Rajasthan High Court
Naresh Kr. Gupta vs High Court Of Judicature For Raj. ... on 4 August, 2004
Equivalent citations: RLW 2005 (1) Raj 759, 2005 (3) SLJ 338 Raj, 2004 (4) WLC 281
Author: A D Singh
Bench: A D Singh, H Lal

JUDGMENT Anil Dev Singh, C.J.

1. Since the identical questions of fact and law have been raised in these writ petitions, they have been heard together and are being disposed of by this common order.

2. The petitioners, who have filed these writ petitions by way of public interest litigation claim themselves to be persons with disabilities. They appeared in the RJ.S. Recruitment Test 2003 held pursuant to the advertisement dated 4.8.2003 for filling up 89 vacancies calculated for the present year and 19 carried forward vacancies but, no reservation for handicapped persons was provided. They seek declaration that the provisions of Persons With Disabilities (Equal Opportunities, Protection of Rights And Full Participation) Act, 1995 (in short, "the Act of 1995") are applicable to the R.J.S. Rules 1955 and they are entitled to 3% reservation for persons with disabilities under the said Act and the Rules framed by the State Government thereunder. It is also prayed that directions be given to the RPSC for calling them for interview and to recommend their names for appointment to the RJS against the aforesaid quota of 3% provided in the Act and the Rules made thereunder.

3. The respondents have disputed their claim on the ground that there is no provision for reservation for persons with disabilities under the existing rules. Therefore, they are not entitled to such reservation unless and until the rules providing for such reservation for handicapped persons are made.

4. Since the petitioners have not qualified for being invited for the ensuing interview, the question whether or not the handicapped persons can be considered for selection and appointment in the RJS against the advertised vacancies in the absence of the rules in this behalf is purely of academic value because even if there had been reservation for handicapped persons, the persons could not have been considered for the same.

5. It is not in dispute that the High Court has drafted the Rajasthan State Judicial Service Rules, 2003 as per the directives of the Supreme Court given in All India Judges' Association and Ors. v. Union of India and Ors. ((2002) 4 SCC 247), while accepting Justice Shetty Commission's Report. The draft of the rules inter-alia provides 3% reservation for persons with disabilities in the RJS. After approval of the Full Court on 4.4.2003, the draft of the rules was sent to the State Government, because the said rules are to be made by the Governor as provided under Article 234 of the Constitution of India after consultation with the RPSC. It appears that the draft rules were forwarded by the State Government to the RPSC for the purpose of consultation but they are still pending consideration and finalisation. The petitioners have, therefore, by way of these writ petitions claimed reservation under the Act of 1995 and the Rules made by the State Government thereunder. Since the relevant rules have not been made by the Governor and have not been notified

so far, there is presently no reservation for the persons with disabilities for appointment in the Rajasthan Judicial Service.

6. Learned counsel for the petitioners has submitted that under the Act of 1995, the handicapped persons are entitled to be considered against the advertised vacancies in R.J.S. to the extent of 3% of the vacancies. This argument is being advanced on the basis of Sections 32 and 33 of the Act of 1995. They have also canvassed that the Act of 1995 being a social welfare legislation, rule of beneficient construction must be adopted to construe Sections 32 & 33 thereof. In support of their submission, they have relied on the decision of the Supreme Court in Lalappa Lingappa v. Laxmi Vishnu Textile Mills Ltd. (AIR 1981 SC 852).

7. In order to appreciate the submission of learned counsel for the petitioners, Sections 32 and 33 of the Act of 1995 need to be noticed. These provisions read as follows:-

"32. Identification of posts which can be reserved for persons with disabilities.-

Appropriate Governments shall-

(a) identify posts, in the establishments, which can be reserved for the persons with disability;

(b) at periodical intervals not exceeding three years, review the list of posts identified and up-date the list taking into consideration the developments in technology.

33. Reservation of Posts.-Every appropriate Government shall appoint in every establishment such percentage of vacancies not less than three per cent, for persons or class of persons with disability of which one per cent, each shall be reserved for persons suffering from-

(i) blindness or low vision;

(ii) hearing impairment;

(iii) locomotor disability or cerebral palsy, in the posts identified for each disability;

Provided that the appropriate Government may, having regard to the type of work carried on in any department or establishment, by notification subject to such conditions, if any, as may be specified in such notification, exempt any establishment from the provisions of this section.

8. As is apparent from a conjoint reading of Sections 32 and 33 of the Act of 1995 and proviso to Section 33 thereof, the posts against which the reservation in an establishment for the persons with disabilities can be made are first to be identified by the State. The State can even exempt an establishment from the provisions of Section 33 of the Act of 1995 in view of the type of work being carried on by it.

9. Till such time the posts in an establishment are identified by the appropriate Government for the purpose of making reservation, no benefit accrues to a candidate afflicted with disability. No other construction of the provisions of Sections 32 and 33 is possible in view of their clear language. The statute cannot be twisted to give an interpretation which is not possible having regard to the language used by it.

10. In the case of judicial service, the posts can be reserved for the persons with disability only by means of rules made under Article 234 of the Constitution of India. The posts identified for reservation must be incorporated in the rules for the persons with disabilities to avail of the benefit contemplated by Sections 32 & 33 of the Act of 1995. The rules providing for reservation in the R.J.S. for persons with disabilities, as already pointed out, are yet to be made and notified. Therefore, the question of the persons with disabilities being considered for advertised vacancies in RJS on the ground of being afflicted by disabilities does not arise.

11. Mr. S.P. Sharma, learned counsel appearing for some of the petitioners submitted that Government by a notification had made reservation for persons with disabilities and this includes reservation in the R.J.S. as well. According to him, this fulfills the requirements of Section 32 of the Act of 1995. In support of his submission, he relied on the decisions of the Punjab & Haryana High Court in Dalbir Singh Bagga v. State of Punjab and Ors. (1999 (5) SLR 702), and the Kerala High Court in Benny v. State of Kerala (2003 (5) SLR 614). These two decisions do not advance the case of the petitioners. These decisions do not deal with the reservation for handicapped persons for appointment in judicial service. The reservation in judicial service can be provided only by rules made under Article 234 of the Constitution of India and not by an executive fiat of the State Government or rules simply made under proviso to Article 234 of the Constitution of India without the consultation of the High Court.

12. In Mohan Kumar Lal v. Vinoba Bhave University and Ors. ((2002) 10 SCC 704), while considering the question as to whether or not the Public Service Commission could ignore the decision to make reservation policy applicable in respect of an appointment to the post, which was advertised on 10.1.1990, and the last date for submission of the application was 30.1.1990, the Supreme Court held that the posts advertised for which the process of recruitment had been initiated, the reservation policy was not made applicable as the provisions for reservation were introduced only on 22.8.1993. In this regard, the Supreme Court has observed, as follows:-

"The High Court in the impugned judgment is of the view that since appointments had not factually been made, the reservation policy would apply. As it transpires, the provisions of Section 57, which governs the field, did not contain any clause for reservation and Sub-section (5) of the said Section 57 providing for reservation was introduced only on 22.8.1993. In this view of the matter in respect of the post advertised for which the process of recruitment had been initiated, the reservation policy could not have been made applicable. The impugned judgment of the High Court was, therefore, erroneous, and cannot be sustained. We, therefore, set aside the impugned judgment of the High Court and hold that the reservation policy, pursuant to the amended provision of Sub-section (5) of Section 57 of the Act, will not apply to the present case."

13. It is to be noted that so far as the judgment of the Supreme Court is concerned, the amendment had come into force while process of selections was on. In the instant case, the draft rules which were framed by the High Court have not been notified by the State so far. Therefore, till such time the rules are made by the Governor and notified, the petitioners and handicapped candidates cannot have any claim on the basis of the provisions of Sections 32 and 33 of the Act of 1995.

14. Learned counsel for the petitioners contended that the mandamus should be issued to the State to make the rules and issue the requisite notification. We are unable to accept this submission of the learned counsel for the petitioners. The rules are legislative in nature. They have to be framed under Article 234 of the Constitution of India. No mandamus can be issued to the State to make the rules and to notify them.

15. The position of law is well established by the various judgments of the Supreme Court. In A.K. Roy v. Union of India ((1982) 1 SCC 271), the Constitution Bench of the Supreme Court took the view that a writ in the nature of mandamus directing the Central Government to bring a statute or a provision in a statute into force in exercise of powers conferred by the Parliament by that statute cannot be issued. In this regard, the Supreme Court observed, as follows:-

"We may now take up for consideration the question which was put in the forefront by Dr. Ghatate, namely, that since the Central Government has failed to exercise its power within a reasonable time, we should issue a mandamus calling upon it to discharge its duty without any further delay. Our decision on this question should not be construed as putting a seal of approval on the delay caused by the Central Government in bringing the provisions of Section 3 of the 44th Amendment Act into force. That Amendment received the assent of the President on April 30, 1979 and more than two and a half years have already gone by without the Central Government issuing a notification for bringing Section 3 of the Act into force. But we find ourselves unable to intervene in a matter of this nature by issuing a mandamus to the Central Government obligating it to bring the provisions of Section 3 into force. The Parliament having left to the unfettered judgment of the Central Government the question as regards the time for bringing the provisions of the 44th Amendment into force, it is not for the court to compel the government to do that which, according to the mandate of the Parliament, lies in its discretion to do when it considers it opportune to do it. The executive is responsible to the Parliament and if the Parliament considers that the executive has betrayed its trust by not bringing any provision of the Amendment into force, it can censure the executive. It would be quite anomalous that the inaction of the executive should have the approval of the Parliament and yet we should show our disapproval of it by issuing a mandamus."

Similarly, in Union of India v. Shree Gajanan Maharaj Sansthan ((2002) 5 SCC 44), the Supreme Court While noting A.K. Roy's case observed, as under:-

"In A.K. Roy v. Union of India a contention was raised that despite the provisions of Section 1 (2) of the Forty-fourth Constitution (Amendment) Act, 1978, Article 22 of the Constitution stood amended on 30-4-1979 when the Amendment Act received the assent of the President and that there was nothing more that remained to be done by the executive except fixing a date for the commencement of the Act as provided under Section 1(2) thereof. According to the said contention, Section 1(2),

which is misconceived and abortive, must be ignored and severed from the rest of the Amendment Act. This Court observed that no mandamus could be issued to the executive directing it to commence the operation of the enactment; that such a direction should not be construed as any approval by the Court of the failure on the part of the Central Government for a long period to bring the provisions of the enactment into force; that in leaving it to the judgment of the Central Government to decide as to when the various provisions of the enactment should be brought into force, Parliament could not have intended that the Central Government may exercise a kind of veto over its constituent will by not ever bringing the enactment or some of its provisions into force; that if only Parliament were to lay down an objective standard to guide and control the decision of the Central Government in the matter of bringing the various provisions of the Act into force, it would have been possible to compel the Central Government by an appropriate writ to discharge the function assigned to it by Parliament. It was further contended that an amendment can be bad because it vests an uncontrolled power in the executive in bringing an enactment into operation. This Court, however, noticed that such power cannot be held to give an uncontrolled power to the executive inasmuch as there are practical difficulties in the enforcement of laws and those difficulties cannot be foreseen. It, therefore, became necessary to leave the judgment to the executive as to when the law should be brought into force. When enforcement of a provision in a statute is left to the discretion of the Government without laying down any objective standards, no writ of mandamus could be issued directing the Government to consider the question whether the provision should be brought into force and when it can do so. Delay in implementing the will of Parliament may draw adverse criticism but on the data placed before us, we cannot say that the Government is not alive to the problem or is desirous of ignoring the will of Parliament."

In a recent decision rendered in Common Cause v. Union of India ((2003) 8 SCC 250), the Supreme Court while reviewing its earlier judgments held, as follows:-

"From the facts of the case, it cannot be said that the Government is not alive to the problem or was desirous of ignoring the will of Parliament. When the legislature itself had vested the power in the Central Government to notify the date from which the Act would come into force, then the Central Government is entitled to take into consideration various facts including such facts as are involved in the present case while considering whether the Act should be brought into force or not. Therefore, keeping in view the facts of the present case, no mandamus can be issued to the Central Government to issue the notification contemplated under Section 1 (3) of the Act to bring the Act into force."

16. Thus, no mandamus can be issued to the respondents to make and notify the rules.

17. It was urged by Mr. Mathur, learned counsel appearing for number of petitioners that the Public Service Commission could not sit over the draft rules as its role under Article 234 of the Constitution of India springs into action after the posts in a cadre are required to be filled up by direct recruitment. According to him, the Public Service Commission has no say in the matter of framing of rules. He referred us to the following observations of the Supreme Court in State of Bihar v. Bal Mukund ((2000) 4 SCC 640):-

"Article 233 dealing with appointment of District Judges, on its own express terminology projects a complete scheme regarding the appointment of persons to the District Judiciary as District Judges. In the present appeals, we are concerned with direct recruitment to the cadre of District Judges and hence Sub-article (2) of Article 233 becomes relevant. Apart from laying down the eligibility criterion for candidates to be appointed from the Bar as direct District Judges the said provision is further hedged by the condition that only those recommended by the High Court for such appointment could be appointed by the Governor of the State. Similarly, for recruitment of judicial officers other than District Judges to the Judicial Service at lower level, a complete scheme is provided by Article 234 wherein the Governor of the State can make such appointments in accordance with the rules framed by him after consulting with the State Public Service Commission and with the High Court exercising jurisdiction in relation to such State. So far as the Public Service Commission is concerned, as seen from Article 320, the procedure for recruitment to the advertised posts to be followed by it is earmarked therein. But the role of the Public Service Commission springs into action after the posts in a cadre are required to be filled in by direct recruitment and for that purpose due intimation is given to the Commission by the State authorities. They have obviously to act in consultation with the High Court so far as recruitment to posts in the Subordinate Judiciary is concerned. The aforesaid ruling is of no help to the learned counsel as the fact remains that it is the Governor who has to make the rules on the subject and the same have not been made and notified so far. This judgment is also not an authority for the proposition that the Public Service Commission was not to be consulted for framing of the rules.

18. Learned counsel for the petitioners referred to the decision rendered in Kunal Singh v. Union of India ((2003) 4 SCC 524). This decision also does not advance the case of the petitioners as it inter-alia deals with the objectives of the Act of 1995.

19. It is with anguish that we note that the draft of the rules framed and approved by the High Court on 4.4.2003 was sent to the State Government for making and notifying the Rajasthan State Judicial Service Rules, 2003. The draft of the rules has not been finalised and notified as yet. It appears that the RPSC raised certain points in July 2003 when the same were forwarded to it for the purpose of consultation. The communication in this regard when received through the State Govt. was replied by the High Court. Still the matter has remained pending and as given out at the bar, the RPSC has now raised certain new issues. Correspondence is being exchanged in this regard. Thus, the finalisation and notification of the Rules is lingering on. We hope and trust that the draft rules will now be finalised and notified at the earliest so that benefit of reservation envisaged for persons with disabilities can be made available.

In view of the aforesaid discussion, the writ petitions are hereby dismissed.