

(2003) 05 SC CK 0009

In the Supreme Court Of India

Case No : Civil Appeal No. 4917 of 2000

Santosh Kumar

APPELLANT

Vs

State of Andhra Pradesh and Others

RESPONDENT

Date of Decision : 22-05-2003

Acts Referred:

Andhra Pradesh Revenue Subordinate Service Rules, 1961 — Rule 8
Andhra Pradesh State and Subordinate Service Rules, 1962 — Rule 47
Constitution of India, 1950 — Article 309, 313

Citation : AIR 2003 SC 4036 : (2003) AIRSCW 2970 : (2003) 5 JT 372 : (2003) 5 SCALE 52 : (2003) 5 SCC 511 : (2003) SCC(L&S) 721 : (2003) 1 SCR 264
Supp : (2003) 1 SLJ 39 : (2003) 4 Supreme 332

Hon'ble Judges : Shivaraj V. Patil, J;Arijit Pasayat, J

Bench : Division Bench

Advocate : L. Nageshwara Rao, J.R. Manohar Rao and G. Ramakrishna Prasad, for S.U.K. Sagar, for the Appellant; M.N. Rao A.D.N. Rao, A.P. Jyothish, Amar Jyothi Sharma, G. Prabhakar and T. Anamika, for the Respondent

Final Decision : Dismissed

Judgement

Shivaraj V. Patil, J.—The Division Bench of the High Court by the common impugned order disposed of Writ Petition Nos. 34839, 35775 of 1997 and 6758 of 1998. This appeal is filed by the respondent No. 4 in W.P. No. 35775/97. Some of the Head Constables including the respondent No. 4 herein (hereinafter referred to as 'respondent') in this appeal were appointed temporarily as out of seniority, Sub-Inspector (OSSI) w.e.f. 3.12.1983 without following recruitment rules. The appellant was appointed as direct recruit on 12.9.1985. Between 1996 and 1997, the Government of Andhra Pradesh issued various Government Orders relaxing relevant recruitment rules in favour of the respondent and others regularizing their services with effect from the date of their temporary appointment affecting the seniority of the appellant. The appellant challenged the same before the A.P. Administrative Tribunal. The Tribunal held that the State Government had power to relax the recruitment rules with retrospective effect but however, the Tribunal

held that the services rendered by the respondent and other similarly placed persons could not be counted as officiating service for determining their seniority as their appointment was not in accordance with the rules and they had not qualified for appointment. Aggrieved by the order of the Tribunal, the respondent and other promotees filed writ petitions before the High Court. The High Court, by the impugned order, allowed the writ petitions holding that the recruitment rules could be relaxed with retrospective effect. The High Court also held that even if their initial appointment was not made by following the procedure laid down by the rules, they had continued in the post uninterruptedly till their services were regularizing by relaxing the rules and so their officiating services had to be taken into account for the purpose of seniority. Hence, this appeal is filed questioning the validity and correctness of the impugned order of the High Court.

2. It may be useful to notice few more facts.

3. The substantive posts of Sub-Inspectors of Police were calculated and apportioned between direct recruits and promotees in 1983. According to the Special Rules, promotees could not exceed 30% of the cadre. There were 200 vacancies out of which 65 were allotted to the promotees and 127 to direct recruitment. The appellant and the other direct recruits were appointed on 12.9.1985 after selection made by APPSC. They underwent training and passed all the tests at the end of training. The Government issued various orders in 1996-97 relaxing the relevant recruitment rules in favour of the respondent and few others regularizing their services with effect from the date of their temporary appointment. Pursuant to the said orders, the Commissioner of Police issued orders regularizing the services of the respondent and other respondents similarly placed with effect from the date of their temporary appointment. Under these circumstances, the appellant and other direct recruits filed O.As. before the A.P. Administrative Tribunal challenging the relaxation of the Rules the consequential regularization of the services of the respondent and others. The Tribunal partly allowed the O.As. holding that the Government were competent to relax the rules in exercise of the powers conferred under Rule 47 of the A.P. State & Subordinate Service Rules, 1962 (for brevity 'General Rules') relating to service conditions with retrospective effect. However, by referring to the various decisions of this Court, the Tribunal took the view that the services rendered by the respondent and other OSSIs could not be counted as officiating service for determining their seniority as their appointments were not in accordance with the rules, they were not qualified for the appointment and that retrospective regularization of their services adversely affected the interest of the appellant and other who were regularly appointed as direct recruits. In the view it took, the Tribunal held that the impugned orders, to the extent they affected the seniority of the appellant and others, were invalid. The respondent and other promotee OSSIs filed writ petitions before the High Court against that part of the order of the Tribunal.

4. As already noticed above, the High Court allowed the writ petitions holding that the recruitment rules relating to the conditions of services could be relaxed with retrospective effect and even if their initial appointment were not made by following the procedure laid down by the rules, the officiating services of the promotees could be counted for the purposes of seniority as they continued in the post uninterruptedly till the regularization of their services.

5. Shri L. Nageshwara Rao, the learned Senior Counsel on behalf of the appellant urged that it was not permissible to relax the basic recruitment rules with retrospective effect; a person who was not appointed in accordance with the rules, was not entitled to seniority from the date of his temporary appointment. According to him, even if appointment could be made as OSSIs from Head Constables by relaxing the rules relating to qualification etc., such relaxation could not affect the seniority of the direct recruits who were appointed on regular basis after selection by APPSC. He took us through various rules and Government Orders in support of his submissions.

6. On the other hand, Shri M.N. Rao the learned Senior Counsel for the respondent made submissions supporting the impugned judgment and justifying the reasons recorded in the judgment in allowing the writ petitions. According to the learned Senior Counsel, the State Government had powers to relax the rules with retrospective effect. Learned counsel for the State while adopting the arguments of Shri M.N. Rao supported the impugned order.

7. We have carefully considered the submissions made on either side. Before the Tribunal it was conceded that the Government have power to relax rules under Rule 47 of the General Rules, but however, it was contended that the basic rules of recruitment i.e. A.P. Police Subordinate Service Rules (for short 'Service Rules') could not be relaxed in exercise of the power under the said Rule. Having regard to the facts of the case on hand, relevant Rules and law laid down by this Court the Tribunal concluded that there was no relaxation of basic qualifications but there was only relaxation of the conditions of service in the case of the respondent in regularizing the services with retrospective effect as Sub-Inspector. In paragraph 21 of the judgment the Tribunal stated that it is well-settled law that the Government in exercise of powers conferred on them under Rule 47 of the General Rules can relax the rules of appointment and such relaxation could be with retrospective effect. Reference was also made to the case of this Court in *M. Venkateswarlu and Others Vs. Govt. of A.P. and Others*, holding that Rule 47 ex facie does not contemplate any notice being given in case of relaxation of eligibility of a single individual for promotion to the post of Deputy Tehsildar; it was not necessary to issue a notice to all affected parties in such a case. However, the Tribunal held that as the appointment of the respondent and others as OSSIs was not in accordance with the Rules and their appointments were not made after considering the case of other eligible persons as per Service Rules, their services could not be taken into consideration while determining the seniority in the cadre of Sub-Inspectors. Finally, the Tribunal

concluded that the unofficial respondents in the O.As. could claim to be regularly appointed as Sub-Inspectors only from the dates on which the Government have issued orders relaxing the service rules; any notional dates of relaxation given to them affecting the seniority of regularly appointed Sub-Inspectors prior to the date of relaxation of Rules could not be held valid. In other words, the Tribunal held that the Government have power to relax the Rules with retrospective effect for the purpose of appointment and promotion but the seniority could not be assigned to them prior to the date of regularization of services affecting the seniority of others, who are regularly appointed prior to date of their regularization. In our view, the Tribunal was not right in saying that any notional date of relaxation was given to the respondent affecting the seniority of the appellant. In fact, service of the respondent was regularized from the actual date on which he was temporarily promoted as OSSSI which was permissible in terms of para 47(B) of the Constitution Bench judgment of this Court in *The Direct Recruit Class-II Engineering Officers' Association and others Vs. State of Maharashtra and others*, . Moreover, the promotion given to the respondent was in promotee quota which did not affect the appellant who was recruited later as a direct recruit. It may be mentioned that there was no direct recruitment in the year 1983-84 to the post of Sub-Inspector when services of the respondent and others were regularized. The appellant was recruited in the year 1985 i.e. subsequent to the date on which the respondent started working actually as OSSSI though temporarily. In this view, the question of affecting the seniority of the appellant without notice did not arise.

8. We may state here itself that the Tribunal did not record a finding whether the services of the unofficial respondents were regularized as against the vacancies meant for promotees or not.

9. The High Court in para 7 of the judgment has recorded a clear finding that the services of the respondent and others were regularized in respect of the vacancies available in the quota meant for the promotees after observing, thus:-

"7. There is another aspect on which not arguments were addressed across the Bar and learned Tribunal has also not recorded any finding. In these cases, the petitioners herein made a specific assertion that the regularization of their services with effect from their initial date of temporary appointment was done within the 30% quota allocated to the promotees. There is no specific denial of this fact in the counter affidavit filed by the non-official respondents herein before the Tribunal though an attempt was made to show that when the petitioners herein were promoted there were no vacancies available within the quota of the promotees and that those appointments were made in the vacancies meant for direct recruits as there was some delay in finalization of the appointments by direct recruits. But there is no specific assertion that as on their date of appointment, vacancies in the promotees quota were not available for the purpose of regularizing the services of the petitioners herein. In fact, on behalf of the Government respondent No. 1 the Assistant Secretary, Home filed an

additional counter affidavit in the Tribunal specifically supporting the contention of the petitioners herein that the regularization of their services was made in respect of vacancies available out of the quota of the promotees. The Tribunal has not recorded any finding on this aspect. This question was not addressed in this Court by the learned counsel for the unofficial respondents herein. For the purpose of these writ petitions and in the absence of any clinching material, the statement made in the affidavit filed on behalf of the Government has to be accepted and it must be presumed that the regularization directed to be effected under the impugned G.Os. was in respect of the vacancies available in the quota meant for the promotees."

Some arguments were advanced before us to contend that the regularization of services of the respondent and others was not against the quota meant for promotees. In view of what is stated in paragraph 7 of the impugned judgment, extracted above, and, particularly, when no argument was advanced before the High Court in this regard, it is not possible to accept the contention put forth on behalf of the appellant disputing the position that the regularization of services of the respondent was against the quota meant for promotees.

10. Rule 47 of the General Rules and corresponding new Rule 31 of 1996 Rules read:-

"47. Relaxation of Rules by the Governor. No rule made under the proviso to Article 309 of the Constitution of India or contained under Article 313 of that Constitution shall be construed to limit or abridge the power of the Governor to deal with the case of any class or category of persons for being appointed to any civil post, or of any person who is serving or has served in a civil capacity under the Government of Andhra Pradesh in such manner as may appear to him to be just and equitable:

Provided that, where any such rule is applicable to the case of any person or a class of persons, the cases shall not be dealt with in any manner less favourable to the person or class of persons than that provided by that rule."

"31. Relaxation of Rules by the Governor. Notwithstanding anything contained in these rules or in the special rules, the Governor shall have the power to relax any rules contained in these rules or Special Rules, in favour of any person or class of persons, in relaxation to their application to any member of a service or to any person to be appointed to the service, class or category or a person or a class of persons, who have served in any civil capacity in the Government of Andhra Pradesh in such manner as may appear to be just and equitable to him, where such relaxation is considered necessary in the public interest or where the application of such rule or rules is likely to cause undue hardship to the person or class of persons concerned."

Based on the language and content of Rule 47 of General Rules and in the light of the decisions of this Court the Tribunal as well as the High Court have firmly concluded that the State Government have power to grant relaxation of Rules

with retrospective effect.

11. A Constitution Bench of this Court in Direct Recruit Class II Engineering Officers' Association's case (*supra*), after considering various aspects and earlier decisions, summed up the conclusions in paragraph 47 of the judgment. For our purpose paras (A) and (B) of the said paragraph are relevant, which are extracted hereunder:-

"47. 'To sum up, we hold that:

(A) Once an incumbent is appointed to a post according to rule, his seniority has to be counted from the date of his appointment and not according to the date of his confirmation.

The corollary of the above rule is that where the initial appointment is only ad hoc and not according to rules and made as a stop-gap arrangement, the officiation in such post cannot be taken into account for considering the seniority.

(B) If the initial appointment is not made by following the procedure laid down by the rules but the appointee continues in the post uninterruptedly till the regularization of his service in accordance with the rules, the period of officiating service will be counted."

The respondent and others were appointed as Sub-Inspectors out of seniority looking to the outstanding merit and record prior to the direct recruits like the appellant. Their services were admittedly regularized by relaxing the Service Rules in exercise of power available under Rule 47 of the General Rules. The appellant did not challenge the validity of Rule 47 and no malafides were established against the authorities in exercise of powers of relaxation under the said Rule. The Tribunal has recorded a finding that the rule relating to the method of recruitment was not relaxed but only the conditions which had to be fulfilled for the purpose of promotion to the category of Sub-Inspector were relaxed; this finding is not disturbed by the High Court; there was no relaxation as to the basic qualification; the State Government regularized the services of the respondent and others with retrospective effect from the date they were temporarily appointed as Sub-Inspectors (OSSIs). It is also not disputed that they continued in service uninterruptedly for about 12-13 years till their services were regularized with retrospective effect. This being the factual position it could not be said that the corollary to paragraph 47(A) of the aforementioned Constitution Bench judgment applies to the facts of the present case. Once their services were regularized it cannot be contended that their initial appointment was only on ad hoc basis and not according to the Rules and made as a stop-gap arrangement. On the other hand paragraph 47(B) supports the case of the respondent.

12. This Court had occasion to consider the power of Government to relax the service rules under Rule 47 of General Rules in *Government of Andhra Pradesh and Others Vs. Sri D. Janardhana Rao and Another*, . In that case a panel of

Deputy Tehsildars for promotion to the cadre of Tehsildars was prepared. The rules at the relevant point of time required that for including in the panel for promotion as Tehsildars, the Deputy Tehsildars had to satisfy certain qualifications including that as Deputy Tehsildars they should have exercised Magisterial powers. Taking note of the historical reasons the Government considered it unfair to exclude the Deputy Tehsildars from Telangana area of Andhra Pradesh for inclusion in the panel for promotion as Tehsildars. Hence exercising power under Rule 47 the Government granted relaxation and the Deputy Tehsildars coming from Telangana area were included in the panel for promotion as Tehsildars. When there was challenge to the power of the Government to relax the conditions of service under Rule 47, this Court expressed the view that Rule 47 of the General Rules gives power to the Governor to relax the rigour of the General Rules in such manner as may appear to be just and equitable. The Court went on to say:-

"It is not difficult to see that the occasion for acting under Rule 47 may well arise after the attention of the Govt. is drawn to a case where there has been a failure of justice. In such cases justice can be done only by exercising the power under Rule 47 with retrospective effect, otherwise the object and purpose of the rule will be largely frustrated."

(Emphasis supplied)

In the same judgment the contention that relaxation can be made under Rule 47 prospectively and not retrospectively was rejected by this Court.

13. This Court yet again in *M. Venkateswarlu and Others Vs. Govt. of A.P. and Others*, held that under Rule 47 and Governor is empowered to relax the rigour of the General Rules in such manner as may appear to him to be just and equitable retrospectively also. In that case the appellant was promoted as Deputy Tehsildar on 20.6.1984. The panel effective from 1.7.1983 for regular promotion was to be drawn for the year 1983-84; he had not completed the requisite length of service postulated by Rule 8(ii) of the A.P. Revenue Subordinate Service Rules, 1961 (Special Rules) for regular promotion as Deputy Tehsildar. He requested for relaxation under Rule 47 of the Rules. The State Government relaxed the shortfall and empanelled him for the year 1983-84 instead of 1987-88 and accordingly he was promoted on regular basis. This relaxation given to the appellant was assailed. Dealing with the question, in paragraph 8, this Court observed:-

"8. Thus it could be seen that the Governor is empowered to relax the rigour of the General Rules in such manner as may appear to him to be just and equitable in the interest of justice and equity. Justice can be done only by exercising the power retrospectively. Otherwise, the object and purpose of Rule 47 will be largely frustrated. The finding of the Full Bench of the Tribunal that Rule 47 cannot be exercising retrospectively is, therefore, clearly illegal."

(Emphasis supplied)

In that judgment another question was also considered whether giving of notice to the persons likely to be affected was necessary before exercising the power of relaxation under Rule 47. In paragraph 11 of the judgment in regard to the same question it is stated, thus:-

"11. The question then is: whether notice to all the persons who are likely to be affected is required before exercising the power under Rule 47? The rule ex facie does not contemplate any notice being given. It is not a case of considering inter se claim of any particular individuals. It is a case of relaxing the eligibility of a single individual as against many. Under these circumstances, we do not think that the rule envisages notice to all the affected persons."

At any rate, in the present case not giving notice to the appellant before relaxation was given to the respondent was immaterial as promotion was given to the respondent in promotee quota, as already stated above.

14. The facts of the case of Desoola Rama Rao and Another Vs. State of Andhra Pradesh and Others, were almost similar to the facts of the case with which we are dealing. In that case respondents 3 and 4 were temporarily appointed as Assistant Engineers on 14.8.1959 and 19.5.1960 respectively before the appellants were recruited as Assistant Engineers. In exercise of powers under Rule 22(a) of the General Rules, the services of respondents had been regularized retrospectively with effect from 19.5.1961. In paragraph 4 of the said judgment this Court observed that the regularization of services of respondents 3 and 4 as directed to take effect, is not anterior to their appointment as Assistant Engineers, the regularization cannot be said to have been vitiated on account of arbitrariness. From this judgment it follows that the power of relaxation can be exercised retrospectively and it can be exercised for the specific purpose of regularization of services of a temporary appointee with retrospective effect from the date of his appointment under Rule 10(a) of the A.P. General Rules.

15. Yet, another decision of this Court in P.V.T. Phillip Vs. P. Narasimha Reddy and Others, supports the case of the respondent to the effect that power to relax under Rule 47 can be exercised with retrospective effect wherever required in the interest of justice and equity.

16. In the case on hand the appointment of the respondent made under Rule 10(a)(i)(I) was regularized by relaxing the relevant service rules and the Standing Order No. 107 of Andhra Pradesh Police Manual Part I by exercising the powers under Rule 47 of General Rules. The Government, as observed by the High Court, for good reasons have chosen to regularize the service of the respondent with effect from the date of temporary promotion as Sub-Inspector in recognition and providing incentive for merit and in public interest. The High Court also noticed that the respondents were given out of seniority promotions on the basis of their individual extraordinary services and merit. The High Court found fault with the observations made by the Tribunal that the appointment of the respondent was not in accordance with the rules and that his appointment

was not made after considering the case of all other eligible persons as per the Rules and as such their services could not be counted for seniority in the cadre of Sub-Inspectors from the date of their temporary appointment. The High Court observed that the question of considering the case of every eligible person along with them would scarcely arise as in such cases, it is only a particular individual based on his notable performance and merit would be picked up for out of seniority promotion as has been done in this case. The High Court also noted that the General Rules provided for ad hoc appointment under Rule 10(a)(i)(1) of the General Rules and in this case there is a provision for appointment by promotion and that is how the respondent had been promoted. In regard to giving of notice to the persons likely to be affected before exercise of power to relaxation under Rule 47, the High Court in paragraph 22 of the impugned judgment observed:-

"22. The only other contention which needs mention is that at any rate the impugned orders of the Government would not affect the interests (seniority) of the un-official respondents inasmuch as no notice has been given to them before the Government passed the impugned orders. It may be mentioned here, the impugned orders do not relate to fixing the inter se seniority within the cadre of Sub-Inspectors. The petitioners herein were promoted in their individual cases based on their exceptional merit and performance. If regularization of their services by relaxing the rules under Rule 47 of the A.P. General Rules happens to affect the seniority of others, this itself does not support the contention that the impugned orders could not have been passed without prior notice to the un-official respondents and others. Further, Rule 47 of the General Rules does not contemplate issuance of notice before the power is exercised. The Supreme Court in the case of M. Venkateswarlu (supra) has held that Rule 47 ex facie does not contemplate any notice. It was also observed that it was not a case to consider inter se claims of any particular individual and that it was a case of relaxing the eligibility requirement of a single individual as against many. In these circumstances, it was held that no notice was required."

17. Another important factor to be kept in mind is that a finding is recorded by the High Court that the promotion given to the respondents to the post of Sub-Inspector was against the vacancies meant for the quota of promotees. The respondent was admittedly promoted on temporary basis as OSSSI prior to the recruitment of the appellant. Once his services were regularized that too in the promotee quota, the appellant being direct recruit cannot make any grievance. In this view it cannot be said that the appellant was an affected person for want of notice before passing the order of relaxation to question the seniority of the respondent.

18. The decisions cited on behalf of the appellant, according to the High Court, did not support the case of the appellant having regard to the facts of those cases and rightly so in our view. That apart, in the light of the direct decisions of this Court dealing with Rule 47 of the General Rules the High Court was right in

following them in the impugned order.

19. The case of N.K. Durga Devi Vs. Commissioner of Commercial Taxes, Hyderabad and Others, also does not help the appellant for three reasons (1) it is on the facts of that case, (2) as can be seen from paragraph 3 of the judgment, the order was made on the basis of concession made by the learned counsel that the relaxation could not have been validly passed without giving notice to all the affected parties since that would be in violation of principles of natural justice, and (3) respondent was promoted as OSSSI in promotee quota and not against quota meant for direct recruits to which category the appellant belonged.

20. Thus viewed from any angle we do not find any good reason or valid ground to interfere with the impugned judgment. Hence, finding no merit in this appeal it is dismissed. No costs.