(2001) 10 AP CK 0013

Andhra Pradesh High Court

Case No: Writ Petition No. 12382 of 1997

J. Dasaratham and Others		APPELLANT
	Vs	
Govt. of A.P. and Others		RESPONDENT

Date of Decision: Oct. 5, 2001

Acts Referred:

- Constitution of India, 1950 - Article 226, 227, 309, 32, 323A

Citation: (2001) 6 ALT 53

Hon'ble Judges: S.B. Sinha, C.J; V.V.S. Rao, J; Goda Raghuram, J

Bench: Full Bench

Advocate: J.R. Manohar Rao, for the Appellant;

Judgement

S.B. Sinha, C.J.
The petitioners herein who are working as Community Health Officers filed Original Application No.6719 of 1994 before the A.P. Administrative Tribunal challenging G.O.Ms. No. 802, dated 28.12.1981.

2. The dispute in this case centres round appointment to the post of Health Inspector which is by way of promotion from the feeder category and by direct recruitment. By reason of G.O.Ms. No. 905, dated 7.11.1974 certain posts are added to the feeder category. G.O.Ms. No. 802, dated 28.12.1981 further amended the relevant rule giving retrospective effect with respect to certain posts which are added to the feeder category and the note inserted therein reads thus:

3. The provisions of this rule shall apply to the following categories with effect from the dates noted against each.

4. The petitioners herein filed the aforementioned original application inter alia questioning the validity of the said G.O.Ms. No. 802, dated 28.12.1981. Some of the beneficiaries of the said government order viz., respondents No. 4 to 7 were impleaded in a representative capacity. It was included in a batch of 22 original

applications. The Tribunal dismissed the original application stating:

5. The applicants in O.A. No. 6719 of 1994 have not impleaded necessary parties and also challenged G.O.Ms. no. 802 which is upheld by the Supreme Court, we hold that no relief can be granted as G.O.Ms. No. 802 was not suspended by the Supreme Court. Therefore, O.A. No. 6719 of 1994 is liable to be dismissed.

6. The said original application, however, was not included in the cause title and no order was passed. Once again the Tribunal passed an order on 29.4.1997 including the original application in the cause title and dismissed the same holding that in the earlier order it was stated that the rules issued in G.O.Ms. No. 802 are valid.

7. A contention was raised before this Court that no party is required to be impleaded when the validity of a rule is challenged in view of the decision of the apex court in (1996) 2 SCR 59 . A plea was also raised that the validity of the said G.O.Ms. No. 802 has not been upheld by the Supreme Court as was wrongly mentioned by the Tribunal. According to the petitioners, having regard to the decision of the apex court in R.N. Nanjundappa Vs. T. Thimmiah and Another, regularization of appointment in exercise of executive power cannot be made by the executive if the same is in infraction of a rule made under proviso appended to Article 309 of the Constitution.

8. When the matter came up before this Court a division bench by an order dated 8.8.1997 passed the following order:

This writ petition was filed against the order of the A.P. Administrative Tribunal in O.a. No. 6719 of 1994. The Tribunal, by a common order dated 19.11.1996, had disposed of 22 cases but in the cause title only 21 case numbers were mentioned. On page 54 of the judgment in paragraph 49, the Tribunal has dealt with the merits of O.A. No. 6719 of 1994 and observed:

''O.A. No. 6719 of 1994 is liable to be dismissed.''

However, no formal order was pronounced evidently due to a clerical mistake as O.A. no. 6719 of 1994 was not listed for judgment. This mistake was realised when an application was filed by the petitioners and the same was disposed of on 29.4.1994 observing:

''In the judgment dated 19.11.1996 in para No. 54, the following shall be added as a penultimate sentence.

''For the reasons stated above, O.A. No. 6719 of 1994 also stands dismissed.

Sri Manohar Rao, learned counsel for the petitioner says that inasmuch as the aforesaid order of dismissal was passed on 29.4.1997, which is subsequent to 18.3.1997 - the cut off date as per the judgment of the Supreme Court in L. Chandra Kumar Vs. Union of India and others, this Court is entitled to exercise the power of judicial review prospectively in respect of matters disposed of by the Tribunals with

effect from 18.3.1997 and this case should not be thrown out on the ground of maintainability.

We are not inclined to agree with the learned counsel. Although technically it is stated that the dismissal order is dated 29.4.1997, in fact the case was dismissed on 19.11.1996 along with certain other matters by a common order. As already stated supra, the common judgment specifically refers to the merits in O.a.No.6719 of 1994 with an observation that it is liable to be dismissed. Because of the lapse on the part of the Registry of the Tribunal in not listing O.A.No.6719 of 1994 for judgment it cannot be said that the case was decided on 29.4.1997 when the clerical omission was noticed and rectified.

The writ petition is, therefore, dismissed as not maintainable. The counsel for the petitioner requests that liberty may be given to the petitioners to approach the appropriate forum to seek the necessary relief. It is needless to mention that it is always open to the petitioners to approach the appropriate forum for seeking necessary relief.

9. A SLP was taken against the said order and special leave having been granted in SLP (Civil) Nos. 4610 and 4611 of 1998, by an order dated 29.4.1999 in Civil Appeal Nos. 2674 and 2675 of 1999 the apex court passed the following order:

Delay condoned. Leave granted.

We have heard learned counsel and perused the counter affidavit filed by the respondents. We think that it is appropriate that the order under challenge should be set aside in so far as it relates to O.A. No. 6719/94 and the writ petition should be remanded to the High Court to be dealt with afresh so that the merits of the principal order of the Tribunal are considered and decided.

Order accordingly.

10. Mr. J.R. Manohar Rao, the learned counsel appearing on behalf of the petitioners, submitted that the learned tribunal has ex facie failed to determine the validity of G.O.Ms.No.802. The learned counsel would contend that the question before the learned tribunal arose in relation to determination of seniority between the direct recruits on the one hand and original three feeder categories on the other in relation whereto there existed no dispute. But the dispute with regard to inter se seniority among the three feeder categories who were appointed on 9.11.1974 and other categories, had not been determined wherefor the validity of G.O.Ms. No. 802 was questioned. The learned counsel would contend that by reason of the said government order, a retrospective effect was given.

11. It may be true, according to the learned counsel, that the question which has been determined in the batch viz., inter se seniority between direct recruits and original three feeder categories had become final. But the second question still requires a determination.

12. Having heard the learned counsel for the parties, we are of the opinion that there is much substance in the contention of the learned counsel. The question raised in this writ petition had not been determined by the learned tribunal.

13. In L. Chandra Kumar Vs. Union of India and others, the apex court observed:

The Tribunals are competent to hear matters where the vires of statutory provisions are questioned. However, in discharging this duty, they cannot act as substitutes for the High Courts and the Supreme Court which have, under our constitutional set up, been specifically entrusted with such an obligation. Their function in this respect is only supplementary and all such decisions of the Tribunals will be subject to scrutiny before a Division Bench of the respective High Courts. The Tribunals will consequently also have the power to test the vires of subordinate legislations and rules. However, this power of the Tribunals will be subject to one important exception. The Tribunals shall not entertain any question regarding the vires of their parent statutes following the settled principle that a Tribunal which is a creature of an Act cannot declare that very Act to be unconstitutional. In such cases alone, the concerned High Court may be approached directly. All other decisions of these Tribunals, rendered in cases that they are specifically empowered to adjudicate upon by virtue of their parent statutes, will also be subject to scrutiny before a Division Bench of their respective High Court. We may add that the Tribunals will, however, continue to act as the only Courts of first instance in respect of the areas of law for which they have been constituted. By this, we mean that it will not be open for litigants to directly approach the High Courts even in cases where they question the vires of statutory legislations (except, as mentioned, where the legislation which creates the particular Tribunal is challenged) by overlooking the jurisdiction of the concerned Tribunal.
The directions issued by us in respect of making the decisions of Tribunals amenable to scrutiny before a Division Bench of the respective High Courts will, however, come into effect prospectively i. e. will apply to decisions rendered hereafter. To maintain the sanctity of judicial proceeding, we have invoked the doctrine of prospective over-ruling so as not to disturb the procedure in relation to decisions already rendered.

In view of the reasoning adopted by us, we hold that clause 2(d) of Article 323A and Clause 3 (d) of Article 323B, to the extent they exclude the jurisdiction of the High Courts and the Supreme Court under Articles 226/227 and 32 of the Constitution, are unconstitutional. Section 28 of the Act and the "exclusion of jurisdiction" clauses in all other legislations enacted under the aegis of Article 323A and 323B would, to the same extent, be unconstitutional. The jurisdiction conferred upon the High Courts under Articles 226/227 and upon the Supreme Court under Article 32 of the Constitution is part of the inviolable basic structure of our Constitution. While this jurisdiction cannot be ousted, other Courts and Tribunals may perform a supplemental role in discharging the powers conferred by Articles 226/227 and 32 of

the Constitution. The Tribunals created under Article 323A and Article 323B of the Constitution are possessed of the competence to test the constitutional validity of statutory provisions and rules. All decisions of these Tribunals will, however be subject to scrutiny before a Division Bench of the High Court within whose jurisdiction the concerned Tribunal falls. The Tribunals will, nevertheless, continue to act like courts of first instance in respect of the areas of law for which they have been constituted. It will not, therefore, be open for litigants to directly approach the High Courts even in cases where they question the vires of statutory legislation (except where the legislation which creates the particular Tribunal is challenged) by overlooking the jurisdiction of the concerned Tribunal. Section 5(6) of the Act is valid and constitutional and is to be interpreted in the manner we have indicated.

14. Keeping in view the decision of the apex court, we are of the opinion that the question as regard validity of G.O.Ms. No. 802 should be determined at the first instance by the Tribunal. We, therefore, set aside the impugned judgment and remit the matter back to the Tribunal for a fresh decision in accordance with law.

15. Having regard to the case being pending for a long time we are of the opinion that the learned tribunal should consider the desirability of disposing of the matter as expeditiously as possible preferably within a period of three months from the date of communication of a copy of this order.