

(1964) 07 KAR CK 0004

In the Karnataka High Court

Case No : Writ Petition No's. 1653, 1749 and 1960 of 1963

Panduranga (K.) and Others

APPELLANT

Vs

State of Mysore and Others

RESPONDENT

Date of Decision : 24-07-1964

Acts Referred:

Constitution of India, 1950 — Article 14, 16

Mysore Civil Services (Classification, Control and Appeal) Rules, 1957 — Rule 5 (1), 5 (3)

Citation : (1965) 1 LLJ 71

Hon'ble Judges : K.S. Hegde, J;G.K. Govinda Bhat, J

Bench : Division Bench

Judgement

Hegde, J.—Common question of law arise in these petitions. But for convenience sake we shall first take up for consideration Writ Petition No. 1653 of 1963. The results of the other two writ petitions depend on the result of this writ petition.

2. Writ petition No. 1653 of 1963. - The petitioner herein were serving in the Revenue Department in the State of Madras till 1 November 1956. They were allotted to the new State of Mysore on the date of the State reorganization. Even before the State reorganization they had been temporarily appointed as deputy tahsildars, but by the date of the States reorganization they had been reverted to a lower rank for want of posts of deputy tahsildars. Petitioner 1 was again appointed as deputy tahsildar on 12 December 1957, petitioner 2 and 3 on 1 April 1958 and petitioner 4 on 25 July, 1958. Ever since then, they have continuously acted as deputy tahsildars till the filing of this petition. Respondents 7 and 8, prior to the reorganization of States, were also serving in the Revenue Department of the Madras states. They were also allotted to the new State of Mysore on the date States reorganization. At no time in their parent State they had served as deputy tahsildars. Respondent 7 was appointed as deputy tahsildar for first time on 11 April 1961 and respondent 8 on 19 May 1961. Respondents 4, 5, 6, 9 and 10 were allotted to the new State of Mysore from other areas. At present respondents 4 to 10 have been promoted as tahsildars by

the order of respondent 2 whereas till the date of the institution of this writ petition, the petitioners continued to be deputy tahsildars. During the tendency of this writ petition, petitioners 2 and 3 have been promoted as tahsildars.

3. The contention of the petitioners is that they are seniors to respondents 4 to 10 and therefore their case should have been considered for promotion before respondents 4 to 10 were promoted, as the promotions in question were made on the basis of seniority-cum-merit. Their further contention is that the promotions of respondents 4 to 10 were made by respondent 2-Divisional Commissioner, Mysore - who, according to them, was not empowered by law to make those promotions and as such those promotions are invalid in law. According to them, promotions to tahsildars' posts can only be made by Government; the Government having not made those promotions it must be held that they were not validly promoted.

4. In this petition, the petitioners have prayed for several reliefs including a prayer for a writ of certiorari quashing the order made by respondent 2 in EST. 5597 GAZ. 63-64-I, II, III, dated 24 August 1963. For the reasons to be presently stated it is not necessary to refer to the other reliefs prayed for in the petition.

5. In the course of his argument, Sri H. B. Datar, the learned counsel for the petitioners, formulated three contentions in support of his prayers in the petition, viz.,

- (i) respondent 2 had no competence to appoint respondents 4 to 10 as tahsildars;
- (ii) the appointments of respondents 4 to 10 as tahsildars are contrary to the rules bearing on the subject; in particular they are contrary to rule 4(3)(b) of the Mysore States Civil Services (General Recruitment) Rules, 1957, and
- (iii) the promotions made offend Arts. 14 and 16 of the Constitution.

6. As we are in agreement with Sri Datar in his first contention, we have not found it necessary to go into other two questions formulated by him.

7. Admittedly respondents 4 to 10 were promoted in pursuance of the order issued by respondent 2. Respondents 4, 7, 8, 9 and 10 were promoted as per his order No. EST. 5597 GAZ. 63-64-I, dated 24 August 1963. Respondent 6 was promoted on the same date by a separate order. Similarly respondent 5 was also promoted by him by means of a separate order of the same date.

8. It is admitted by all the parties that the Divisional Commissioner has no powers to appoint a tahsildar. None of the learned counsel appearing for the parties has invited our attention to any rule under which a Divisional Commissioner could have made the appointments in question. The appointments of tahsildars have to be made by the Government as per rules contained in the Mysore Civil Services (Classification, Control and Appeal) Rules, 1957. Rule 5(1) therein classifies the public services of the State into class I, class II, class III

and class IV. The tahsildars" posts fall within class II. See sub-rule (3) of rule 5 as amended by means of notification No. GAD. 13SSR 61, dated 26 July 1961. Part III of the rules prescribes the appointing authorities. Rule 7(1) says :

"Save as otherwise provided, all first appointments to the State civil services, class I and class II, shall be made by the Government."

9. Respondents 4 to 10 were appointed for the first time as tahsildars as per the impugned orders. At one stage, the learned Government Pleader made a faint suggestion that that rule will not apply in the case of promotions and it refers only to direct appointments, because, according to him, appointments by promotion are not first appointments. This contention does not accord with the plea taken in the counter affidavit filed on behalf of the State nor was it pressed, in our opinion, very rightly. An appointment under the Classification, Control and Appeal Rules can be either by direct recruiting or by promotion from the lower ranks. As the Government Pleader himself did not press the contention noticed above, it is unnecessary to go into it. The real plea of the Government was - that is the plea taken in the pleadings - that in the matter of appointment of tahsildars by promotion Government had for the time being delegated its powers to the Divisional Commissioner. The question is whether the Government could have validly delegated its power of appointing tahsildars, to the Divisional Commissioner. The alternative contention was, whether the delegation was valid or not, the Government having ratified those appointments, they are no more open to challenge. Therefore we have now to decide -

(i) whether the Government is competent to delegate its powers under rule 7 of the Classification, Control and Appeal Rules to anyone ? and

(ii) whether an appointment made by an incompetent authority can be validly ratified by the Government ?

10. The rules in the Mysore Civil Services (Classification, Control and Appeal) Rules, 1957, were framed by the Governor by virtue of powers conferred on him by the proviso to Art. 309 of the Constitution of India. Article 309 says :

"Subject to the provisions of this Constitution, Acts of the appropriate legislature may regulate the recruitment, and conditions of service of persons appointed, to public services and posts in connexion with the affairs of the Union or of any State."

11. In view of this provision, recruitments to public services and conditions of persons appointed to them are to be regulated by Acts of appropriate legislatures. But then proviso to this article says :

"Provided that it shall be competent ... for the Governor of a State or such person as he may direct in the case of services and posts in connexion 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 until provision in that behalf is made by or under an Act of the appropriate legislature under this

article, and any rules so made shall have effect subject to the provisions of any such Act."

12. Rules made by the Governor under the aforementioned proviso take the place of Acts of appropriate legislatures until the concerned legislature steps in and enacts a statute in that regard. Our State legislature has not yet exercised its power under Art. 309. Hence that field is now covered by the rules framed by the Governor. Those rules are akin to, or at any rate, bear some similarity to the statutes enacted by the legislature. In this case it is unnecessary to find out their true character. Suffice it to say that, to the extent they are within the ambit of Art. 309, they have all the force of an Act of a competent legislature. Under those rules the Government is the especially empowered authority to make the appointments in question and admittedly the rules do not empower the Government to delegate its powers to anyone else. The power conferred on the Government is a statutory power and therefore its exercise should be in accordance with the rules. Quite clearly the Government has no plenary powers in the matter of appointment and hence its powers in that regard is incapable of delegation.

13. The question, how far a statutory power of an administrative character can be delegated, came up for consideration before the Supreme Court in *Pradyat Kumar Bose Vs. The Hon'ble The Chief Justice of Calcutta High Court*, . The Supreme Court laid down that it is well-recognized that a statutory functionary exercising a power cannot delegate its ultimate responsibility for the exercise of that power. This very question, in a somewhat different manner, came up before a Bench of this Court in *M. A. Jaleel v. State of Mysore* 1961 Mys. L.J. 425. Therein, their lordships were considering whether the Power conferred on the Central Government under S. 115(5) of the States Reorganization Act can be delegated by it to the State Government. Dealing with that contention this is what their lordships observed :

"We were not shown any evidence of such delegation. It is also clear that it is was not permissible for the Central Government, which was a delegate of Parliament, to assign to the Government of the State as it is stated to have done, its entire responsibility to make the integration. The common law maxim that delegated power cannot be delegated, does not, it is true, incorporate any rigid and inflexible rule forbidding the delegation of any portion of the power confined to a statutory functionary, although certain cases may call for its rigorous application. Power confided to a person in circumstances demonstrating the special confidence or trust reposed in his individual judgment and discretion, such as judicial power or other power involving appreciable skill and judgment, is clearly no delegatable. Such power is exercisable personally by the functionary to which it is committed. But, there may be cases in which a delegated of some part of the work to be done is permissible, although it would be difficult to make any exhaustive enumeration of cases in which such delegation would be valid or to precisely define the limits of delegable power. But even in cases in which some

part of the work to be performed by a statutory functionary may be assigned to another agency or his delegate, it is clear that what cannot be delegated is the final disposition of the matter."

14. What is complained here is that the Government had abdicated its power and left its statutory power to be exercised by one of its subordinates. This complaint appears to well-founded. Let us first find out what really happened in the matter. The true picture is disclosed from the letter written by the Government to the Divisional Commissioner on 31st December 1958. This is what that the letter says :

"Sub. - Temporary promotions to the vacant posts of tahsildars, Ref : Your letter No. A.P.R. 203/58-59, dated 27 December 1958.

Pending the preparation and finalisation of the State-wide eligibility list of class III officials for promotion as tahsildars to the extent of the 30 percent of vacancies on the basis of seniority-cum-efficiency, Government have decided that the vacant posts of tahsildars or equivalent posts including the post of district Sheristedars which have been upgraded and the vacant posts of managers in the Divisional Commissioner's office in each division may be filled up, as a temporary measures by promotion of seniormost officials from amongst the officials working in the respective division as district sheristedars, deputy tahsildars, naib tahsildars, mahalkaries, aval karkuns and taluk sheristedars as the case may be.

I am therefore to request you to order such promotions purely on temporary basis on the basis of seniority-cum-merit to be fixed by you in your division subject to the condition that the promotions will cease when the State-wide eligibility list is finalized.

The promotions to the upgraded posts of district sheristedars will take effect from the date from which incumbent appointed by you joins the post.

Pending issue of amendments to classification, Control and Appeal Rules empowering Divisional Commissioners to appoint officiating tahsildars for short periods, the appointment made by you in pursuance of this letter may be reported to the Government for issues of final orders for purposes of audit."

15. It is clear from this letter that the Government had completely abdicated its powers in the matter of appointing tahsildars by promotions, in favour of the Divisional Commissioner. It told the Divisional Commissioner that he should make the appointments in question. The Divisional Commissioner was asked that

"the appointment made by you in pursuance of this letter may be reported to the Government for issue of final orders for purposes of audit."

16. From the above letter it is clear that what the Divisional Commissioner had to do was not to recommend names for appointment but "to order such promotions." The appointments made by him are to "take effect from the date

from which incumbents appointed by you join the posts." He was merely to report to the Government "for issue of final orders for purposes of audit." From the letter quoted above it is clear that the Divisional Commissioner was to make the appointment and the Government undertook in advance to issue final orders in order to avoid audit objections. Plainly and frankly the Government had abdicated one of its statutory functions. It did not reserve to itself any discretion. Admittedly in pursuance of the orders of Divisional Commissioner, some of the appointed persons took charge of their new posts on 26 and others on 28 August 1963. Before they took charge the Government had not issued any notification appointing them as tahsildars. Hence there can be no doubt that the Government did not appoint respondents 4 to 10 as tahsildars. They were appointed by the Divisional Commissioner in pursuance of the Government letter dated 31st December 1958. This writ petition was filed on 27th August 1963 challenging the validity of the promotions of respondents 4 to 10. During the pendency of the writ petition, the Government issued notification No. RD 183 EGO 63, dated 13th September 1963; but the same was published on 26th September 1963. That notification reads :

"The promotions of the following officials as tahsildars ordered by the Divisional Commissioner, Mysore Division, in his notification mentioned against each are ratified. The promotions are purely on a temporary basis, without prejudice to the claims of seniors and until further orders.

Name Number and date of notification

1. B. G. Kuttappa ... EST 5597 GAZ 63-54-I, dated 24th August 1963.
2. Syed Abdul Zahir ... Do.
3. G. N. Parthasarathy ... EST 5597 GAZ 63-64-II, dated 24th August 1963.
4. Safiulla Meccai ... EST 5597 GAZ 63-64-III, dated 24th August 1963.
5. U. Radhakrishna Rao ... EST 5597 GAZ 63-64, dated 24 August 1963.
6. A. Saldhna ... Do.
7. Safiur Rahman ... Do."

17. From this notification again it is clear that the promotions were made by the Divisional Commissioner, Mysore. The Government merely blessed the promotions made by him. In these circumstances, it cannot be said that the Government had at all applied its mind in the matter of promotions of respondents 4 to 10. The Government purported to have ratified those appointments only to conform to the requirements of the law, with a view to avoid audit objections. Once we come to the conclusion that the appointments made by the Divisional Commissioner are invalid in law - we have no doubt they are - there is no question of ratifying those appointments. Those appointments were about initio void and therefore no question of ratification arises. That apart, from what we have seen above, it is beyond doubt that the government did not

apply its mind to the appointments in question. Its ratification was a mere formal affair. It merely went through a meaningless formality. That is no ratification under law.

18. In view of our above finding it is not necessary to go into the other contentions advanced by Shri Datar. All that we need say is that the Government is bound to adhere to the rules bearing on the subject while making the promotions to the posts of tahsildars and it cannot travel outside those rules. What those rules are and what their effect is, we need not go into at this stage. If the Government does not act in accordance with the rules, it is needless to say, the aggrieved party has a right to approach this Court.

19. Certain complications appear to have been introduced in the matter of promotions to the posts of tahsildars by the consent order passed in Writ Petitions Nos. 1487 of 1961 and 30 and 31 of 1962 on the file of this Court. That order was passed on 13 September 1962. In those petitions it was prayed that this Court may be pleased to issue a writ of mandamus to the State of Mysore and the Divisional Commissioner of Mysore directing them to promote the petitioners therein as tahsildars in the Mysore division on the basis of the eligibility list of sheristedars prepared by the Divisional Commissioner and to direct them not to post or promote any person shown below the petitioners in the list in question. We very much regret to notice that though the State reorganization has taken place as long as 1 November 1956, the Government has not yet it possible to prepare even a provisional inter-state seniority list. The real difficulty in this case, as in several other service matters that come up before this court, is that no official knows his real place in the department in which he is serving. His future is uncertain and, to a large extent, it depends on the whims and fancies of his superior officers. We are not unaware of the difficulties involved in integrating the services that have been allotted to the new State of Mysore. But it is nobody's case that the task is beyond the capacity of the Government at the State and the Center. From 1 November 1956 to July 1964 is a long way off; several officers must have retired during this long interval. As time goes on more and more persons must be retiring, most of them disappointed and frustrated. From the numerous cases that have come before us, we are left with a feeling that there is some amount of frustration amongst the service personnel. How widespread it is, is a matter of conjecture. The Government's failure to integrate the services has naturally made the service personnel grievance-minded. Such an atmosphere must have necessarily affected the discipline amongst the services. The existing nebulous state of affairs is likely to lead the honest among those who are responsible for promotion to take wrong decisions and the dishonest amongst them to favour to favour their favourites and manipulate things. In such a situation, if the aggrieved parties or parties who feel aggrieved, being unaware of the real position, go about with the felling that they have been denied justice either because of communal considerations or because of regional prejudice whether their belief is real or fancied, but can certainly be genuine, the blame must

squarely rest on those who are responsible for this sorry state of affairs. There is no need to remind the Government that they can be no efficient administration, unless those in services are satisfied that they are dealt with justly and fairly. The work of this court has been enormously increased by the writ petitions filed by the disappointed Government servants. In a large number of cases they come to this court with a feeling of despair looking to this court as their only hope to get justice. In public interest, this state of affairs should be remedied at the earliest. We have said all these things, not with a view to tilt at the Government, but with a view to pointedly bring to the notice of the Government, a dangerous situation, the evil thereof may not have been sufficiently noticed by the Government.

20. Now, coming to the order made in the writ petitions mentioned above, curiously enough when those petitions came up for hearing, the petitioners therein did not press for any relief. On the other hand, the Government, the petitioners and the respondents in those petitions came to an understanding and requested the court to record the agreement reached. The court ordered accordingly. We have been taken through the order made in those cases. We have no hesitation in saying that the order in question merely incorporated the agreement reached by the parties. No direction was given by the court. Therefore, that order cannot, and in fact, did not strike down any rule framed by the Governor or set aside any action taken by him. The material portion of that order reads :

"After we heard arguments for sometime Shri Venkataramayya appearing on behalf of the petitioners, Shri Datar appearing on behalf of the respondents 2 to 8 in Writ Petition No. 1487 of 1961 (who are petitioners in this writ petition) and the Government Pleader appearing on behalf of the State, told us that we could make a consent order in these writ petitions and we now make that order.

Promotions to the post of a tahsildars in case in which a deputy tahsildar was a taluk sheristadar on 1 November 1960 (this date is said to be mistake for 1 November 1956) or in which a person of the South Kanara district or the Bellary district had become a tahsildar (we are told this is a mistake for deputy tahsildar) by 9 June 1959, should not be made on the basis of the Government notification of 27 November 1961. When making those promotions no precedence will be given to the civil servants of the South Kanara district and the Bellary district who become deputy tahsildars by 9 June 1959 over the taluk sheristadars of the former State of Mysore under the provisions of the Government order of 27 November 1961. In making the aforesaid promotions to the post of the tahsildars what should be taken into account would be some intelligible and rational basis and not basis created by the Government order of 27 November 1961. It should, of course, be made clear that when promotions are made to the post of a tahsildar, those promotions should be made from amongst form only those who are deputy tahsildars on this date (namely, the date of the order) including the petitioners and respondents 2 to 8 in Writ

Petition No. 1487 of 1961."

21. In the first place, the order admittedly proceeded on the basis of mistaken facts. The agreement reached is clearly vitiated by mutual mistakes. Secondly it is a consent order. It can only bind the parties to the agreement and not the others. Such an order cannot and in fact it did not strike down any rule, nor did it give any direction to the Government. Agreement recorded in that order is incapable of implementation in any competition between someone who was not a party to that order and one who was a party to the same. Therefore it has no legal force. Hence in making promotions the Government has to proceed on the basis of existing rules and not on the basis of that order.

22. A grievance was made of the fact that the promotions challenged in this petition were not only not made in accordance with the rules bearing on the subject; they did not even conform to the agreement incorporated in the order. Some of the promotees were not deputy tahsildars on the date of that order, viz., 13 September 1962. Therefore the Divisional Commissioner is not right in his assertion that he had acted on the basis of the order in question. That order appears to have been used as a convenient shield to cover the action taken by the Divisional Commissioner for which there appears to be no other legal justification.

23. For the reasons mentioned above this writ petition is allowed and the promotions of respondents 4 to 10 are quashed. The Government will now proceed to make promotions on the basis of the rules bearing on the subject. The petitioners were parties to the above mentioned consent order which has given occasion to trouble. Hence there will be no order as to costs.

24. Writ Petitions Nos. 1749 and 1960 of 1963. - For the reasons mentioned above in our order in Writ Petition No. 1653 of 1963, these petitions are allowed and the promotions challenged in these petitions are quashed. The Government is directed to proceed to make promotions to the posts of tahsildars on the basis of rules bearing on the subject. No costs.