

PETITIONER:
M. VENKATESWARLU ETC.

Vs.

RESPONDENT:
THE GOVERNMENT OF ANDHRA PRADESH &ORS. ETC.

DATE OF JUDGMENT: 12/03/1996

BENCH:
RAMASWAMY, K.
BENCH:
RAMASWAMY, K.
G.B. PATTANAIK (J)

CITATION:
1996 SCC (5) 167 JT 1996 (3) 439
1996 SCALE (3)44

ACT:

HEADNOTE:

JUDGMENT:

WITH
CIVIL APPEAL NO. 4416 OF 1996

(Arising out of SLP (C) No.7034 of 1995)
J U D G M E N T

K. Ramaswamy, J.
Leave granted.
C.A. No. 4415/96

(@ SLP (C) No. 13653/94)

Appellant was appointed as L.D.C. on January 21, 1975 in the Revenue Establishment of Prakasam District in A.P. He was promoted as a U.D.C. (Senior Assistant) in 1982 and as a Dy. Tehsildar on June 20, 1984. The panel effective from July 1, 1983 for regular promotion was to be drawn for the regular promotion was to be drawn for the year 1983-84. At that time he was short of one year and three months for purpose of total service of eight years; and of five months for purpose of period of two years as Senior Assistant for regular promotion as a Dy. Tehsildar. His name was recommended for consideration of promotion for the year 1986-87. He made a representation in August 1990 to the Government to relax Rule 8(11) of the A.P.. Revenue Subordinate Service Rule (for short, 'Special Rules') to impanel him for the year 1983-84. The District collector and the Commissioner, Land Revenue recommended for the relaxation. The Government exercising the power under Rule 47 of the A.P.. State Subordinate Service Rules (for short, 'General Rules') issued the orders in G.O.M.S. No. 792, Revenue (SER. III) Department, dated 28.7.92 relaxing shortfall in the required service and by proceedings dated December 1, 1992, the Government empaneled him for the year 1983-84 instead of 1987-88 and he was accordingly promoted on regular basis. The respondents came to challenge the relaxation given to him for the year 1983-84. When the O.A.

had come up for final hearing,, the Division Bench by its order dated October 26, 1993 had held that by operation of Rule 22 of the General Rules read with Rule 6 of the Special Rules, the appointment by transfer or promotion is available and that appellant was entitled to promotion as Dy. Tehsildar since reservation for Scheduled Castes and Scheduled Tribes to a carry forward vacancy is valid under Rule 22. However, since it was found that there were conflicting decisions on application of Rule 22 of the General Rules to the carry forward vacancies, reference was made to the Full Bench. The Full Bench by majority in the impugned order dated April 7, 1994 has held that Rule 22 of the General Rules does not apply to carry forward vacancies for appointment by promotion or transfer. Retrospective relaxation under Rule 47 of the General Rules is illegal as relaxation cannot retrospectively be given effect. Accordingly, the Tribunal dismissed the O.A. Thus this appeal by special leave.

Shri A. Subba Rao, learned counsel for the appellant contended that Rule 22 of the General Rules read with Rule 5 of the Special Rules gives power to the State to appoint members of the Scheduled Castes and Scheduled Tribes to a vacancy or a post in a service or classes of service by virtue of application of rule of reservation not only to initial recruitment but also for appointment by promotion or transfer. The question of carry forward arises only when candidates belonging to Scheduled Castes and Scheduled Tribes who were to get adequate representation in the service or class of posts are not available. Relaxation under Rule 47 would always be retrospective since the requisite conditions prescribed under the Rules cannot be complied with before action is taken. Consequently, the view of the Full Bench is not correct in law while the Division Bench had correctly interpreted the rule of reservation.

Ms. K. Amareshwari, learned senior counsel appearing for the State, supported the stand of the appellant. Shri P.P. Rao, the learned senior counsel appearing for the contesting respondent, contended that though Rule of reservation contemplated under Rule 22 of the General Rules would be applicable to appointment by promotion or transfer, the exercise of the power of relaxation under Rule 47 is bad in law. According to the learned counsel, no injustice or inequality as envisaged in Rule 47 is made out; its benefit should be given only to a class of persons by general relaxation as is contemplated in that behalf but not in an individual case. The appellant had not pointed out any such injustice. His only contention is that relaxation may be given and he may be made eligible for relaxation which may not be given in individual cases. Completion of the prescribed length of service is a condition of service which cannot be relaxed. An ineligible person cannot be made eligible by relaxing Rule 47. No notice was given to the affected persons before exercising the power under Rule 47. By exercise of the power to grant relaxation, the appellant is made senior over several persons in the category as a Senior Assistant stealing a march over the senior U.D.Cs. in his promotional post of Dy. Tehsildar. Their legitimate hopes and expectations cannot be upset by exercising power under Rule 47. The Government did not give any finding of injustice and inequality to be done to a class of persons or at least to the individual appellant. Though Rule 47 may be valid the exercise of power is vitiated by error of law. On that premise, he seeks to support the judgment of the Full Bench.

Having given our anxious consideration to the

respective contentions, the question arises: whether Rule 22(ii)(e) to (g) would be applicable to appointment by promotion or transfer? This point is no longer res integra. In a recent judgment in Commissioner of Commercial Taxes, A.P. & Anr. vs. G. Sethumadhava Rao & Ors. [1996 (1) SCALE 721] interpreting Rule 22 of the General Rules this Court has held that Rule 5 of the A.P. Commercial Tax Subordinate Service Rules envisages applicability of Rule 22 of the General Rules for appointment to the above service. Conjoint reading of the two provisions postulates that the carried forward vacancies and current reserved vacancies in the recruitment year shall be available for utilization even where the total number of such reserved vacancies exceeds 52% of the vacancies filled that year in case the overall representation of the Scheduled Castes and Scheduled Tribes in the total strength of the concerned grade or cadre, class or classes of service has not reached the prescribed percentage of reservation of 16% for Scheduled Castes and 7% for Scheduled Tribes, as the case may be. By operation of Article 16(4A) of the Constitution introduced by the Constitution (77th Amendment) Act, 1995 w.e.f. June 17, 1995, the principle of reservation in promotions would be applicable where the Scheduled Castes and Scheduled Tribes are not adequately represented in promotional posts in class or classes of services under the State. The rule of reservation by promotion is consistent with Articles 14 and 16(1) and (4) to provide equality of opportunity to the Scheduled Castes and Scheduled Tribes. Rule 22(ii) of the General Rules is quite wide enough to bring within its ambit the appointment by promotion or transfer. The object of carry forward is to avoid lapse of the posts when persons qualified and eligible for appointment by promotion were not available. It is settled law that recruitment consists of three modes - direct recruitment, promotion and by transfer - defined under the General Rules.

The finding of the Full Bench, therefore, that Rule 22 of the General Rule does not apply to appointment by promotion or transfer is clearly inconsistent with Rule 22(ii) which envisages appointments "otherwise than by direct recruitment". Therefore, we hold that appointment by promotion or by transfer is available to carry forward vacancies in the post of Dy. Tehsildar. Sri Rao, therefore, has not rightly canvassed the correctness of the Division Bench decision.

The question then is: whether the Government was justified in exercising the power under Rule 47 of the General Rules? This point too is no longer res integra. This Court considered the scope of Rule 47 in the case of Government of A.P. & Ors. vs. Sri D. Janardhana Rao & Anr. [(1977) 1 SCR 702]. After extracting Rule 47 at page 706, this Court had held that:

"The real question that requires to be decided in this appeal is whether rule 47 permits relaxation to any rule with retrospective effect. Before proceeding to consider this aspect, it is necessary to dispose of one small point raised on behalf of the appellants that the impugned order was not really retrospective but prospective in operation because it was only from the date of the order that the inclusion of the names of the said 63 employees in the panels

for the different years was regularized. The order made on June 30, 1971 relaxed rule 49(a) of the Special Rules in the case of these employees to validate the panels for the years 1965, 1966, 1968 and 1969. The impugned order thus regularized the inclusion of the names in the panels which was done long before the order was made. The order is, therefore, clearly retroactive and not prospective in operation.

Rule 47 of the Andhra Pradesh State and Subordinate Services Rules gives power to the Governor to relax the rigor of the general rules in such manner as may appear to him to be just and equitable. To show that rule 47 giving such wide power to the Governor is not unique of its kind, counsel for the appellants referred to similar provisions in several other Service Rules like, rule 13 of the Secretary of State's Service (Medical Attendance) Rules, 1938, rule 10 of the Indian Police Service (Pay) Rules, 1954, and rule 10(b), proviso, of the Indian Forest Service (Appointment by Competitive Examination) Regulations, 1967/ Clearly, the power under rule 47 is to be exercised in the interest of justice and equity. It is not difficult to see that the occasions for acting under rule 47 may well arise after the attention of the Government 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."

Thus it could be seen that the Governor is empowered to relax the rigor 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 the Rule 47 will be largely frustrated. The finding of the Full Bench of the Tribunal that Rule 47 cannot be exercised retrospectively is, therefore, clearly illegal.

The next question is: whether the Government had addressed to itself the real issue of justice or inequality? It is true that from a reading of the order the Government do not appear to have been anguished from that perspective. But the conclusion can be supported by the facts available in the case. It is seen that under Rule 22(ii)(g), the carry forward of the reserved backlog vacancies could be for a period of three years and when the vacancies could not be filled up at the end of the third year, the Government is required to consider whether the vacancies would be thrown

open to the general candidates dereversing the backlog vacancies. Due to the non-availability of the qualified candidates the Government instead of resorting to dereservation of the vacancies, appears to have relaxed the rigor of Rule 8 (a)(ii) of the Special Rules which envisages that the candidate has to put in minimum of total service of eight years and a minimum service of two years as a Senior Assistant. The annexure referred to in Rule 8(a)(ii) of the Special Rules is to the following effect:

"Must have served for a period of not less than eight years (including services as Revenue Inspector prescribed in clause (iii) below in a post not lower in rank than the category of Lower Division Clerk, two years of which should have been in the post of an Upper Division Clerk:

Provided that the Upper Division Service rendered by a member of the District Revenue Establishment or any other Department, office or special duty, shall be counted to the extent to which he should have counted as Upper Division Clerk in the regular line but for his appointment as Upper Division Clerk elsewhere.

In this case, the appellant fell short of five months service for purpose of period of two years as a Senior Assistant and of one year and five months for purpose of total service of eight years in the Revenue Department. In view of the huge backlog of reserved vacancies on account of non-availability of Scheduled Castes/Scheduled Tribes candidates, the Government appears to have intended to relieve the injustice to the appellant by relaxing the prescribed period of service under Rule 8(ii) read with the annexure. It is not in dispute that the appellant had passed all the prescribed tests well within time. The only ineligibility was as regards completion of the required period of service. It is settled law that the Government cannot relax the basic qualifications but in an individual case they can relax, in an appropriate case, the conditions of service. It is seen that the appellant having passed all the tests, he was required to fulfill the condition of total service of eight years and minimum service of two years as Senior Assistant. Therefore, with a view of fill up the backlog vacancies which, as rightly pointed out by Shri P.P. Rao, undisputably is a constitutional obligation, the Government appears to have exercised the power under Rule 47 by condoning the deficiency of requisite length of service though no specific finding in that behalf was recorded. The test of justice and equity envisaged in Rule 47 is to be understood in this background. Relaxation may be given to a class of persons or an individual.

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. It is true that in the cadre of Senior Assistant, the respondents were seniors to the appellant. But by operation

of Rule 22 read with Articles 16(1), 16(4) and 16(4A), the appellant by promotion as reserved candidate would steal a march over his seniors in the lower cadre and would become senior as Deputy Tehsildar.

By operation of protective discrimination, a Junior officer belonging to Scheduled Castes or Scheduled Tribes, by operation of Article 16(1) read with Articles 16(4) and 16(4A) would steal a march over his erstwhile seniors in the lower cadre and get promotion. Thereby, the appellant becomes senior in the promotional post, namely, Deputy Tehsildar. By operation of Rule 33(a) of the General Rules, his seniority would be determined with reference to the date on which he discharged the duties in the post of Deputy Tehsildar. The consequence is inevitable due to application of Rule 22 of the General Rules read with Rule 6 of the Special Rules. Therefore, it is not necessary to give any notice to all the affected parties before exercising the power under Rule 47 of the General Rules.

The appeal is accordingly allowed. But in the circumstances without costs.

C.A. No.4416/96

(@ SLP (C) No.7034/95)

The controversy raised in this case is no longer res integra. The ratio of this Court in The Commissioner of Commercial Taxes, A.P., Hyderabad & Anr. vs. G. Sethumadhava Rao & Ors. [1996 (1) SCALE 721] squarely applies to the facts in this case. In view of the above discussion and in view of the ratio of G. Sethumadhava Rao's case, the appeal is allowed but, in the circumstances, without costs.