

B.M. Solanki and anr. Vs. State of Gujarat and ors.

B.M. Solanki and anr. Vs. State of Gujarat and ors.

SooperKanoon Citation : sooperkanoon.com/737925

Court : Gujarat

Decided On : Oct-12-1999

Reported in : (2000)2GLR1429

Judge : Rajesh Balia, J.

Acts : [Constitution of India](#) - Articles 14, 16, 236, 309, 310 and 311

Appeal No. : Special Civil Appln. No. 7868 of 1997

Appellant : B.M. Solanki and anr.

Respondent : State of Gujarat and ors.

Advocate for Def. : S.P. Hasurkar and; Hansa Punani, Adv.

Advocate for Pet/Ap. : A.M. Raval, Adv.

Judgement :

1. Heard learned counsel for the parties. The petitioner challenges the validity of the Joint Director Class I in the Commissionerate of Gujarat and Rural Industries Recruitment Rules 1997 framed by the Governor of Gujarat in exercise of powers conferred under proviso to Art. 309 of the [Constitution of India](#) and notified on 13th August 1997. He also challenges the rules framed for recruitment of Project Manager and Deputy Director Class I, namely, Project Manager and Deputy Director under the Commissionerate of Gujarat & Rural Industries Recruitment

Rules 1997 promulgated on the same date.

2. From the facts disclosed in the petition, it appears that until resolution dated 28th November 1972 was passed, the cottage Industries and industrial co-operatives were administered generally under the Department of Co-operation. However, by the aforesaid resolution, a separate Directorate of Gujarat Industries and Industrial Co-operation was created and the first director of the cottage industries was manned from co-operation department working in the cadre of Joint Registrar. Until the framing of Rules under challenge, the administrative post was filled by from the persons of co-operation department whether by deputation or promotion to the post though the same was not included in the cadre of the co-operation department. In other words, the post of Joint Director in Directorate of Cottage Industries and Industrial Co-operatives was ex cadre post not included in the rules governing other posts in the co-operation department. In 1992, by notification dated 7-12-92, Gujarat Co-operative Service Class I Recruitment Rules 1993 were framed also in exercise of powers conferred on Governor under proviso to Art. 309 of the Constitution in suppression of all previous rules made by the Government. The rules were meant for recruitment of the following posts only :

(a) Deputy Registrar of Co-operative Societies.

(b) District Registrar of Co-operative Societies.

(c) Sub-Auditor, Co-operative Societies.

(d) Manager (KVCJ) & District Registrar, Co-operative Societies.

3. Another set of rules for recruitment to the post of Class II in the co-operation department were framed known as Gujarat Co-operative Services Class II Recruitment Rules 1992 (hereinafter referred to as 'Class II Recruitment Rules, 1992'). These rules were meant for recruitment to the State Co-operation Department, Assistant Registrar of Co-operative Services, Assistant Director of Cottage Industries, Assistant Registrar for Industrial Co-operation, Assistant District Registrar of Co-operative Societies, Sub-Auditor, Co-operative Societies and Manager and Assistant District Registrar of Co-operative Societies. In spite of

framing these two set of rules in 1992, the posts of Joint Director Class I and Project Manager which also falls in the same grade, and Deputy Director Class I were not included in the cadre to be governed by these two set of rules. These posts in the Directorate of Cottage Industries and Industrial Co-operatives were continued to be manned by executive orders on deputation from different departments. The methodology of filling these posts on deputation from different department were challenged in Special Civil Application No. 6605/97 by some of the incumbents in the co-operation department seeking a writ of prohibition against giving deputation to persons from other departments except from the department of co-operation and cottage industries. With this background, the Rules of 1997 were framed providing for recruitment of Joint Director through promotion and the sources of recruitment through promotion was identified as persons who have worked for not less than 5 years in the said cadres. Separate Rules were also framed for recruitment in the Cadre of project manager/deputy director, Class I in the Commissionerate of cottage and industries which were to provide feeder cadre for promotion to post of Joint Director. The latter rules provided recruitment by both the methods, namely by promotion as well as by direct recruitment. The sources of recruitment by promotion on the post of project manager and deputy director Class I in the cadre attached to the commissioner of cottage and rural industries were persons who were for not less than 8 years worked as technical officer or assistant director, or industrial promotion officer or textile officer Class II under the Commissioner of Cottage & Rural Industries. It also envisaged relaxation in the period of experience, if no person with the requisite experience under the Commissionerate of cottage and rural industries were available. For direct selection, the age limit was prescribed to be 32 years which was relaxable in favour of the candidates having the exceptional qualification or experience or both and who are already in the service of the Government of Gujarat in accordance with the provisions of the Gujarat Civil Services Classification and Recruitment (General) Rules, 1967 as amended from time to time, apart from providing other qualification for the purpose of eligibility of the persons seeking consideration for direct selection.

4. The petitioner challenges the validity of Rules of 1997 on the ground that the same are violative of Arts. 14 and 16 of the Constitution inasmuch as it affects

adversely the petitioner's right for consideration to the post in question. The Rules have also been challenged on the ground of mala fide exercise of powers of framing the rules and the petitioners having not been given an opportunity to raise objection before framing of the Rules.

5. Having carefully considered the contentions of the learned counsel for the petitioners, I am of the opinion that none of the contentions raised by the learned counsel for the petitioners can be sustained.

6. Article 309 reads as under :-

'309. Recruitment and conditions of service of persons serving the Union or a State - Subject to the provisions of this Constitution, Acts of the appropriate Legislature may regulate the recruitment, and conditions of service of persons appointed, to public services and posts in connection with the affairs of the Union or of any State :

Provided that it shall be competent for the president or such person as he may direct in the case of services and posts in connection with the affairs of the Union, and for the Governor of a State or such person as he may direct in the case of services and posts in connection with the affairs of the State, to make rules regulating the recruitment, and the conditions of service of persons appointed, to such services and posts until provisions in that behalf is made by or under an Act of the appropriate Legislature under this article, and any rules so made shall have effect subject to the provisions of any such Act.'

7. This clearly envisages that it is primarily for the Legislature viz. Parliament or State Legislative assembly to make laws regulating the recruitment and conditions of service of persons appointed to Public Services and posts in connection with affairs of Union or State as the case may be, and power vest in them. However, until such law is made by legislature, by dint of proviso to Art. 309, the same legislative function is exercisable by the President or the Governor as the case may be. The power is obviously of transitional nature until legislature decides to act. If the Parliament or State Legislative Assembly makes law regulating recruitment and conditions of services, the proviso does not come into play. The

provision makes it clear that making of law relating to recruitment and conditions of service for appointing persons in public services or posts in connection with the affairs of Union or State is a primary legislative function and whether legislature enacts law or on the field remaining unoccupied, rules are framed under proviso to Art. 309, it is primarily exercise of legislative function and in either case, if the law relating to recruitment. Like any other law is subject to constitutional limits. The position has been succinctly stated by Apex court in A. B. Krishna v. State of Karnataka AIR 1998 SC 1050.

'The Rule-making function under the proviso to Art. 309 is a legislative function. Since Art. 309 has to operate subject to other provisions of the Constitution, it is obvious that whether it is an act made by the Parliament or the State Legislature which lays down the conditions of service or it is the Rule made by the President or the Governor under the Proviso to that Article, they have to be in conformity with the other provisions of the Constitution specially Arts. 14, 16, 310 and 311.'

8. It is also well established that there is presumption in favour of validity of legislative action both as to legislative competency of authority and that it is within constitutional limits, such as those relating to fundamental rights. The Burden to establish that impugned legislative action is beyond legislative competence of the law making authority or that it transgresses any constitutional limits is on the person who lays such challenge. In sustaining the presumption of constitutionality, the Court may assume every state of facts which can be conceived existing at the time of legislation.

9. In Charanjit Lal Chowdhary v. Union of India, AIR 1951 SC 41, Fazl Ali, J. stated :

'..... it is the accepted doctrine of the American Courts, which I consider to be well founded on principle, that presumption is always in favour of the constitutionality of an enactment, and the burden is upon him who attacks it to show that there has been clear transgression of the Constitutional principles.'

10. In Burrakur Coal Co. v. Union of India, AIR 1961 SC 954, a Constitution Bench spoke through Mudholkar, J. :

'Where the validity of a law made by a competent legislature is challenged in a Court of law, that Court is bound to presume in favour of its validity. Further, while considering the validity of the law, the Court will not consider itself restricted to the pleadings of the State and would be free to satisfy itself whether under any provision of the constitution the law can be sustained.'

11. The two proposition has earlier been stated by the Apex Court in Ramkrishna Dalmia v. Justice S. R. Tendulkar, AIR 1958 SC 538 :

(b) That there is always presumption in favour of the constitutionality of an enactment and the burden is upon him who attacks it to show that there has been clear transgression of the constitutional principles;

.....

(c) that in order to sustain the presumption of the constitutionality of the Court may take into consideration matters of common knowledge, matters of common report, the history of the times and may assume every state of facts which can be conceived existing at the time of legislation.

12. The principles have recently been reiterated by the apex Court in State of Bihar v. Bihar Distillery Ltd., AIR 1997 SC 1511.

13. The Rule making function under proviso to Art. 309 of the Constitution being a legislative function, and distinct from executive or quasi judicial function. Such Rules constitutes law within the meaning of Art. 236 and constitutes law.

14. The constitutional validity of a rule framed under Art. 309 can only be challenged on the grounds as are open to challenge for any statutory measure. Ordinarily, the legislative action is not liable to be challenged on the ground of mala fide or for not affording hearing to affected persons governed by such rules. It is open to challenge on the ground of legislative incompetence of the person authorising such legislative activities and it is also liable to be challenged on the ground of being violative of Art. 14. In the present case, challenge to validity of Rules of 1997 is not on the ground of lack of legislative competence or that it infringes Art. 310 or 311 of the Constitution. The urge of the petitioners is that it

violates Arts. 14 and 16 inasmuch as it does not provide equality of opportunity to the Class I officers of Department of Co-operation to be considered for promotion to the posts of Deputy Director, Class II/Project Manager which constitute feeder cadre for further promotion to the post of joint Director in the Commissionerate of Cottage and Rural Industries.

15. The touch stone of violation of Art. 14 is not that it transacts class legislation, but can be challenged on the ground that there is no reasonable nexus of the classification envisaged under such enactment to the purpose sought to be achieved. If it is applicable to every member of a well defined class, it is not open to the charge of denial of equal protection on the ground that it has no application to the other class of person. It is well established now that legislative enactment for achievement of an object or purpose need not be all embracing. It is for the legislation to determine the subject matter for which to legislate and merely because, it has not legislated for one field will not render the legislation for field for which it has been enacted in any manner discriminatory and violative of Art. 14. In the present, case, while the rules have been framed for recruitment to two cadre viz. (1) the Joint Director Class I and (2) Deputy Director Class I and Project Manager in the commissionerate in question but has not framed rules for recruitment to posts on lower echelons in the commissionerate. Hence, it is not possible to hold the rules framed discriminatory merely because rules for recruitment to posts in commissionerate at lower cadres has been left to be filled through executive instructions and no rules have been framed to regulate such posts.

16. In the matter of recruitment to any cadre, it is a matter of policy and depends upon variable circumstances to lay down criterion of eligibility and sources from which the recruitment shall be made through different methods. Such a laying down of a policy cannot be per se be said to be arbitrary, unreasonable and violative of Arts. 14 and 16 of the Constitution.

17. In the present case, the foundation of this writ petition is that the growing activities of cottage industries and industrial co-operatives necessitated separate constitution of commissionerate of cottage and rural industries for administrative

streamlining and setting up of establishment separately necessarily include the recruitment of personnel for running this newly created department. The necessity of creating a separate cadre for the special requirement of the development and regulations of cottage industries and co-operative industries with the object of which alone, the new department was brought into existence in 1972, cannot be undermined. Therefore, merely because rules provided independently for recruitment to the higher administrative post required for the Commissionerate cannot be held against the formation of independent rules by creating independent cadre to be governed by the new rules. If that be so, then envisaging which posts to be governed by it and the sources from which such posts have to be filled, are matters of policy to be decided by the Rule Making Authority and cannot be fettered by any other consideration.

18. In the present case, so far as the appointment to the post of joint director is concerned, the only methodology of appointment envisaged under the rules is by promotion from person in the cadre of project manager or deputy manager class I in the very same Commissionerate. Thus, the promotion is exclusively manned from the lower posts in the Commissionerate with minimum experience. So far as the cadre of project Manager and Deputy Director Class I is concerned, the separate rules of 1997 for that matter provided two method of recruitment, namely by promotion and direct recruitment. The sources from which the promotion have been made are also been identified in the rules. The sources for promotion to the post of project manager/deputy director Class I has been confined to the classes of officers namely, technical officer, assistant director textile officer Class II in the Commissionerate of Cottage and Rural Industries itself. That is to say, it has not looked for sources outside its own structure. By making this provision, the fact that vacancies that hitherto, in the absence of rules, were being filled from different department or from one single department does not remove it further from the nexus for which the recruitments are being made namely, manning higher posts from persons having experience of the working in the same department for a number of years on different posts. The fact that the persons working in the co-operation department, otherwise who were earlier considered for such posting in the absence of rules, does not give any vested right to be heard or to be provided for promotional opportunities in the new department in the matter of framing of

policy by framing the rules, so long as the sources identified for promotion to the post of Project Manager or Dy. Director Class I, is confined to the persons serving in the Commissionerate and not to outside source. The fact that no separate rules have been framed for recruitment of a technical officers, assistant manager or technical officers Class II and they are left free so far to be governed by executive instructions, in the absence of any rules for the recruitment in the Commissionerate, does not give any ground to treat the persons working in co-operation Department as such as one class for the purpose of recruitment to the newly created Commissionerate in 1972, solely on the basis that once the commissionerate of cottage industries was not a separate department, but was a part of the co-operation department. The fact that such persons could also be included and the sources of recruitment could have been more broad base does not affect the authority of policy framers to define the sources of recruitment for the posts in the department in question from within its own framework and not to look beyond. It may be remembered that once a cadre is formed, recruitment to higher post by promotion is confined to member within cadre. No outsider source for recruitment on promotion is contemplated. This rule has not been given by. The promotion guaranteed by rules in question is confined to persons already serving within the department and not outside. No further distinction is made between the persons falling in the said resource, namely serving in the Commissionerate on different posts. There is no allegation that from amongst such source within the Commissionerate, any discrimination is practised by denying equal opportunity in consideration for promotion. Therefore, challenge to violation of Art. 14 or 16 cannot be sustained on this ground.

19. Opportunity of being appointed by direct recruitment to these posts to any person being eligible is not denied and the rules to the persons like petitioners or any other persons, provides same opportunity to all those who fall within the eligibility criterion of educational qualification, age and other conditions subject to the relaxations, if any, without any distinction.

20. I am therefore of the opinion that on facts of the present case, no case for a hostile discrimination or a classification without any rational nexus to object sought to be achieved has been made out by the petitioners so as to affect the validity of

the impugned rules on the touchstone of the Constitutional limits.

21. So also, in my opinion, the contention of the petitioners to the validity of rules on the basis of mala fide or breach of principles of natural justice cannot be entertained in examining the validity of legislative action of the respondents. No hearing is required to make or to make changes in the Rules framed under Art. 309. Reference in this connection may be made to *Yadav v. State of Punjab*, AIR 1981 SC 561 : (1981 Lab IC 104).

22. The petition therefore fails and is hereby dismissed. Notice discharged.

23. Petition dismissed.

SooperKanoon - India's Premier Online Legal Search - sooperkanoon.com