

A. Satyanarayana & Ors vs S. Purushotham & Ors on 24 April, 2008

Author: S.B. Sinha

Bench: S.B. Sinha, V.S. Sirpurkar

CASE NO.:

Appeal (civil) 2963 of 2008

PETITIONER:

A. Satyanarayana & Ors

RESPONDENT:

S. Purushotham & Ors

DATE OF JUDGMENT: 24/04/2008

BENCH:

S.B. Sinha & V.S. Sirpurkar

JUDGMENT:

J U D G M E N T REPORTABLE CIVIL APPEAL NO. 2963 OF 2008 (Arising out of SLP (C) No.17064 of 2006) With Civil Appeal No.____2964____ of 2008 (Arising out of SLP (C) No.10137 of 2007) S.B. Sinha, J.

1. Leave granted.

2. Interpretation of GOMs. No.368 dated 18.8.1999 is in question in these appeals which arise out of a judgment and order dated 21.8.2006 passed by a Division Bench of the Andhra Pradesh High Court in Writ Petition Nos.8551/01, 14651/2000 and 16842/2000.

3. Respondents herein were Private Secretaries (PSs) of the Secretaries of the Government of Andhra Pradesh. Appellants of the Civil Appeal arising out of SLP (C) No.10137 of 2007 are the Section Officers (SOs) working in the Secretariat of the Government of Andhrapradesh.

4. Indisputably, the post of 'Private Secretary' (PS) as also that of the 'Section Officer' (SO) are the feeder posts for promotion to the post of Assistant Secretary.

The total number of posts in the cadre of Sections Officers was 365. Indisputably, 10 PSs attached to the Secretaries of the Government of Andhra Pradesh have to undergo training for a period of two years as a SO. The number of PSs at a given point of time was 25. The promotional channel to the post of Assistant Secretaries was the SO.

5. By reason of GOMs No.1059 dated 15.7.1960, the State issued a notification providing for promotion to the post of Assistant Secretary also from the cadre of PSs.

On or about 16.6.1971, GOMs No.58 was issued whereby and whereunder Andhra Pradesh General Services class XXVIII was constituted. SOs of different departments including Law, Finance Management as also of any other department were put in different categories. However, in view of the fact that the PSs were not having any promotional channel or avenue for further promotion, with a view to obtain suggestions so as to avoid stagnation in service, the Government of Andhra Pradesh constituted a Committee known as B.N. Raman Committee. The said Committee submitted its report making its recommendations, pursuant whereof and in furtherance whereof, G.O. No.538 was issued on 6.11.1982 inserting Rule 3B in the Rules, which is to the following effect :

"In the said rules, after rule 3.A the following rule shall be added, namely:-

'3B. Special provision for the appointment of personal Assistants to secretaries to Government as Section Officers:-

a) Notwithstanding anything in sub-rule (a) of Rule 3, the personal Assistant to Secretary to Government (including; private secretary and Government personal Assistant to principal Secretary/Additional Chief Secretary/Second Secretary/Ex-officio Secretary to Government) shall be eligible for appointment as section officer, provided he gives an option for considering him to such appointment and the option once exercised by him for appointment as section officer shall be final and irrevocable."

6. The PSs could be transferred to the posts of SOs by obtaining an option in that behalf as laid down in G.O. No.504 dated 21.10.1983. On or about 1.5.1984, the promotional avenue for the PSs to the post of Assistant Secretary was introduced prescribing 1:19 quota between PSs and SOs for promotion to the post of Assistant Secretary. The said ratio of 1:19 was given retrospective effect w.e.f. 6.11.1982 by GOMs.364 dated 16.6.1984. An amendment was made in the Rules by GOMs No.81 dated 21.2.1985 in terms whereof the ratio of 1:19 fixed for promotion, between the PSs and SOs was made applicable from 1.5.1984 instead of 6.1.1982. The Rules were suitably amended in terms of the proviso appended to Article 309 of the Constitution of India w.e.f. 17.7.1985 whereby and whereunder training for a period of two years for the PSs was made compulsory. A further amendment was made for appointment from the posts of PS to the posts of SOs on tenure basis by a Government Order dated 18.12.1985. An amendment was also made in the Rules for making the posts of PS as the feeder category for promotion to the posts of Assistant Secretary by reason of GOMs. No.525 dated 21.9.1989.

7. Representations were made to the State by the Andhra Pradesh Secretariat Association to review the said Rules with regard to the ratio fixed therefor. Representations in that behalf were also received by the State from Andhra Pradesh State Typist and Stenographers Association.

8. The issue was placed before the Cabinet Sub-Committee on Service and Related Matters.

A report was submitted. The recommendations made by the Cabinet Sub-Committee were considered by the Government. Noticing that out of the permanent cadre strength of SOs was 365 and that of the PSs was 25 and as 10 PSs occupy the posts of SOs, the ratio between PSs and SOs worked out at 14:1. It was decided that a cycle of 15 vacancies may commence with SOs, having regard to the number of employees in the said cadre. It was furthermore noticed that the cadre strength of all the non-cadre officers from Assistant Secretary to Additional Secretary except Law and Finance and Planning, as it stood then, was 151.

It was opined that having regard to the said ratio, the number of posts required to be earmarked for the category of PS to Secretary of Government in the ministerial line should be 10. By reason of the impugned G.O., it was directed :

"The Government, accordingly revise the criteria for promotion from the category of Section officers and Private Secretaries to Secretaries to Government to the categories of Assistant Secretary to Government and upto Additional Secretary to Government (Non-cadre). Based on the permanent cadre strength of both the categories; 10 (ten) posts only are to be earmarked for promotion from the category of Private Secretary to Secretary to Government to the categories of Assistant Secretary to Government and upto the Additional Secretary to Government (non-cadre). Accordingly the Government hereby order that the number of Private Secretaries to Secretaries to Government or Deputy Secretary to Government or Joint Secretary to Government or Additional Secretary to Government (Non-cadre) shall not exceed 10 (ten) in number at any given point of time. These orders shall come into force with immediate effect.

The Government also order coincident that the promotions be so regulated with immediate effect so as to ensure the maintenance of the above criteria between Section Officers and Private Secretaries to Secretaries to Government while effecting promotions to the post of Assistant Secretary to Government from the two feeder categories of Section Officer and Private Secretary to Secretary to Government The Government further order that promotion from the category of Private Secretary to Secretary to Government to and in the categories of Assistant Secretary to Government and upto Additional Secretary to Government shall be limited and confined to the above 10 (ten posts of Assistant Secretary/Deputy Secretary/Joint Secretary/Additional Secretary by a Private Secretary promotee, the next private secretary be promoted to the feeder post of Assistant Secretary with the said earmarked 10 posts."

Pursuant thereto, the Rules were amended by GOMs no.397 dated 20.9.1999 in terms whereof Note 3 in Rule 3 was substituted which we would notice a little later.

9. Respondents herein filed an original application before the Andhra Pradesh State Administrative Tribunal, inter alia, questioning the validity of the said notification.

By reason of a judgment and order dated 14.2.2000, the said original applications were allowed, holding :

"In the circumstances, we hold that the impugned GOMs No.397 G.A. (Ser.B) Department dated 20.9.1999 and GOMs. No.368 G.A.(Ser.B) Department dated 18.8.1999 cannot be sustained except to the extent of prescription of the ratio 1:14 for promotion to the post of Assistant Secretaries only, between the two feeder categories of PSs and SOs. Further restrictions on the absolute number of posts that could be held by the PSs and restricting the promotional chances to the posts of Deputy Secretary Joint Secretary and Additional Secretary, are unwarranted. As already stated, the applicants, once they enter the stream of Assistant Secretaries should be considered for promotion to the higher categories on the basis of their seniority in the feeder categories and eligibility and suitability. There is absolutely no necessity to lay down any further restriction in this regard. Even for the post of Assistant Secretary, we hold that the ratio of 1:14 itself will work as a limiting factor on the representations of both the categories in the posts of Asst. Secretaries, as the applicants belong to the minor group, they will have only lesser number of posts. There is absolutely no necessity to impose further restriction with regard to the number of posts to be given to the applicants or with regard to the promotional prospects to further higher categories. Accordingly, we hold that the impugned G.O.Ms. No.368 G.A. (Ser.B) Dept. dated 18.8.1999 except to the extent of prescribing a ratio of 1:14 between PSs and Section Officers for promotion to the post of Assistant Secretary, and the impugned GOMs No.397 GA (Ser.B) Dept., dated 20.9.1999 limiting the number of posts to Ten (10) only at any given point of time in respect of Private Secretaries to Secretaries to Government, occupying any of the posts Asst. Secretary or Deputy Secretary to Government (non-cadre) are not sustainable as the same are arbitrary, discriminatory and violative of Article 14 and 16 of the Constitution of India and are accordingly set aside."

It was directed :

"While following the formula of 1:14 between Private Secretaries and Section Officers for promotion to the category of Assistant Secretaries, the respondents will consider the case of the Private Secretaries in the first vacancy and thereafter, consider the cases of Section Officers for the other 14 vacancies."

10. Appellants aggrieved by and dissatisfied therewith filed writ petitions before the Andhra Pradesh High Court. By reason of the impugned judgment, the said writ petitions have been allowed holding that the said Rule is not unconstitutional, stating :

"The permanent cadre strength of Section Officers is 355 posts as against the permanent cadre strength of private Secretaries to the Secretaries to the Government is 25 posts. The ratio between the permanent cadre strength of Sections Officers on the one hand and the Private Secretaries on the other is 355:25 or 14:1. The

permanent cadre strength of non-cadre officers (other than in Law, Finance & Planning Departments), i.e., from Assistant Secretaries to Additional Secretaries is 151 posts. With a view to enable both Private Secretaries and Section Officers to have reasonable opportunities of upward movement to these non- cadre officers posts of Assistant Secretaries and above upto Additional Secretaries, in proportion to their permanent cadre strength of 14:1, the Government decided to fix an upper limit on the total number of non-cadre posts which can be held by the Private Secretaries category as 10 posts leaving the other 141 posts to the Section Officers. As there were already more than 10 non-cadre officers from the Private Secretaries category, it was decided to restrict entry of Private Secretaries to the non-cadre officers posts till the existing number of non-cadre officers, from the Private Secretaries category fell below 10. While the Private Secretaries, on promotion as Assistant Secretaries, were integrated with the other Assistant Secretaries and treated on par with them for further promotion to the posts of Deputy Secretaries and above, entry of persons from the Private Secretaries category, for promotion to Assistant Secretaries category, was restricted. While the impugned amendment is no doubt peculiar and instead of the normal practice of prescribing a ratio or a quota or the total number of posts which may be held by persons from one of the feeder categories on promotion to a higher category, the total number of posts to be held by them in the non-cadre posts of Assistant Secretaries, Deputy Secretaries, Joint Secretaries and Additional Secretaries have been clubbed together and a maximum limit of 10 posts has been prescribed to be filled up from the Private Secretaries category, that, by itself, would not render the impugned amendment to the Rules ultra vires Articles 14 and 16 of the Constitution of India."

It was opined that the principles of judicial review do not permit the courts to examine as to whether prescription of another criteria would have been more beneficial or not for that would, in effect, amount to sitting over the judgment over the policy choice of the rule making authority.

11. Mr. L.N. Rao and Mr. P.P. Rao, learned senior counsels appearing for the appellants would submit :

1. Keeping in view the constitutional principles laid down under Articles 14, 16, 320 and 335 of the Constitution of India, the cap of not more than 10 posts to be held at any time by the PSs channel in all the posts of Secretaries is not permissible in law.
2. The Government in a situation of this nature although was entitled to revise the ratio of promotion from 1:19 to 14:1 based on the then existing relative strength of two cadres should have rational nexus with the object of promotion.
3. There being total integration of Private Secretaries and Section Officers at the level of Assistant Secretaries, no further discrimination on the basis of birthmark or otherwise could have been provided for.

12. Mr. M.L. Verma, learned senior counsel appearing on behalf of the State of Andhra Pradesh and Mr. Iyer, learned senior counsel appearing on behalf of the respondents, on the other hand, would urge :

A. The impugned Rules having not prescribed for a restriction on promotion to the posts of Deputy Secretary onwards on merit having not provided for, the judgment of the High Court is unassailable. B. Having regard to the ratio prescribed by the Rules being 14:1 in a cycle of 15, the Rule provides for a formula for being worked out and is, thus, merely clarificatory in nature. C. Under the old rule, the ratio was 1:19 in terms whereof only 7.5 posts out of 151 posts could to be allotted to the Private Secretaries; by reason of the amended Rule now 10 posts would be available to the incumbents of the said cadre and, thus, is beneficial to the appellant. D. The State would stick to the ratio for promotion to the post of Assistant Secretaries between SOs and PSs at 141:10 and the same under no circumstances would be disturbed. E. No pleading in regard discrimination having been raised before the Tribunal, the same should not be permitted to be raised for the first time before this Court.

F. The State having taken a conscious decision after long deliberations and upon due application of mind not only on the report of the Raman Committee but also on the basis of the report of the Cabinet Sub- Committee, this Court should not interfere with the impugned rule as by reason thereof rights of employees of being two different and distinct categories had been adjusted.

13. Before embarking upon the rival contentions raised before us, we may place on record that the number of posts of SOs was 365, out which 355 belonged to the regular Column and 10 were PSs who had been undergoing training. The number of posts, however, has since gone up to 533. The number of posts of PSs which were earlier 25 has now gone upto 30. Quota in ordinary parlance would mean proportionate share. The State, indisputably, when provides for two different sources as feeder posts for promotion to a higher post, it is entitled to fix quota. The Tribunal, at the outset it may be noticed, committed an error in directing the State to consider promotion to the Private Secretaries in the ratio of 1:14 whereas in terms of Rules, it should be 14:1. Before us, learned counsel appearing on behalf of the appellants conceded in regard to this aspect of the matter.

14. Indisputably, the Rules for recruitment to the post of PSs and SOs are different. Qualifications prescribed therefor are also different. Presumably, the nature and quantum of the work are also different.

15. The total number of posts in Assistant Secretaries, Deputy Secretary, Joint Secretary and Additional Secretary are as under :

Name of the Post Number of posts Assistant Secretary Deputy Secretary Joint Secretary Additional Secretary Out of the aforementioned posts the ratio of SOs and PSs is :

Assistant Secretary 94 : 7 Deputy Secretary 28 : 2 Joint Secretary 14 : 1 Additional Secretary 5 : 0 It is not necessary for us to notice all the provisions of the Rules. We may, however, take notice of the fact that Rule 3 prescribes the method of appointment. The channel of promotion to the posts of Additional Secretary, Joint Secretary, Deputy Secretary and Assistant Secretary to the Government is as under :

"Additional Secretary to government (Non-Cadre) other than in the law and Finance and Planning (Finance) Department By promotion of Joint Secretary to Government (Non-Cadre) in the Department of Secretariat other than Law and Finance and Planning (Finance) Department Joint Secretary to Government (Non-

Cadre) in the Departments of Secretariat other than Law and Finance and Planning (Finance) Department

(i) By promotion of Assistant Secretary to Government in the Departments of Secretariat other than Law and Finance and Planning (Finance) Department

(ii) By transfer on tenure from any other service, subject to Note 8 below.

Assistant Secretary to Government in the Departments of Secretariat other than Law and Finance and Planning (Finance) Department

(i) By promotion of Section Officer (SC), Section Officers and Private Secretaries to Secretaries to Government.

(ii) By transfer on tenure of a Special Grade Deputy Collector of the Revenue Department for one post in the revenue Department of the Andhra Pradesh Secretariat.

(iii) By promotion of Accounts Officers

(iv) If the State Government so direct by transfer from among full members and approved probationers of any other service which the State Government may specify.

By reason of GOMs No.397 Note 3 of Rule 3 was substituted in the following terms :

"NOTE (3) : The cases of Private Secretaries to Government including Private Secretaries to Chief Secretary/Special Chief Secretary/Principal Secretary/Second Secretary/Special Secretary/Ex- officio Secretary to Government who are found suitable at the end of two years training as Section Officers shall be considered for appointment as Assistant Secretary to Government in the Departments of Secretariat in each unit of appointment, along with the Section Officers including Section Officers (SC). Promotion from the category of the aforesaid Private Secretaries to the categories of Assistant Secretary to Government and upto the Additional Secretary to Government shall be limited and confined to 10 (ten) posts only at any given point of

time. A Private Secretary shall be promoted to the post of Assistant Secretary within the said earmarked 10 (ten) posts only on vacation of a post of Assistant Secretary/Deputy Secretary/Joint Secretary/ Additional Secretary."

16. It does not speak of any quota. It confines the number of posts to 10 at any given point of time. The number of 10 posts can be filled up only on vacation of a post of Assistant Secretary/Deputy Secretary/Joint Secretary/ Additional Secretary.

17. The affidavit affirmed on behalf of the State as also the Respondent No.3 herein categorically show that ordinarily in a given situation 10 PSs would be working as SOs. The Tribunal, as noticed hereinbefore, directed the State to fix the quota of SOs vis-à-vis PSs at 14:1 wrongly recorded as 1:14. The State as also the Private Secretaries filed writ applications questioning the said direction.

18. The stand which was taken before us, however, is that the limiting the number of posts to be held by PSs was limited to 10 having regard to the quota of promotion being fixed at 14:1 so as to enable the cycle of 15 to be worked out.

We have noticed hereinbefore, although it does not appear from the impugned GOMs that the State intends to strive to maintain the ratio of 14:1 to 10 in the posts of Assistant Secretaries onwards.

19. Various examples have been sought to be placed before us as a result whereof the ratio may get disturbed in given cases. It is stated, that out of 15 posts, three may go to PSs and 12 to the SOs.

20. We, however, are of the opinion that the validity or otherwise of a quota rule cannot be determined on surmises and conjectures. Whereas the power of the State to fix the quota keeping in view the fact situation obtaining in a given case must be conceded, the same, however, cannot be violative of the constitutional scheme of equality as contemplated under Articles 14 and 16 of the Constitution of India. There cannot be any doubt whatsoever that a policy decision and, in particular, legislative policy should not ordinarily be interfered with and the Superior Courts, while exercising its power of judicial review, shall not consider as to whether such policy decision has been taken mala fide or not. But where a policy decision as reflected in a statutory rule pertains to the field of subordinate legislation, indisputably, the same would be amenable to judicial review, inter alia, on the ground of being violative of Article 14 of the Constitution of India. {See Vasu Dev Singh & Ors. v. Union of India & Ors. [2006 (1) SCALE 108] and State of Kerala & Ors. v. Unni & Anr. [(2007) 2 SCC 365].

21. The High Court, therefore, in our opinion, was not wholly correct when it opined that a policy decision cannot be a subject matter of judicial review. If the State has the power to fix a quota, the Rule underlying the legislative policy must stop at that and the necessary consequences thereof must ensue. Indisputably, again although the State was entitled to provide for quota as also a guideline as to how the roster should work out itself, but thereby it cannot be permitted to put a cap on promotion for the entire service period.

22. While saying so, we are not unmindful of the legal principle that nobody has a right to be promoted; his right being confined to right to be considered therefor.

23. Similarly, the power of the State to take a policy decision as a result whereof an employee's chance of promotion is diminished cannot be a subject matter of judicial review as no legal right is infringed thereby.

24. However, such a Rule must apply to both the groups. Promotion to a higher post from the officers of a particular cadre would depend upon a large number of factors a person may retire; he may be departmentally proceeded against, he may be sent on deputation; he may resign; Cessation of employment, thus, may be on various grounds. If the number of posts is limited despite uncertainty with regard to arising of any vacancy on any higher post, the validity of such a rule would be open to question.

25. The Superior Courts, while exercising their power of judicial review, must determine the issue having regard to the effect of the subordinate legislation in question. There must exist a rational nexus between the impugned legislation and the object of promotion. Promotions are granted to a higher post to avoid stagnation as also frustration amongst the employees. This Court, in a large number of decisions, has emphasized the necessity of providing for promotional avenues. [See Food Corporation of India and Ors. v. Parashotam Das Bansal and Ors. [Civil Appeal No.991 of 2008 decided on 5.2.2008]. The State, keeping in view that object, having found itself unable to provide such promotional avenue, provided for the scheme of Accelerated Career Progress (ACP). The validity and effect of the impugned legislation must be judged keeping in view the object and purport thereof. This Court would apply such principle of interpretation of statute which would enable it to subserve the object in place of subverting the same.

26. Whereas, on the one hand, it has been contended before us that all future promotions that is promotion from the post of Assistant Secretary upwards are given on merit, on the other hand, a cap of 10 posts has been made for all the four categories of posts. It is one thing to say that the State evolves a policy of prescribing a reasonable quota at all levels of the promotion but it would be another thing to say that while totally ignoring the question of birthmark, a few posts shall be identified only on the basis of the original posts held by the employee concerned.

27. To the said extent, the rule maintain a birthmark which runs counter to the decisions of this Court in Dwarka Prasad & Ors. v. Union of India & Ors. [(2003) 6 SCC 535].

Although mere chance of promotion is not a fundamental right, but right to be considered therefor is. In that view of the matter, any policy whereby all promotional avenues to be promoted in respect of a category of employees for all time to come cannot be nullified and the same would be hit by Article 16 of the Constitution of India.

28. It has not been disputed before us that a panel is required to be prepared every year. The High Court, in its judgment, has considered the question only with reference to upward mobility. From the Rules, it furthermore appears that even the SOs can be transferred to the posts of PSs. Who

would be holding what post, even at a subordinate level, may, thus, be a question of chance. It has been contended that whereas an Assistant normally has to put in a minimum of 15 to 16 years of service before he is promoted as a SO and further 8 to 12 years service as a SO before he is promoted to the post of Assistant Secretary; a PS could become Assistant Secretary within a period of 10 years. Our attention has further been drawn to the fact that at one point of time all the five posts of Additional Secretaries had been occupied by persons from the Private Secretary stream. They allegedly have other chances of promotion to the posts of Commercial Officers etc.

29. Grievances of SOs have been taken into consideration for the purpose of fixation of a ratio of 1:19 amending the same to 14:1. No exception thereto can be taken but hardship faced by a section of employees in the past by itself cannot be a ground to deprive another section of their constitutional and legal right.

30. We are, therefore, of the opinion that whereas ordinarily the ratio should not be disturbed, the same should not lead the court to a conclusion that such a policy has to be accepted although it takes away the right of a class of employees.

31. We have no doubt in our mind that before a rule is declared ultra vires, the same must be held to be wholly arbitrary or irrational. In any event a plea of discrimination is based on adequate pleadings therefor would be essential. What, however, must be noticed by us is that the impugned rule does not take into consideration the events which may take place in future, as for example increase in the strength in the cadre. If the number of posts for promotion is limited to 10, even in a case like the present one where the number of posts has gone up, only 10 posts can be filled up from the cadre of the PSs although the same would contravene the ratio of 14:1. If the Government intends to change the ratio, it may do so. It may also provide for separate rules providing for maintenance of two different cadres at all levels. But what is impermissible is laying down a condition subsequent to adoption of a policy decision which defeats the object and purport thereof.

32. A statutory rule, it is a trite law, must be made in consonance with constitutional scheme.

A rule must not be arbitrary. It must be reasonable, be it substantive or a subordinate legislation. The Legislature, it is presumed, would be a reasonable one. Indisputably, the subordinate legislation may reflect the experience of the Rule maker, but the same must be capable of being taken to a logical conclusion.

33. Applying the said principle, we are of the opinion that the impugned Government Orders cannot be sustained. They are set aside accordingly. Appeals are allowed with costs. Costs assessed at Rs.25,000/- (Rupees twenty five thousand only.)