Supreme Court of India
Dr. K. Ramulu And Anr. Etc vs Dr. S. Suryaprakash Rao And Ors on 15 January, 1997
Bench: K. Ramaswamy, S. Saghir Ahmad, G.B. Pattanaik

PETITIONER:
DR. K. RAMULU AND ANR. ETC.

Vs.

RESPONDENT:
DR. S. SURYAPRAKASH RAO AND ORS.

DATE OF JUDGMENT: 15/01/1997

BENCH:
K. RAMASWAMY, S. SAGHIR AHMAD, G.B. PATTANAIK

ACT:

HEADNOTE:

JUDGMENT:

WITH CIVIL APPEAL NO. 406-407 OF 1997 (Arising out of SLP (C) No. 2281/87(CC 6799-6800/96) O R D E R Leave granted.

We have heard learned counsel for the parties. These appeals by special leave arise from the Order of the Andhra Pradesh administrative Tribunal, made on June 5, 1996 in O.A. No. 1224/96 and Order made on 19.8.1996 in Review M.A. No. 2039/96 in O.A. No. 1224/96.

The facts are, very fairly, not in dispute. Respondent No.1 both sets of appeals is a Veterinary Assistant Surgeon in A.P. Animal Husbandry Department. He filed O.A. seeking direction for preparation of a panel of candidates for promotion as Assistant Director under Rule 4 of the A.P. Subordinate Service Rules [for short, the `General Rules']. The Tribunal directed the respondent-Government to prepare and operate the panel for the years 1995-96 for promotion to the post of Assistant Director in the A.P. Animal Husbandry Service. Calling that order in question, these appeals have been filed by the contesting respondents as well as by the State.

Shri L. Nageswara Rao, learned counsel for the appellants, have raised three-fold contention. It is firstly submitted that the respondent has no right to be considered for promotion as Assistant Director. Secondly, even if he has got such a right to appointment to the post, the Government have power to revise its policy of accordance with the revised policy. The direction given by the Tribunal

is contrary to the policy decision taken by the Government, namely, to reconsider the policy of promotion in the Service and to make rules afresh in the place of the existing Rules. In this premise, the Tribunal has committed manifest error in directing the Government to prepare, finalise and operate the panel for the years 1995-96 for promotion as Assistant Director of the A.P. Animal Husbandry Department. Shri H.S. Gururaja Rao, learned senior counsel appearing for the first respondent, in the main appeals, has contended that the first respondent has a right to be considered to promotion to the post in accordance with the Rules existing in the year 1995-96. The Rules made afresh do not take away the right of the first respondent to be considered in accordance with the existing Rules. Rule 4 read with Rule 3 of the General Rules gives mandate to the Government to prepare the panel by September 30 of every year to be operative till the end of December of the succeeding year or preparation of the fresh panel, whichever is earlier. In this case, since the process of the preparation of the panel has already been commenced for filling up the existing vacancies, the Government is required to complete the preparation of the panel, finalise the panel and operate the panel. The Tribunal, therefore, was right in giving the impugned direction. He also contended that the right given by the Tribunal cannot be taken away by the Rules made prospectively w.e.f. June 12, 1996, the date on which the amended Rules made in G.P. Ms. No. 54 of Animal Husbandry & Fisheries Department, Government of A.P. came into force.

In view of the rival contentions, the question that arises for consideration is: whether the view taken by the Tribunal is correct in law? It is seen that A.P. Animal Husbandry Service Rules, 1996 made in G.O. Ms. No. 54 of Animal Husbandry & Fisheries Department dated June 6, 1996 [for short, the `Rules'] came into force with effect from June 12, 1996. The Rules repealed the existing Rules made in G.O. Ms. No. 729 dated 24.9.1977. The Pules prescribe four classes of services. Class `A' consists of Category-I, Director of Animal Husbandry, Category-II, the Additional Director, Category-III, the Joint Director, Category-IV, the Deputy Director, Category-V, the Assistant Director and Category-VI, the Veterinary Assistant Surgeons. It is prescribed at the end that "all the posts in each category are inter-changeable for the purpose of seniority, promotion, transfer and postings". It is not in dispute that prior to the Rules came into time under the old Rules [for short, the 'repealed Rules'], for the purpose of promotion in each category, each class of post was considered to be a separate unit. The Government had appointed one-man Commission headed by Sri V. Sundaresan, I.A.S. to go into the anomalies into the operation of the Rules. The report was submitted by Sundaresan Commission on June 25, 1990. It would appear from the record that even as on November 22, 1988, a decision was taken by the Government in the Animal Husbandry Department to amend the repealed Rules by making necessary changes. While the process was going on, after the receipt of the report of the Sundaresaan Commission, the Government had called for the comments from the Director of Animal Husbandry Department. The Director had submitted his comments on September 20, 1995. Thereafter, several meetings were held to follow up the matter of amendment of the repealed Rules. The Rules ultimately came to be made. It is also clear from the record that the Government had taken decision not to fill up any of the vacancies until the repealed Rules were duly amended. After the direction issued by the Tribunal, the Department was advised to make temporary promotion pending finalization of the Rules. The Director submitted the proposal to prepare the penal and several sittings were fixed to consider the cases but the same could not materialise.

In this perspective, the question arises; whether the omission on the part of the Government in preparing and finalizing the panel for promotion of the Assistant Veterinary Surgeons to the post of Assistant Director is vitiated by any inaction on the part of the Government and whether it is in violation of Rule 4 of the General Rules? It is seen and is not in dispute that under Rule 4 of the General Rules all first appointment to the State Service and all promotions/appointments by transfer shall be made on grounds of merits and ability and shall be made in accordance with the special Rules. It also envisages that list of approved candidates requires to be prepared in accordance with the Rules. It shall be prepared ordinarily during the month of September every year on the basis of estimated vacancies sent in terms of sub-clause (iv) and 30th of September shall be reckoned as the qualifying date to determine the eligibility of the candidate for such appointment, which shall cease to be in force on the afternoon of the 31st December of the succeeding year or till the new panel is prepared, whichever is earlier. Second proviso to the Rule provides that if the vacancies are not available for the particular panel period, subject to the appointing authority recording a certificate to that effect; or "where the appointing authority does not consider it necessary", it is not necessary to prepare the panel. At this stage, it is necessary to emphasis that the opinion of the Government by the proviso would not be arbitrary. As rightly pointed out by Shri L. Nageshwara Rao, the decision not to prepare the panel should be on valid and relevant considerations and it should not be arbitrary decision taken by the Government. The object of Rule 4 is that all eligible candidates should be considered in accordance with the Rules. Panel should be finalized and operated so as to give an opportunity to the approved candidates to scale higher echelons of service which would augment the efficacy of service, inculcate discipline and enthuse officers to assiduously work hard and exhibit honesty and integrity in the discharge or their duties. Nonetheless, it is seen that clause (ii) of the second proviso gives power to the State Government not to prepare the panel and to consider the cases though the vacancies are available, as stated earlier, pending amendment of the Rules or recasting the Rules afresh. The Government have taken conscious decision not to fill up any of the pending vacancy until the process is completed which they had started on "administrative grounds". As seen, the process was completed and the Rules have come into force w.e.f. June 12, 1996.

In the light of the above factual matrix and the legal setting, the question is: whether the Tribunal was right in directing the Government to prepare and operate the panel in accordance with its directions? The Constitution Bench f this Court in Shankarsan Dash v. Union of India [(1991) 3 SCC 47], had considered the question in an analogous situation. Therein, pursuant to the selection made by the UPSC for appointment to the Civil Services, a list of I.P.S. officers was prepared and the appellant was one of the candidates in the waiting list. The Government of India had taken a decision not to fill up the vacancies except to the extent of the Scheduled Tribe candidates who were selected and were in the waiting list. The appellant therein filed O.A. which was dismissed by the Tribunal. On appeal, this Court held thus:

> "It is not correct to say that if a number of vacancies are notified for appointment and adequate number of candidates are found fit, the successful candidates acquire an indefeasible right to be appointed which cannot be legitimately denied. Ordinarily the notification merely amounts to an invitation to qualified candidates to apply for recruitment and on their selection they do not acquire any right to the post. Unless

> the relevant recruitment rules so indicate, the State is under no legal duty to fill up all or any of the vacancies. However, it does not mean that the State has the licence of acting in an arbitrary manner. The decision not to fill up the vacancies has to be taken bona fide for appropriate reasons. And if the vacancies or any of them are filled up, the State is bound to respect the comparative merit of the candidates, as reflected at the recruitment test, and no discrimination can be permitted. This correct position has been consistently followed by this court, and we do not find any discordant note in the decisions in State of Haryana v. Subhash Chander Marwaha, Neelima Shangla v. State of Haryana, or Jatendra Kumar v. State of Punjab".

In paragraph 8, this Court considered the ratio in State of Haryana V/s. Subhash Chander Marwaha [(1974) 3 SCC 220] wherein though the vacancies were existing and select list candidates were available, pursuant to the recommendation made by the High Court not to appoint any candidate who had secured less than 55% marks, the Government acted upon it and did not appoint the candidates in the waiting list. When they claimed their right to appointment, and the order was issued by the High Court for filling up all the vacancies from persons in the waiting list, this Court had laid that though the candidates were waiting in the list, they had no right to be appointed. It was held that the plea of arbitrariness does not arise since the Government have taken a decision not to appoint any of the persons who secured less than 55% of the marks. This Court also has pointed out in Shankarsan Dash case that when the Government have taken a conscious policy decision not to fill up the vacancies, the decision must be reasonable and not arbitrary. Since it was a policy decision it could not be interfered with. It was held that the vacancies for the Scheduled Tribe candidates were being filled up for the reason that vacancies reserved for them were not being filled up due to non-availability of the select candidates. The decision to fill up the vacancies reserved for Scheduled Tribe candidates was justified on the ground that non- filling up of the vacancies belonging to the general candidates cannot be characterized as arbitrary decision. It was observed that "the fact that it was not for the Public Service Commission to take a decision in this regard was emphasised in this judgment. None of these decisions, therefore, supports the appellant". Thus it could be seen that it the decision of the Government is supported by valid reasons, it cannot be stated that the decision taken by the Government as arbitrary.

This position was reiterated by this Court in State of Bihar & Ors. v. Md. Kalimuddin & Ors. [(1996) 2 SCC 7]. Therein, the Government of Bihar also have taken a decision to revise the policy of reservation and pending decision the appointments of the wait listed candidates were deferred. The High Court, however, approached the matter and gave direction thus:

> "The Panel thus does not appear to be violative of the reservation policy of the State. So far s the proposed rules of recruitment are concerned, the details of which have not been furnished from which it could be gathered as to whether any substantial or drastic deviation is sought to be made from the existing rules regarding the procedure no longer to be a necessary qualification or condition of eligibility I do not want to go into the correctness of the policy of the State dispensing with the necessity of the training as a condition of eligibility. However, I have serious doubt whether appointment of untrained teachers in preference to the trained ones who are already

> in panel and available for appointment can be said to be in public interest."

This Court further held thus:

> "The ultimate outcome of that exercise is not fully brought out on record but it is obvious that the State Government was not acting mala fide and merely with a view to denying appointment to the respondents herein. Merely because notwithstanding the availability of trained personnel the State Government was inclined to change the rules in that behalf does not appear to be valid ground for contending that the Government had acted mala fide. Without knowing the nature of change it was not open to the High Court to anticipate the policy and brand it as unreasonable."

In paragraph, 9 it was observed that "we are of the opinion that even if it is assumed that the panel or select list had not expired at the date of filing of the writ petition, the refusal on the part of the Government to make appointment from the panel or select list, vide letter date 27.5.1993, could not be condemned as arbitrary, irrational and or mala fide.

The same ratio was reiterated in U.O.I. & Ors. v. K.V. Vijeesh [(1996) 3 SCC 139, paras 5 and 7]. Thus, it could be seen that for reasons germane to the decision, the Government is entitled to take a decision not to fill up the existing vacancies as on the relevant date. Shri H. S. Guraraja Rao, contends that this Court in Y.V. Rangaiah & Ors. v. J. Sreenivasa Rao & Ors. [(1983) 3 SCC 284] had held that the existing vacancies were required to be filled up as per law prior to the date of the amended Rules. The mere fact that Rules came to be amended subsequently does not empower the Government not to consider the persons who are eligible prior to the date of appointment. It is sen that the case related to the amendment of the Rules prior to the amendment of the Rules. Two sources were available for appointment as sub-Registrar, namely, UDCs and LDCs. Subsequently, Rules came to be amended taking away the right of the LDCs for appointment as sub-Registrar. When the vacancies were not being filled up in accordance with the existing Rules, this court had pointed out that prior to the amendment of the Rules, the vacancies were existing and that the eligible candidates were required to be considered in accordance with the prevailing Rules. Therefore, the mere fact of subsequent amendment does not take away the right to be considered in accordance with the existing Rules. As proposition of law, there is no dispute and cannot be disputed. But the question is: whether the ratio in Rangaiah's case would apply to the facts of this case? The Government therein merely amended the Rules, applied amended Rules without taking any conscious decision not to fill up the existing vacancies pending amendment of the Rules on the date the new Rules came into force. It is true, as contended by Mr. H.S. Gururaja Rao, that this Court has followed the ratio therein in many a decision and those cited by him are P. Ganeshwar Rao & Ors. v. State of A.P. & Ors. [(1988) Supp. SCC 740], P. Mahendranath v. State of Karnataka [(1990) 1 SCC 411], A.A. Caljon v. Director of Education [(1983) 3 SCC 33], N.T. Dev v. Karnataka PSC [(1990) 3 SCC 157, Ramesh Kumar Choudha & Ors. v. State of M.P. & Ors. [(1996) 7 Scale 619]. In none of these decisions, situation which has arisen in the present case had come up for consideration. Even Rule 3 of the General Rules is not of any help to the respondent for the reason that Rule 3 contemplates making of an appointment in accordance with the existing Rules.

It is seen that since the Government have taken a conscious decision not to make any appointment till the amendment of the rules, Rule 3 of the General Rules is not of any help to the appellant. The ratio in the case of Ramesh Kumar Choudha & Ors. v. State of M.P. & Ors. [(1996) 7 SCALE 619] is also not of any help to the respondent. Therein, this Court had pointed out that the panel requires to be made in accordance with the existing Rules and operated upon. There cannot be any dispute on that proposition or direction issued by this Court. As stated earlier, the Government was right in taking a decision not to operate Rule 4 of the General Rules due to their policy decision to amend the Rules. He then relies on paragraph 14 of the unreported judgment of this Court made in Union of India V/s. S.S. Uppal & Anr. [(1996) 1 Unreported Judgments (SC) 393]. Even that decision is not of any help to him. He then relies upon the judgment of this Court in Gajraj Singh etc. v. The State Transport Appellate Tribunal & Ors. etc. [(1996) 7 SCALE 31] wherein it was held that the existing rights saved by the repealed Act would be considered in accordance with the Rules. The ratio therein is not applicable because the existing Rules do not save any of the rights acquired or accruing under the Rules. On the other hand, this court had pointed out in paragraph 23 thus:

> "Whenever an Act is repealed it must be considered, except as to transactions past and closed, as if it had never existed. The effect thereof is to obliterate the Act completely from the record of the Parliament as if it had never been passed it, (sic) it never existed except for the purpose of those actions which were commenced, prosecuted and concluded while it was existing law. Legal fiction is one which is not an actual reality and which the law recognises and the court accepts as a reality. Therefore, in case of legal fiction the court believes something to exist which in reality does not exist. It is nothing but a presumption of the existence of the state of affairs which in actuality is non-existent. The effect of such a legal fiction is that a position which otherwise could not obtain is deemed to obtain under the circumstances. Therefore, when Section 217(1) of the Act repealed Act 4 of 1939 w.e.f July 1, 1989, the law in Act 4 of 1939 in effect came to be non-existent except as regards the transactions, past and closed or save."

Re: Cauvery Water Disputes Tribunal [(1993) Supp. 1 SCC 96] also does not help the appellant. Therein when the judgment of this Court had become final, the Governor issued an ordinance not to implement the judgment of this Court. The constitution Bench, therefore, had held that since the judgment was allowed to become final, it is not open to the Government not to implement the judgment by issuing an ordinance holding that it amounts to interferes with power of judicial review of this Court.

Thus, we hold that the first respondent has not acquired any vested right for being considered for promotion in accordance with the repealed Rules in view of the policy decision taken by the Government which we find is justifiable on the material available from the record placed before us. We hold that the Tribunal was not right and correct in directing the Government to of Assistant Directors of Animal Husbandry Department in accordance with the repealed Rules and to operate the same.

The appeals are accordingly allowed. The order of the Tribunal is set aside but, in the circumstances, without costs.