

THE HON'BLE SRI JUSTICE RAMESH RANGANATHAN

AND

THE HON'BLR SRI JUSTICE M.SATYANARAYANA MURTHY

WRIT PETITION NO.30688 OF 2013

ORDER: {Per the Hon'ble Sri Justice Ramesh Ranganathan}

The proceedings, under challenge in this Writ Petition, is the order of the first respondent dated 18.10.1993 informing the petitioner that, in view of the instructions issued in Memo No.609/Ser.C/78-1, dated 06.04.1978, his application dated 03.10.1993, to consider his candidature for promotion to the post of Administrative Officer, cannot be considered.

Facts, to the limited extent necessary, are that the petitioner was initially appointed as a Junior Assistant on 03.01.1983. He was subsequently promoted as a Senior Assistant in the year 2000 and, thereafter, as a Superintendent in July, 2008. The petitioner applied for admission for a B.A. degree course in Ambedkar Open University in the year 2000. It is his case that, in order to seek admission in Ambedkar Open University, no prior permission from the appointing authority is required in as much as the education provided by the Open University is not during office hours of any regular employee, and they conduct classes only on Sundays; and study, in the Open University, would not disturb the regular office duties of an employee. It is also contended that there is no statutory rule, or executive instructions under Article 162 of the Constitution of India, compelling the employee to obtain permission from his employer before seeking admission into any degree course from Ambedkar Open University and the Government has not framed any rules, or issued any executive instructions in this regard as it is the right available to every citizen to pursue higher education.

The petitioner claims to have passed all the examinations in the year 2004 except one paper i.e., Political Science Part-I, which he passed in November 2011. After acquiring the qualification of B.A. from Ambedkar Open University, the petitioner made a representation to the

Junior Civil Judge, Sircilla, Karimnagar District, under whom he was working, to enter the acquired qualification of B.A. in the Service Register. The Junior Civil Judge is stated to have passed an order directing that an entry be made in his Service Register. The petitioner was placed at Sl.No.10 in the Gradation List of Superintendents prepared on 01.12.2012 wherein it was mentioned that he possessed qualification of B.A., apart from Judicial Post Parts I and II, Criminal Judicial Test etc.

By proceedings dated 27.09.2012, the first respondent directed the petitioner to appear for an interview, on 03.10.2012 at 2.30 pm, for considering his candidature for promotion to the post of Administrative Officer (Category 1). The petitioner would contend that he could not get promotion for want of vacancy, and his senior got promoted to the post of Administrative Officer. Thereafter, by proceedings dated 28.12.2012, the first respondent directed the petitioner to submit proof of the permission accorded to him either from the District Judge or from the High Court to pursue B.A. examination in Telugu from Ambedkar Open University, during the academic year 2011-12, on or before 31.12.2012. The petitioner submitted his explanation on 07.01.2013 stating that no permission was obtained as no permission was required to pursue education from Ambedkar Open University. He also stated that Ambedkar Open University had also not insisted on submission of any such no objection certificate. The first respondent, thereafter, issued a Memo dated 11.01.2013 informing the petitioner that his acquisition of B.A. degree, without prior permission of the Head of the Department to pursue the said degree course, was against the procedure in existence, as per the Government Orders, which amounted to grave misconduct. The petitioner was asked to submit his explanation to the show cause notice dated 04.02.2013 as to why disciplinary action should not be initiated against him as per the CCA rules.

The petitioner submitted his objections to the show cause notice dated 04.02.2013 wherein he relied on the judgment of the Madras High Court in W.P.No.34826 dated 07.02.2008, and reiterated his earlier explanation to the effect that, for admission in Ambedkar Open University,

prior permission was not required; the memo was not executive instructions issued under Article 162 of the Constitution of India; it was merely an internal communication not having legal force; and there was no law, or any provision issued by the appropriate government under the proviso to Article 309 of the Constitution of India, restraining him from pursuing education from Ambedkar Open University without obtaining permission from the Head of the Department.

In the impugned order, the first respondent relied on the Government of Andhra Pradesh Memo No.609/Ser.C/78-1, dated 06.04.1978, and held that the petitioner ought to have obtained prior permission from the competent authority for prosecuting a B.A. degree. The petitioner was informed that, in view of the instructions issued under Memo No.609/Ser.C/78-1, dated 06.04.1978, his application, to consider his candidature for promotion to the post of the Administrative Officer, could not be considered.

In the counter affidavit filed on behalf of the first respondent, these facts are reiterated, and it is stated that several judicial employees working in the District have applied for according permission to pursue B.A. (three years degree course) from Ambedkar Open University in the past, and this Court had accorded permission; and the petitioner's contention, that the Government Memo issued in the year 1978 was inapplicable to him, was not tenable. The judgment of the Madras High Court in W.P.No.34826 dated 07.02.2008 was stated not to constitute a binding precedent.

The relevant portion of Government Memo No.609/Ser.C/78-1, dated 06.04.1978 reads as under:-

“.....It has been brought to the notice of the Government that some Universities have started correspondence courses for the degree course and joining the colleges is not necessary for these courses. The question whether prior permission of the Government or other competent authorities, as for regular evening-classes, is necessary in respect of Government employees who intend pursuing these study courses has been examined by the Government. In order to enable the competent authorities to stipulate the condition that the pursuit of the study course (By correspondence) does not in any way interfere with the official duties of the Government servants, the

Government have decided that prior permission is necessary in such cases also. The Heads of Departments and Departments of Secretariat are requested to bring this to the notice of all Government servants under their control.....”

It is evident from the afore extracted portion of the Memo dated 06.04.1978 that all the Heads of Departments were requested to bring the Memo to the notice of all the Government servants under their control. This obligation, to bring the contents of the Memo to the notice of all employees, is, evidently, cast on the Head of Department (including the first respondent) as no employee can be presumed to be aware of the Government Memo, which is in the nature of internal communication, unless he is informed of the same. Even legislation-plenary or subordinate - is also required to be published by a reasonable mode. In

Harla v. The State of Rajasthan^[1], the Supreme Court held:-

“...We do not know what laws were operative in Jaipur regarding the coming into force of an enactment in that State. **We were not shown any, nor was our attention drawn to any custom which could be said to govern the matter. In the absence of any special law or custom, we are of opinion that it would be against the principles of natural justice to permit the subjects of a State to be punished or penalised by laws of which they had no knowledge and of which they could not even with the exercise of reasonable diligence have acquired any knowledge. Natural justice requires that before the law can become operative it must be promulgated or published. It must be broadcast in some recognisable way so that all men may know what it is; or at the very least, there must be some special rule or regulation or customary channel by or through which such knowledge can be acquired with the exercise of due and reasonable diligence. The thought that a decision reached in the secret recesses of a chamber to which the public have no access and to which even their accredited representatives have no access and of which they can normally know nothing, can nevertheless affect their lives, liberty and property by the mere passing of a Resolution without anything more is abhorrent to civilised man. It shocks his conscience. In the absence therefore of any law, rule, regulation or custom, we hold that a law cannot come into being in this way. Promulgation or publication of some reasonable sort is essential....**” (emphasis supplied)

Again in **Gulf Goans Hotels Co. Ltd v. Union of India**^[2], the Supreme Court observed:-

“....In the absence of due authentication and promulgation of the guidelines, the contents thereof cannot be treated as an order of the

Government and would really represent an expression of opinion. In law, the said guidelines and its binding effect would be no more than what was expressed by this Court in State of Uttaranchal vs. S.K. Vaish in the following paragraph of the report :

“It is settled law that all executive actions of the Government of India and the Government of a State are required to be taken in the name of the President or the Governor of the State concerned, as the case may be [Articles 77(1) and 166(1)]. Orders and other instruments made and executed in the name of the President or the Governor of a State, as the case may be, are required to be authenticated in the manner specified in the rules made by the President or the Governor, as the case may be [Articles 77(2) and 166(2)]. **In other words, unless an order is expressed in the name of the President or the Governor and is authenticated in the manner prescribed by the rules, the same cannot be treated as an order on behalf of the Government.**” “A noting recorded in the file is merely a noting simpliciter and nothing more. It merely represents expression of opinion by the particular individual. By no stretch of imagination, such noting can be treated as a decision of the Government. Even if the competent authority records its opinion in the file on the merits of the matter under consideration, the same cannot be termed as a decision of the Government unless it is sanctified and acted upon by issuing an order in accordance with Articles 77(1) and (2) or Articles 166(1) and (2). **The noting in the file or even a decision gets culminated into an order affecting right of the parties only when it is expressed in the name of the President or the Governor, as the case may be, [pic]and authenticated in the manner provided in Article 77(2) or Article 166(2).** A noting or even a decision recorded in the file can always be reviewed/reversed/overruled or overturned and the court cannot take cognizance of the earlier noting or decision for exercise of the power of judicial review.”

It is also essential that what is claimed to be a law must be notified or made public in order to bind the citizen. In Harla vs. State of Rajasthan while dealing with the vires of the Jaipur Opium Act, which was enacted by a resolution passed by the Council of Ministers, though never published in the Gazette, this Court had observed :- “Natural justice requires that before a law can become operative it must be promulgated or published. It must be broadcast in some recognisable way so that all men may know what it is, or, at the very least, there must be some special role or regulation or customary channel by or through which such knowledge can be acquired with the exercise of due and reasonable diligence. The thought that a decision reached in the secret recesses of a chamber to which the public have no access and to which even their accredited representatives have no access and of which they can normally know nothing, can nevertheless affect their lives, liberty and property by the mere passing of a Resolution without anything more is abhorrent to civilised man.” It will not be necessary to notice the long line of decisions reiterating the aforesaid view. **So far as the mode of publication is concerned, it has been consistently held by this Court that such mode must be as prescribed by the statute. In the event the statute does not contain any prescription and even under the subordinate legislation there is silence in the matter, the legislation will take effect only when it is published through the customarily recognized official channel, namely, the official gazette (B.K. Srivastava vs. State of Karnataka). Admittedly,**

the 'guidelines' were not gazetted.

If the guidelines relied upon by Union of India in the present case fail to satisfy the essential and vital parameters/requirements of law as the trend of the above discussion would go to show, the same cannot be enforced to the prejudice of the appellants as has been done in the present case. For the same reason, the issue raised with regard to the authority of the Union to enforce the guidelines on the coming into force of the provisions of the Environment Protection Act so as to bring into effect the impugned consequences, adverse to the appellants, will not require any consideration....” (emphasis supplied)

It is evident, therefore, that no employee can be held to have committed a misconduct in terms of a Government Memo which has not been communicated to him. With a view to ascertain whether or not the said Government Memo No.609/Ser.C/78-1, dated 06.04.1978 was communicated to the petitioner, we asked Sri P.Venugopal, learned Standing Counsel for the High Court, to ascertain whether or not a copy of the said Memo dated 06.04.1978 was communicated to the petitioner.

Learned Standing Counsel, on instructions from the first respondent, stated that Memo No.609/Ser.C/78-1, dated 06.04.1978 was entered in the Inward Register of the District Court, Karimnagar at Sl.No.2568 dated 29.04.1978; and, as the petitioner was initially appointed in the year 1983, circulation of the said Memo to him did not arise. The petitioner is sought to be penalized for his failure to adhere to the conditions stipulated in the Memo dated 06.04.1978, the contents of which he was not even made aware of. While a feeble submission is made by Sri P.Venugopal, learned Standing Counsel, that the petitioner has not claimed ignorance of the said Memo, it must be borne in mind that the right to be considered for promotion is a fundamental right under Article 16 (1) of the Constitution of India, and as there can be no waiver of a fundamental right (**Olga Tellis v. Bombay Municipal Corporation**^[3]), the petitioner cannot be deemed to have waived his right to be considered for promotion, based on a Memo which does not have statutory sanction, and has not even been communicated to him.

Reference made to Rule 9 (ii) of the Andhra Pradesh Civil Services (Classification, Control and Appeal) Rules, 1991, by Sri

P.Venugopal, learned Standing Counsel, is also misplaced. Rule 9 (ii) stipulates the penalties, which may be imposed on a Government servant, including withholding of promotion. It is not even the case of the respondents that disciplinary action was initiated against the petitioner pursuant to which he was imposed the punishment of withholding of promotion. All that the first respondent has done is to reject the Petitioner's candidature for promotion based on Memo No.609/Ser.C/78-1, dated 06.04.1978.

The mere fact that some other employees had applied for permission, before prosecuting B.A. course from Ambedkar Open University, would not render failure of the petitioner, to obtain prior permission, a misconduct justifying his not being considered for promotion to the post of Administrative Officer. As noted hereinabove, such a memo could not have been relied on without communicating the same to the employee concerned. Unlike legislation - plenary or subordinate - which require its publication in the Official Gazette, and an executive instruction under Article 162 of the Constitution which is required to be notified, the Government Memo dated 06.04.1978 is merely an internal communication which does not provide for any particular mode of publication. It is for this reason that the Memo itself required the Heads of Department to bring its contents to the notice of all Government servants under their control. It is only if the said Memo had been communicated by the first respondent to the petitioner when he joined service in the year 1983, or at least prior to his having applied for B.A. correspondence course in Ambedkar Open University, could action have been taken against him.

We can only hope that the authorities concerned take steps forthwith to communicate a copy of Memo No.609/Ser.C/78-1, dated 06.04.1978 to all the employees working in their respective units. The impugned order of the first respondent is set aside. The first respondent shall consider the petitioner's case for promotion to the post of Administrative Officer in accordance with law at the earliest, in any event not later than three (3) months from the date of receipt of a copy of this

order.

The Writ Petition is, accordingly, allowed. There shall be no order as to costs. Miscellaneous petitions, if any, pending shall stand closed.

(RAMESH RANGANATHAN, J)

(M.SATYANARAYANA MURTHY, J)

30th December 2015
RRB

[\[1\]](#) AIR 1951 SC 467(1)
[\[2\]](#) (2014) 10 SCC 673
[\[3\]](#) AIR 1986 SC 180