Gokula Education Foundation (Regd.) and ors. Vs. the State of Karnataka and ors.

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SooperKanoon Citation : sooperkanoon.com/372351

Court : Karnataka

Decided On : Aug-02-1977

Reported in : AIR1977Kant213; ILR1977KAR1217

Judge : C. Honniah, ;V.S. Malimath, ;S.R. Range Gowda, ;Jagannatha Shetty and ;M.K. Srinivasa Iyengar, JJ.

Acts : Constitution of India - Articles 162 and 366; Constitution of India (42nd Amendment) Act, 1976 - Article 228-A

Appellant : Gokula Education Foundation (Regd.) and ors.

Respondent : The State of Karnataka and ors.

Advocate for Def. : M.P. Chandrakantraj Urs, Government Adv., ;S. Vijayashankar and ;V. Tarakaram, Advs.

Advocate for Pet/Ap. : N. Santhosh Hegde, Adv.

Judgement :

Jagannatha Shetty, J.

1. The petitioners in these writ petitions have challenged the constitutional validity of the two orders of the State Government marked as Exhibits 'C' and 'D' to the writ petitions. Exhibit 'C' is dated June 10, 1977, bearing No. ED 210 TGL 6 (1) regulating the admission and capitation fee in Engineering Colleges, Exhibit 'D' is dated June 13, 1977, bearing No. ED 210 TGL 76 (11), the annexure to which contains rules regulating the selection of candidates for admission to Government aided and unaided Engineering Colleges (Full-time/Part-time) and Technological Institute, Bangalore, for the academic year 1977-78. Both the orders are passed by the State Government in exercise of its executive power under Art. 162 of the Constitution.

2. These petitions were posted for preliminary hearing before a learned single Judge of this Court, who, after issuing rule nisi, referred them to a Division Bench for final disposal. Before the Division Bench, an objection was raised on behalf of the State that the impugned orders are 'State law' as defined in Art. 366(26A) of the Constitution, and in view of the provisions contained in Art. 228-A, the learned single judge had no jurisdiction to issue rule nisi. The petitions have therefore been posted before us for a decision on the preliminary question, whether the orders impugned by the petitioners are 'State law' as defined in Art. 366(26A).

After hearing counsel on both sides, we pronounced our unanimous opinion on July 19, 1977, that the impugned orders are not 'State law' within the meaning of Art. 366(26A) stating that we will Rive our reasons later Accord- we now record our reasons.

3. 'Central law' and 'State law' have been defined by Cls. (4A) and (26A) of Art. 366, inserted by the Constitution (42nd Amendment) Act, 1976. These amendments have been necessitated since the jurisdiction to determine the constitutionality of laws has been divided between the Supreme Court and the High Courts, This is -an innovation introduced by the Constitution (42nd Amendment) Act, 1976. After the 42nd Amendment the

constitutional validity of Ventral law' has become a forbidden fruit to the High Courts. Their jurisdiction to declare any 'Central law' to be constitutionally invalid, has been taken away. They have, however, jurisdiction to determine the constitutionality of 'State law' The said amendment has also provided for composition of the Bench to hear such case, and a special majority has been prescribed for a decision to invalidate a 'State law'. In a High Court consisting of less than 5 Judges, the Full Court must hear and the decision must be unanimous to declare a law unconstitutional [Art. 228-A(4)(b)]; In a High Court having more than 5 Judges, -a Bench of not less than 5 Judges must sit for determining the constitutionality of 'State law' -and no law shall be declared unconstitutional unless 2/3 of such Bench concur in the decision [Art, 228-A(4)(a)]. In the result, it will no longer be possible for a single judge or even a Division Bench of a High Court to hear and decide a question of constitutionality of a law; and, in a Bench of 5, not less than 4 must concur in order to invalidate 'State law'.

From these provisions, it is clear that if the orders impugned in the writ petitions -are 'State law', necessarily the petitions ought to have been posted for preliminary hearing -before a Special Bench of five Judges, as R. 12 of the Writ Proceedings Rules, 1977, framed by the High Court 'Provides:

'Every writ petition after it has been admitted to register, shall be posted before the appropriate Bench for preliminary hearing: Provided that when the constitutional validity of any State law is -challenged, it shall be posted before a Bench consisting of not less than five Judges.'

4. With these preliminary observations, we may now proceed to peruse the definition of ',State law'. It is defined under Art. 366(26A) to mean:

'(a) a State Act or an Act of the Legislature of a Union territory;

(b) An Ordinance promulgated by the Governor of a State under Art. 213 or by the administrator of a Union territory under Art. 239-B;

(c) any provision with respect to a matter in the State List in a Central Act made before the commencement of this Constitution;

(d) any provision with respect to a matter in the State List or the Concurrent List in a Provincial Act;

(e) any notification, order, scheme, rule, regulation or bye-law or any other instrumpet having the force of law made under any Act, Ordinance or provisions referred to in sub-clause (a), sub-clause (b), sub-cI. (c) or sub-clause (d);

(f) any notification, order, scheme, rule, regulation or bye-law or any other instrumpet having the force of law, not falling under sub-clause (e), and made by a State Government or the administrator of a Union territory or an officer or authority subordinate to such Government or administrator; and

(g) any other law (including any usage or custom having the force of law) with respect to a matter in the State List.'

To make the picture complete, we may refer to the definition of 'Central law'. It has been defined in Art. 366(4A) as follows:

''Central law' means any law other than a State law but does not include any amendment of this Constitution made under Art. 368'.

5. If these two definitions are closely examined, the first thing that strikes is that 'State law' or 'Central law' has been defined to include 'law' and 'law, only. 'State law', if we summarise, includes different categories of legislation. They are:

(i) An Act or Ordinance of a State; an Act or Ordinance made by the Legislature or Administrator of a Union

territory;

(ii) Any provision in a pre-Constitution Central Act or State Act relating to a matter in the State List;

(iii) Any subordinate legislation made under any of the foregoing Acts or provisions;

(iv) Any subordinate legislation made by a State Government or the Administrator of a Union territory or any authority or officer subordinate to them; .and

(v) Any other law with respect to a matter in the, State List.

The intention of the Parliament appears to be clear when we read subclause (g). The said sub-clause coming ,as it does at the end of Clause (26A) states 'any other law with respect to a matter in the State List'. That means all those provisions referred to in the sub-cls. (a) to (f) must be 'law'. Apart from that, the definition of 'Central law' further confirms our view. This definition is residuary and means any law other than a 'State law'.

6. The word 'law' has a particular ,meaning in legal parlance. The most standard definition of 'law' has been given by Salmond thus:

'Law is the body that principally recognised and applied by the State in the Administration of Justice. In other words, the law consist of the rules recognised and acted on by Courts of Justice.'

It is clear there from, that it is only that rule which is capable of being enforced by the Court of law are recognised as 'law' and that which are incapable of being enforced by the Court of law, cannot be regarded as 'law'. Likewise, the answer to the question whether any rule of conduct has the force of law or not, must be found from the f act whether it is enforced -by the Courts of law Another characteristic of 'law, is, it is rule of general conduct while administrative instructions relate to particular person. The other characteristics have been illustrated by the Supreme Court in Sukhdev Singh v. Bhagatram, : (1975)ILLJ399SC , thus:

'The characteristic of law is the manner and procedure adopted in many forms of subordinate legislation. The authority making rules and regulation must specify the source of the rule and regulation making authority. To illustrate, rules are always framed in exercise of the specific power conferred by the statute to make rule& Similarly, regulations are framed in exercise of specific power conferred by the statute to make regulations. The essence of law is that it is made by the law makers in exercise of specific authority .....

This again means 'that when a power, exercised by an official or 'by a Governmental organ, is challenged, legal authority therefore derived from existing law must be shown, and that no valid law can exist save that which is recognised as such by the Courts.''

7. With this background, we will now proceed to notice the rival contentions:

It is the common case of both the parties that-the impugned orders were made by the State Government in the exercise of its executive power and not under any enactment referred to in subclauses (a) to (d) of -Clause (26A). Mr. Chandrakanthraj Urge, learned High :Court Government Advocate urged that the impugned orders tall under sub-clause (f). He submitted that if a notification, order, scheme, rule, regulation or byelaw is shown to have been made by the State Government or the administrator of a Union territory or an officer or authority subordinate to such Government or, administrator, then it becomes automatically 'State law'. But Mr. Venugopal. learned counsel for the petitioners contended that sub-clause (f) excludes all kinds of executive orders which do not have the force of law. He also urged that the orders made by the State Government in exercise of its executive power have no force of law. Mr. Chandrakanthraj Urs next urged that the words 'having the force of law' found in Clause (26A) (f) qualifies only the last words, that is, 'other instrument', and they do not qualify the other preceding words like notification, order, scheme, rule, regulation or bye-law. He further said that the omission to put a comma after the word 'instrument' and before the words 'having the force of law' must necessarily lend to the construction suggested by him.

8. In our opinion, it is difficult to accept the contention urged for the State, that the executive orders made by the State Government fall within the definition of 'State law'. Article 162 with which we are directly concerned in this case reads:

',Subject to the provisions of this Constitution, the executive power of a State shall extend to the matters with respect to which the Legislature of the State has power to make laws.'

Similarly, Art. 73 provides that the executive power of the Union shall extend to matters with respect to which the Parliament has power to make laws. These articles are concerned primarily with the distribution of the executive power between the Union on the one hand and the State on the other. Neither of these articles, however, contains any definition as to what the executive function is and what activities would legitimate come within its scope. it may at best be stated that that power connotes the residue of Governmental functions that remain after legislative and judicial functions are taken away, as observed by the Supreme Court in Ram Jawaya v. State of Punjab, : [1955]2SCR225 . But the Supreme Court has made it quite clear in G. J. Fernandez v. State of Mysore, : [1967]3SCR636 that Art. 162 does not confer any power on the State Government to frame rules and it only indicates the scope of the executive power of the State. It was further observed therein that the State can give administrative instructions under the executive power to its servants how to act in certain circumstances, but that will not make such instructions statutory rules which are justifiable in certain circumstances. In order that such executive instructions have the force of statutory rules, it must be shown that they have been issued either under the authority conferred on the State Government by some statute or under some provision of the Constitution providing therefore. Fernandez's case : [1967]3SCR636 is also an authority for the proposition that a breach of any executive instruction or any disobedience thereof does not confer any right on a person to come to Court for any relief based on the breach of such instructions although it is open for the State to take disciplinary action against its servant concerned who disobeyed those instructions. These principles have been reiterated in Sukhdev Singh's case : (1975)ILLJ399SC wherein it was observed at page 1338, paragraph 24 thus..... That rules and regulations can be made only after reciting the source of power whereas administrative instructions are not issued after reciting the source of power. Second, the executive power of a State is not authorized to frame rules under Art. 162.

' Again, in P. C. Sethi v. Union of India, : (1975)ILLJ520SC and also in Union of India v. Majji Jangammayya, : [1977]2SCR28 , the Supreme Court observed that administrative instructions, if not carried into effect for obvious and good reasons, cannot confer a right to enforce the same.

From these statements of law, it is perfectly clear that the executive power does not confer rights on the State Government to make 'law' including legislation or subordinate legislation. It confers power on the State to issue only executive instructions. Such executive instructions although issued in the form of any rule, notification or order, will not have the efficacy of law or the force of law, and therefore must fall outside the, ambit of sub-clause (f) of Clause (26A),

9. The above conclusion of ours itself may be sufficient to reject both the contentions advanced by Mr. Chandrakanthraj Urs. However, since he has largely depended upon the plain construction of sub-clause (f) of Clause (26A) in support of his second contention, we may briefly refer to the same. He contended that 'any notification, order, scheme, rule, regulation or bye-law' referred to in sub-cI. (f) of Clause (26A) need not have the force of law. According to him, it may be sufficient if any notification, order, scheme, rule, regulation or bye-law is merely shown to have been made by the State Government or an Officer or authority subordinate to the State Government, as the words 'having the force of law' qualifies only the word 'instrument, therein and not the preceding words. in order to appreciate this contention, it is better to have a second look at sub-clause .(f) of Clause (26A). It reads:

'(f) any notification, order, scheme, rule, regulation or bye-law or any other instrumpet having the force of law, not falling under sub-clause (e), and made by a State Government or the administrator of a Union

territory or an officer or authority subordinate to such Government or administrator;'

Before we come to consider the arguments put forward by each side on this part of the case, it will be useful to refer to the general principles of construction. Firstly, we must bear in mind that we enter the field of constitutional interpretation, There are a number of established canons of interpretation to assist the courts in ascertaining the Parliamentary intention. The principles stated by Cooley* in this regard are as follows:

'A cardinal rule in dealing with written instruments is that they shall receive an unvarying interpretation, and that their practical construction is to be uniform what a court is to do, therefore, is to declare the law as written, leaving it to the people themselves to make such changes as new circumstances may require.

The meaning of the constitution is fixed when it is adopted, and it is not different at any subsequent time when a court has occasion to pass upon it.'

Lord Macnaghten in Vacher & Sons 'Ltd. v. London Society of Compositors, 1913 AC 107 at p. 117 observed at p. 117 thus:

'Now it is 'the universal rule,' as Lord Wensleydale observed in Grey v. Pearson (1-857) 6 HLC 61 at p. 106, that in construing statutes, as in construing all other written instruments, 'the grammatical and ordinary sense of the words is to be adhered to, unless that would lead to some absurdity, or some repugnance or inconsistency with the rest of the in strumpet, in which case the grammatical and ordinary sense of the words may be modified, so as to avoid that absurdity and inconsistency, but no further'.'

Subba Rao, J., Las he then was, speaking for the Supreme Court in Collector of Customs, Baroda v. D. S. & W. Mills Ltd., : 1983ECR2163D(SC) added one more principle by observing at p. 1551, paragraph 4, thus:

*A Treatise on the Constitutional Limitations, page 54..... It is equally well settled principle of construction that where alter native constructions are equally open that alternative is to be chosen which will be consistent with the smooth working of the system which the statute purports to be regulating; and that alter native is to be rejected which will introduce uncertainty, friction or confuse into the working of the system.

Lord Sinion in Rugby Joint Water Board v. Foottit, (1972) 1 All ER 1057 at pages 1076-1077 has laid down two aspects of all these canons of construction. He said thus:

'That the canons of construction have two aspects: First, as a code of communication whereby the draftsman signals the parliamentary intention to the courts; and, secondly, as the quintessence of what experience has found to be the best guide to parliamentary intention.'

He finally said:..... that Parliament is to be presumed to intend justice and avoid in justice or anomaly .....

10. On scrutiny of the entire Clause (26A) it becomes apparent to us that it was not every order or instruction made by the State Government or its Officers that was within the direct or indirect contemplation of the draftsman. It seems to us to be beyond doubt that Parliament manifested an intention to include only legislation & delegated legislation within the ambit of sub-cls. (a) to (f) of Clause (26A) Delegated legislation has been included under sub-cls. (e) and (f). There again, as the words appear, it is not every kind of delegated legislation that was intended to 'be included. Only those, in our opinion, which have the force of have found a happy place there. That much is clear if one compares the wordings of sub-cls. (e) and (f). The delegated legislation which do not fall under sub-clause (e) are intended to be included under sub-clause (f). This sub-clause would evidently cover subordinate legislation made by the State Government or its officers in exercise of the powers conferred on them by the Parliamentary enactments, like the Essential Commodities Act, 1955 or the Motor Vehicles Act, 1939. That appears to -be the frame and tenor of sub-cls. (e) and (f).

11. The learned counsel for the State, however, strongly relied on the absence of a comma after the word 'instrument' and before the words 'having the force of law'. He also urged that the 'instrument' referred to in

sub-clause (1) is not a specie of delegated legislation like notification, order, scheme, rule, regulation or bye-law which are set out in the first part of the sub-clause.

We do not think that the absence of a comma, after the word 'instrument' is in any way indicative of the fact that the words 'having the force of law' do not qualify the preceding words like notification, order, scheme, rule, regulation or bye-law. We also do not accept the submission that word 'instrument' has been used to convey a different meaning other than statutory instrument. The words 'any other instrument! found in sub-clause (f), in our view. Refer only to statutory instruments. which are another specie of delegated legislation. The following passage from Bindra's Interpretation of Statutes* lends support to our view:

'The Act of Parliament which delegates the power may in so many words lay down that 'regulations', 'rules, 'orders', 'warrants', 'minutes?, 'schemes', 'bye-laws', or other instruments - for delegated legislation appears under all these different names.'

Similar is the expression found in Maxwell on Interpretation of Statutes.' Therefore, in the setup in which the different types of delegated legislation have been arranged both under subclauses (e) and (f), a comma after the word 'instrument' appears to be unnecessary. In this context, a reference may also be made to the definition of 'law' under Art. 13(3)(a), wherein also we do not find a 'comma' separating the words 'having the force of law, from the preceding words.

If the construction suggested for the State is accepted, it would produce outrageous -anomalies. That which has been hitherto not recognised as 'law' will have to be accepted as 'State law'. All notifications or administrative directions, statutory or otherwise. made by the State and tens of thousands of its subordinate Officers and authorities would fall within the conception of 'State law'. Even a tender notification issued by the State or one of its subordinate officers to supply bread to the patients in the hospitals may not fall outside the said definition. When all these are challenged on any constitutional ground, a Special Bench of five Judges must sit and determine their validity, virtually paralysing the work of the High Court causing further delay in the disposal of the mounting arrears. We do not think that the Parliament had intended to produce such a result.

*N, S. Bindra's interpretation of Statutes, 6th Edition, 1975, page 690.

**Maxwell on Interpretation of Statutes,Eleventh Edition, pages 49 and 290.

12. In the view that we have taken it must be held that the learned sing Judge was -competent to issue rule nisi in these writ petitions.

13. Order accordingly.