
(1980) 10 SHI CK 0003

In the High Court Of Himachal Pradesh

Case No : Civil Writ Petition No. 88 of 1972

Shri Durga Dass

APPELLANT

Vs

State of Himachal Pradesh

RESPONDENT

Date of Decision : 15-10-1980

Acts Referred:

Constitution of India, 1950 — Article 309

Citation : (1981) ShimLC 79

Hon'ble Judges : V.P. Gupta, J

Bench : Single Bench

Advocate : H.M. Sharma, for the Appellant; A.G. and H.K. Paul, Assistant to A.G., for the Respondent

Final Decision : Allowed

Judgement

V.P. Gupta, J.—Durga Dass Petitioner is serving as a District Family Planning Officer with the Himachal Pradesh State. In this petition he has alleged that the rules regarding the method of recruitment for the post of District Family Planning Officer in the Medical and Public Health Department, Himachal Pradesh, were published in the Rajpatra, Himachal Pradesh, on 19th October, 1968, and that the said rules were made under Article 309 of the Constitution of India. The copies of the notification and the rules are Annexures A and A-1 respectively. It is alleged that according to these rules, the posts of District Family Planning Officers are to be filled -50% by promotion and 50% by direct recruitment. According to the rules (copy Annexures A-1) promotions are to be made from amongst the Health Educators and Family Planning Social workers, having five years' service in the grade.

2. The Petitioner alleges that an advertisement has been published in "The Tribune", dated the 10th July, 1972, wherein applications have been invited for filling up of seven temporary posts of District Family Planning Officers and the copy of this advertisement is placed as Annexure B. It is alleged by the Petitioner that in the advertisement the qualifications for eligibility to the post of District

Family Planning Officer are quite different from the qualifications which are laid down in the rules (copy Annexure A). It is further stated by the Petitioner that according to the advertisement, Annexure B, all the vacancies are to be filled by direct recruitment and there is no vacancy which is to be filled by promotion. The grievance of the Petitioner is that the rules which were framed under proviso to Article 309 of the Constitution could not be changed and that the advertisement (Annexure B) is not in consonance with the statutory rules. It is further stated that the Petitioner is an eligible person who can be considered for appointment as a District Family Planning Officer by promotion in accordance with the rules and that the said advertisement, (Annexure B) is likely to affect the rights of the Petitioner because no post, according to the said advertisement, is to be filled by promotion. It is alleged by the Petitioner that the imposition of the conditions, contained in the advertisement (Annexure B) are discriminatory and violative of the fundamental rights and the same are also against the statutory rules. On these allegations the Petitioner has prayed that a writ in the nature of certiorari be issued by which the qualifications for the appointment of District Family Planning Officers laid down in the notification (Annexure B), which are contrary to the statutory rules, be quashed and that the Respondent be directed to fill up the posts in accordance with the statutory rules, i.e. Annexure A-1.

3. A return was filed to this writ petition by the Respondent and it was alleged that the Government of India, Ministry of Health, Family Planning and Urban Development, have prescribed the said pattern for implementation of family planning programme throughout the country and that in accordance with the instructions, dated 29th October, 1966, issued to all State Governments/Union Territories, the criteria for filling up the posts of District Family Planning Officers has been laid down. The copy of the instructions, dated 29th October, 1966, is Annexure R.A. It is further stated that Himachal Pradesh Government has agreed to this scheme and for implementation of this scheme the posts of District Family Planning Officers have been created, vide Annexure RB. It is further stated that the posts of District Family Planning Officers under the new pattern are to be manned by the Medical Officers in accordance with the instructions of the Government of India, Ministry of Health, and, therefore, non-Medical Officer have no claim or right for being appointed as District Family Planning Officers and the old pattern is to be replaced in accordance with the pattern approved by the Government of India, Ministry of Health. It is further stated that the Petitioner is working as a District Family Planning Officer on a purely stop-gap arrangement with effect from 21st August, 1970. It is also stated that the rules for recruitment of District Family Planning Officers published in the Rajpatra of the year 1968 under Article 309 of the Constitution pertained to non-Medical posts which were in existence prior to implementation of the new pattern approved by the Government of India, and as such the same are not applicable for filling up the present post of District Family Planning Officers for which the pay scale is quite different and which posts are to be manned by Medical Officers Class I. It is also stated that the old posts of District Family Planning Officers (who were non-

Medical Officers) will be abolished after the appointment of Medical Officers of Class I in the new scale. It is also stated that the Petitioner is junior most Health Educator and was only allowed to work as a District Family Planning Officer on the old pattern as a purely stop-gap arrangement, which appointment has been discontinued from 14th August, 1972. On these grounds it is alleged that the Petitioner has no claim and the writ petition should be dismissed.

4. A rejoinder to the return was filed and the allegations made in the writ petition were re-asserted.

5. I have heard Shri H.M. Sharma, Advocate for the Petitioner and Shri H.K. Paul, Assistant to Advocate-General for the State.

6. The learned Counsel for the Petitioner contended that the rules (copy Annexure A-1) have been framed under Article 309 of the Constitution and, therefore, these are statutory rules. It is further contended that the Government of India, Ministry of Health, had no authority to make any amendments or changes in these rules by administrative or executive orders and that the advertisement (copy Annexure B) is only based upon the administrative/executive instructions. The learned Counsel contended that the statutory rules have the force of law and the executive instructions have to be ignored and that the statutory rules could only be changed by making amendment in the rules. In support of his contention he has relied upon *Tribhuvan Nath Bhargava v. Union of India* and Ors. 1976 ALJ 645, *K.P. Krishnankutty Menon and Others Vs. State of Kerala*, and *State of Haryana etc. etc. v. Shameshar Jang Bahadur etc. etc.* (1972) SCC 188.

7. The learned Counsel for the Respondent contended that the previous post of District Family Planning Officer was a non-medical post and that the Government of India after considering the various circumstances and in accordance with the Special Committee Rules on the Family Planning Programme made certain changes. In accordance with the implementation of this programme, the posts of District Family Planning Officers were converted into medical posts and the same were to be manned by Class I Officers. He has referred to the copy of the memorandum, dated 29th October, 1966 (Annexure RA) from the Government of India to all the State Governments and the Union Territories, and Annexure RB in which the scheme for implementation of family planning programme has been laid down. The learned Counsel contended that in accordance with this scheme the advertisement (Annexure B) is quite justified. He has also referred to Annexure RD, a notification, dated 14th August, 1972, by which the Governor, Himachal Pradesh, has ordered the discontinuation of the stop-gap arrangement regarding the appointment of the Petitioner as a District Family Planning Officer.

8. This writ petition was filed on 21st July, 1972.

9. I have considered the contentions of the learned Counsel for the parties and have also gone through the annexures appended with the writ petition.

10. The rules contained in Annexure A-1 were made under Article 309 of the Constitution of India as is clear from Annexure A. These rules have the statutory force and the same will remain operative till they are amended in accordance with law. In the rules (copy Annexure A-1), it is clearly laid down that 50% of the posts of District Family Planning Officers will be filled by promotion from amongst the Health Educators and Family Planning Social Workers with five years' service in the grade.

11. The advertisement (Annexure B) clearly states that seven posts of District Family Planning Officers are to be filled but the qualifications laid down for appointment to these posts are quite different than the qualifications laid down in the statutory rules (Annexure A-1). Moreover, in Annexure B, there is nothing to show that any posts are to be filled by promotion. It may be correct that the advertisement, Annexure B, was issued under certain new programme and upon the instructions of Government of India, Ministry of Health, Family Planning and Urban Development, for implementation of the new programme of family planning, but these instructions whether executive or administrative cannot override the statutory rules which have the force of law. In these circumstances the advertisement, contained in Annexure B, is clearly in violation of the statutory rules and the posts of District Family Planning Officers cannot be filled by ignoring the statutory rules. The Petitioner claims that he is eligible for the post of District Family Planning Officer in accordance with the statutory rules (Annexure A-1), and, therefore, by the said advertisement (Annexure B) his rights for consideration and appointment to the post of District Family Planning Officer are affected. The grievance of the Petitioner is justified and if he is eligible for the post then naturally he has a right to be considered for promotion. The advertisement, Annexure B, which is clearly in contravention of the rules cannot thus be adhered to for filling up the posts of the District Family Planning Officers.

12. In State of Haryana's case (supra) it has been held:

The instructions issued by the Government undoubtedly affect the promotion of the concerned officials and, therefore, they relate to their conditions of service. The instructions add to the qualifications already prescribed by the rules framed under Article 309. By adding, the Government has really altered the existing conditions of service. The Government is not competent to alter the rules framed under Article 309, by means of administrative instructions.

13. In K.P. Krishnankutty Menon and Ors. case (supra) it is held:

There is a distinction between a rule framed by the Governor under the proviso to Article 309 and an executive order passed by Government. They are not same. Though every order passed by Government is required to be expressed in the name of the Governor, it does not follow that because an executive order is required to be expressed in the name of the Governor it can be considered to be a rule under the proviso to Article 309.

The conditions of service of Government employees can be prescribed either by

rules framed under the proviso to Article 309 or in their absence by executive orders. If there are no rules covering the subject, there is no objection in Government passing executive orders regulating it. But once the rules are framed under the proviso to Article 309 covering the subject, the rules cannot be varied or modified by executive orders, as the field is already covered by the rules. An executive order purporting to alter or modify an already existing rule under Article 309 has no legal validity and is inoperative and no legal rights can be based on such order.

14. In *Tribhuvan Nath Bhargava's* case (supra) also it has been held that the Government cannot amend or supersede statutory rules by administrative instructions.

15. Therefore, in view of the facts stated above and the law referred to above, it is clear that the rules (copy of which is Annexure A-1) cannot be changed by administrative or executive instructions issued by the Government of India or the State of Himachal Pradesh, and the advertisement (copy of which is Annexure B) is clearly in violation of the statutory rules and as such will be held to be ineffective.

16. The result, therefore, is that the writ petition is allowed, and the Respondent is directed to fill the vacancies of District Family Planning Officers strictly in accordance with the rules framed for recruitment of District Family Planning Officers under Article 309 of the Constitution of India.

17. The parties are left to bear their own costs.