or of any State. Until such a law is made by the Legislature, the proviso to that article provides that it shall be competent for the President or such person as he may direct..... in the case of services and posts in connection with the affairs of the Union, and for the Governor of a State or such person as he may direct in the case of services and posts in connection with the affairs of the State, to make rules regulating the recruitment, and the conditions of service of persons appointed, to such services and posts. Such rules shall have effect of course subject to any Act of the Legislature in this behalf and the provisions of the Constitution. The State of Andhra Pradesh has not so far enacted any law regulating the recruitment and conditions of service of persons appointed to public services and posts in connection with the affairs of the State. The rules made by the Governor under

Article 309 therefore at the moment regulate the affairs of the public services in the State. In so far as the electrical branch of the P.W.D. of the State of Andhra Pradesh is concerned, there is no rule prescribing the ratio of promotions between the two categories of services mentioned above. As stated earlier, from the days of composite Madras, these promotions were made under a convention which had developed, that is to say, while four promotions were made from the Junior Engineers" category, one promotion was made from the Supervisors, Grade 1. This convention however never found any place either in any Act enacted by the Legislature or the rules made by the Governor under the proviso to Article 309. This convention however was disturbed by G.O.Ms. No. 2674 dated 4-11-1960 when it fixed the ratio of 2:1. That G.O. again has been modified by a subsequent G.O.Ms. No. 2570 dated 8-11-1961 which takes the position back to the ratio of 4:1. The first G.O.Ms. No 2674 dated 4-11-1960 admittedly has not been published in any official gazette nor is the second G.O. of 8-11-1961 so published. The first and the second G.Os. do not mention that they were issued in exercise of the powers vested in the Governor under the proviso to Article 309. In spite of this, it is argued by Mr. C. V Dikshitulu, the learned counsel for the petitioners, that the G.O.Ms. No. 2674 dated 4-11-1960 has the authority of law and since the second G. O. is not clothed by any authority of law, the first still occupies the field and casts a legal obligation on the State Government implicitly to follow the ratio in regard to the promotion as 2:1. The contention has been that while the first G.O. was issued after the Public Service Commission was consulted in accordance with Article 320, the second G.O was issued without the consultation of the Public Service Commission. The second G.O., it is submitted by the learned counsel, does not therefore supersede the earlier G.O. which still holds the field.

7. In order to appreciate this contention, it is necessary to examine whether the said G.O. can be said to be a rule made by the Governor in the exercise of the powers which he enjoys under Article 309 and consequently has the force of law . It cannot be validly contended that every order issued by the Government in the name of the Governor constitutes law merely because it affects a number of people as was argued by the learned counsel for the petitioners. Similarly, it cannot be justifiably contended that the rules prepared under the statute, even though not published in the official gazette, if communicated to the parties concerned would have the force of law. In order to have force of law to any subordinate legislation, it must firstly be authorised by the parent Act and secondly the subsidiary legislation must be made by competent authority after following the formalities prescribed in that behalf and finally it must have been published for the information of the public. The essential characteristics of a law including a subordinate law is that it shall lay down a policy either creating new rights or liabilities or affecting the existing one. If such a law is made by competent authority and in the manner prescribed, it will certainly have force of law and would be a binding rule of conduct and consequently it would be enforced in any court of law. What must follow is that every order passed by the

Government, unless it is clothed with the authority of law, would not confer any right or create any liability on the individual or groups of individuals nor could an action be founded on that in any court of law. Merely because a G.O. can be traced to a statutory power under which rules could have been made, it cannot be said that the G.O. is law and can be enforced in a court of law. The source of the power does not affect the character of the G.O. issued. It is from the G.O. that one has to find out whether the G.O. has been issued as a rule under Article 309. Whether the G.O. is law or an administrative instruction naturally depends upon the character or the nature of the G. O. issued and it must be determined in view of the circumstances of each case. While the source of power can be taken into account merely because such a source exists, every act done by the authority cannot be said to be law. In order to have the validly made rule under Article 309, the Governor and not the Government must first of all exercise the powers vested in him under Article 309 and made a rule regulating the recruitment, etc., to the services and then publish the same in the official gazette or in any other prescribed manner for the purpose of informing the public. If in the instant case, it is found that the Governor has not made any rule in exercise of the power under Article 309, nor was it intended to be a rule under that provision of the Constitution and that it was not published in the official gazette, there could be little difficulty in reaching the conclusion that the G.O. lacks all the postulates of a rule under Article 309 of the Constitution.

8. Applying this test to G.O.Ms. No. 2674 dated 4-11-1960 it would be clear that although the G.O is issued in the name of the Governor it was issued by the Government. It was never intended that the said G. O. would be rule under Article 309 of the Constitution though it may contain legislative material. Nor in fact the Governor has made any rule under Article 309. The executive direction has been issued in the name of the Governor in compliance with the other provisions of the Constitution and certainly not in accordance with Article 309. Merely because the Governor's name appears in the G.O., it cannot be contended that it amounts to a rule made by him under Article 309. It is an executive direction given for the guidance of those who are responsible for making promotions from the said two categories. That this is the correct interpretation of the G.O. gathers support from the earlier practice prevailing right from the days of composite Madras State that promotions were made on the basis of some convention in the ratio of 4:1. That convention was recognised in a modified form in the G.O. of 4-11-1960 which was subsequently modified by another G.O. of the same character dated 8-11-1961. It will thus be plain that neither the convention nor the subsequent two decisions in the form of G.Os. were at any time incorporated in the rules which were already in vogue under Article 309. No fresh rule was made by the Governor in exercise of his power under Article 309 at any time in so far as the services in the Electrical Branch of the P.W.D. are concerned fixing the ratio between the two categories of services for the purpose of promotion. I am therefore clear in my opinion that G.O.Ms. No. 2664 dated 4-11-1960 is only an administrative direction given by the Government in the name of the

Governor but is not a rule made under Article 309 and consequently hicks all the attributes of a rule validly made under Article 309. It is obvious that such a G.O. does not create any right either in the petitioners or in groups of persons which could e enforced in any court of law.

9. What must follow from the above said discussion is that the Government was quite competent to alter the direction which they had earlier given by issuing the subsequent G.O. dated 8-11-1961. The fact that Public Service Commission was not consulted before the Second G.O. was issued does not alter the character of the G.O. The present position therefore is that the promotions to the said two categories are regulated by the executive direction fixing the proportion as 4:1 between the two categories ot services. Since I held that the said two G.Os. do not have the force of law but are mere executive directions, it is obvious that they do not cast any legal duty on the Government which can be enforced by a writ of mandamus under Article 226 of the Constitution of India.

10. It can hardly be disputed that if the proportion of 4 : 1 holds the field in so far as the promotions are concerned, the petitioners cannot have any grievance. The counter gives all the necessary figures in regard to both these branches of services and from those figures it becomes plain that the category of Supervisors, grade 1, has not been treated contrary to the proportion of 4 : 1. The petitioners therefore must await their chances of promotion according to the said ratio. They cannot in any case ask that their promotions should be made in accordance with G.O.Ms. No. 2674 dated 4-11-1960 which stands superseded by the subsequent G.O.Ms. No. 2570 dated 8-11-1961.

11. For the aforesaid reasons, the writ petition fails and is dismissed . There will be no order as to costs.