

**IN THE HIGH COURT OF PUNJAB AND HARYANA AT
CHANDIGARH**

Date of decision: 16.11.2015

C.W.P. No.18158 of 2015

Joginder Singh Mann & others

----Petitioners

Vs.

State of Punjab & another

----Respondents

**CORAM: HON'BLE MR. JUSTICE HEMANT GUPTA
HON'BLE MRS. JUSTICE RAJ RAHUL GARG**

Present: Mr. Hawa Singh Hooda, Senior Advocate, with
Mr. Chander Shekhar, Advocate, for the petitioners.

HEMANT GUPTA, J.

Challenge in the present writ petition is to an Ordinance No.1 of 2015, whereby the Haryana Police Act, 2007 was amended so as to provide that direct recruitment to various non-Gazetted ranks in the Police Service shall be made through the Haryana Staff Selection Commission and that the Gazetted post shall be made through the Haryana Public Service Commission. Such provision was to substitute State Level Police Recruitment Board and the District Level Police Recruitment Boards introduced by Haryana Amending Act No.3 of 2013.

It was in pursuance of directions of the Hon'ble Supreme Court in a judgment reported as Parkash Singh & others Vs. Union of India & others (2006) 8 SCC 1, the Haryana Police Act, 2007 was enacted, as a measure of reforms in the Police Administration. The Court considered the reports submitted by the National Human Rights Commission, the Law Commission and other Committees on the Reforms of Criminal Justice System. The Hon'ble Supreme Court has issued the following directions:

“26. Having regard to (i) the gravity of the problem; (ii) the urgent need for preservation and strengthening of Rule of Law; (iii) pendency of even this petition for last over ten years; (iv) the fact that various Commissions and Committees have made recommendations on similar lines for introducing reforms in the police set-up in the country; and (v) total uncertainty as to when police reforms would be introduced, we think that there cannot be any further wait, and the stage has come for issue of appropriate directions for immediate compliance so as to be operative till such time a new model Police Act is prepared by the Central Government and/or the State Governments pass the requisite legislations. It may further be noted that the quality of Criminal Justice System in the country, to a large extent, depends upon the working of the police force. Thus, having regard to the larger public interest, it is absolutely necessary to issue the requisite directions. Nearly ten years back, in *Vineet Narain & Ors. v. Union of India & Anr.* [(1998) 1 SCC 226], this Court noticed the urgent need for the State Governments to set up the requisite mechanism and directed the Central Government to pursue the matter of police reforms with the State Governments and ensure the setting up of a mechanism for selection/appointment, tenure, transfer and posting of not merely the Chief of the State Police but also all police officers of the rank of Superintendents of Police and above. The Court expressed its shock that in some States the tenure of a Superintendent of Police is for a few months and transfers are made for whimsical reasons which has not only demoralizing effect on the police force but is also alien to the envisaged constitutional machinery. It was observed that apart from demoralizing the police force, it has also the adverse effect of politicizing the personnel and, therefore, it is essential that prompt measures are taken by the Central Government.

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28. More than four years have also lapsed since the report above noted was submitted by the National Human Rights commission to the Government of India.

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30. Article 32 read with Article 142 of the Constitution empowers this Court to issue such directions, as may be necessary for doing complete justice in any cause or matter. All authorities are mandated by Article 144 to act in aid of the orders passed by this Court. The

decision in Vineet Narain's case (supra) notes various decisions of this Court where guidelines and directions to be observed were issued in absence of legislation and implemented till legislatures pass appropriate legislations.”

The Court also directed the constitution of State Security Commission, Selection and minimum tenure of DGP, Minimum tenure of IG of Police and other officers, Separation of investigation, Police Establishment Board, Police Complaints Authority and National Security Commission. The Police Establishment Board was contemplated to decide all transfers, postings, promotions and other service related matters of officers of and below the rank of Deputy Superintendent of Police. It was suggested to be a departmental body comprising the Director General of Police and four other senior officers of the Department.

In terms of the directions issued by the Hon'ble Supreme Court, the Central Government suggested a transparent recruitment process vide communication dated 12/16.11.2009. As per the petitioners, it is to comply with the aforesaid communication of the Central Government, the State Level Recruitment Board and the District Level Recruitment Board was constituted, when the Police Act was amended vide Haryana Act No.3 of 2013, when Sections 4A to 4G were inserted contemplating constitution of State Level Police Recruitment Board and District Level Police Recruitment Board/Committees. The petitioners were appointed as Members of the State Level Police Recruitment Board.

It was on 05.06.2015, the Haryana Police Act, 2007 was amended vide Haryana Ordinance No.1 of 2015. Sections 2 & 3 of the said Ordinance read as under:

“2. In the Haryana Police Act, 2007 (hereinafter called the Principal Act), for sub-section (2) of Section 4 of the following sub-section shall be substituted, namely:

“(2) The direct recruitment to various non-gazetted ranks in the police service shall be made through the Haryana Staff Selection Commission and gazette post shall be made through Haryana Public Service Commission as per relevant applicable service rules, by adopting a transparency process.”

3. In the Principal Act, for existing 4A, the following section shall be substituted, namely:

“4A. Dissolution of State Level Recruitment Board - (1) The State Level Recruitment Board constituted vide Haryana Government, Home Department, notification No.S.O. 52/H.A..25/2008/S.4a/2013, dated the 15th May, 2013 is hereby dissolved.

(2) Notwithstanding such dissolution

- (a) Anything done or any action taken by the State Level Recruitment Board shall not be invalidated;
- (b) all the recommendation made by the State Level Recruitment Board, pending with the Home Department shall be subject to the approval of the Government;
- (c) Proceedings pending before the State Level Recruitment Board, before dissolution shall stand transferred to the Haryana Staff Selection Commission; and
- (d) All the assets of the State Level Recruitment Board shall vest in the Home Department.”

It is the said Ordinance, which is subject matter of challenge in the present writ petition.

Learned counsel for the petitioners has vehemently argued that the State has provided for State Level Police Recruitment Board or the District Level Recruitment Boards in terms of the draft Legislation circulated by the Government of India. Therefore, the method of recruitment could not be changed by the State Legislature. It is contended that the draft Legislation was circulated in pursuance of the directions of the Hon’ble Supreme Court,

therefore, the State Legislature is bound to frame Laws in accordance with the directions issued by the Hon'ble Supreme Court.

Before examining the nature and/or extent of the directions issued by the Hon'ble Supreme Court, the fact remains that it is a constitutional mandate that State Public Service Commission shall be consulted on all matters relating to methods of recruitment to civil services and for civil posts (...see *Article 320*). In terms of Clause (3) of Article 320 of the Constitution, the Haryana Public Service Commission (Limitation of Functions) Regulations, 1973 have been framed. The said Regulations provide that it shall not be necessary to consult the Haryana Public Service Commission on the suitability of candidates for all non-Gazetted Group 'C' and Group 'D' posts. The recruitment of the Police is also recruitment to the civil posts, therefore, the State Public Service Commission is a constitutional authority constituted to make appointments to civil posts, is enjoined to make appointments to all civil posts. The Ordinance is, in fact, supplements such constitutional provision.

Similarly, the recruitment to the non-gazetted post is contemplated to be made through Haryana Staff Selection Commission by adopting a transparency process. All civil posts may be Gazetted or non-Gazetted posts are required to be filled up by way of transparent and fair process. Therefore, be it the post in the Police Department or in the other Departments, the same are required to be filled up in the transparent manner. Therefore, conferment of power to make appointments to the non-Gazetted ranks of the Police Service cannot be said to be in violation of any principle of law.

The judgment in Parkash Singh's case (supra) deals with constitution of Police Establishment Board. It does not specifically deal with the recruitment to the State Police. Still further, the Central Government has no power to direct a State to legislate in a particular manner in respect of

matters falling within the exclusive domain of the State Legislature, as contained in List II of 7th Schedule. Though there is no direction of the Hon'ble Supreme Court to constitute a Recruitment Board in a particular manner, but it well settled that the Court cannot direct a State Legislature to frame law in a particular manner.

One of the earliest case, which arose for consideration is M/s Narinder Chand Hem Raj & others Vs. Lt. Governor, Administration, Union Territory, Himachal Pradesh & others (1971) 2 SCC 747, wherein the Hon'ble Supreme Court held as under:

“7.No court can issue a mandate to a legislature to enact a particular law. Similarly no court can direct a subordinate legislative body to enact or not to enact a law which it may be competent to enact.

The relief as framed by the appellant in his writ petition does not bring out the real issue calling for determination. In reality he wants this Court to direct the Government to delete the entry in question from Schedule A and include the same in Schedule B. Article 265 of the Constitution lays down that no tax can be levied and collected except by authority of law. Hence the levy of a tax can only be done by the authority of law and not by any executive order. Unless the executive is specifically empowered by law to give any exemption, it cannot say that it will not enforce the law as against a particular person. No court can give a direction to a Government to refrain from enforcing a provision of law. Under these circumstances, we must hold that the relief asked for by the appellant cannot be granted.”

Later, a three Judges' Bench of the Hon'ble Supreme Court in State of H.P. Vs. Parent of a Student of Medical College (1985) 3 SCC 169 held that it is for the executive branch of the Government to decide, whether or not to introduce any particular legislation. In the said case, the Bench was ceased of a matter, where the Court directed enactment of Anti Ragging Law. The Bench held as under:

“4. When the court passes any orders in public interest litigation, the court does so not with a view to mocking at legislative or executive authority or in a spirit of confrontation but with a view to enforcing the Constitution and the law, because it is vital for the maintenance of the rule of law that the obligations which are laid upon the executive by the Constitution and the law should be carried out faithfully and no one should go away with a feeling that the Constitution and the law are meant only for the benefit of a fortunate few and have no meaning for the large numbers of half-clad, half-hungry people of this country. That is a feeling which should never be allowed to grow. But at the same time the court cannot usurp the functions assigned to the executive and the legislature under the Constitution and it cannot even indirectly require the executive to introduce a particular legislation or the legislature to pass it or assume to itself a supervisory role over the law-making activities of the executive and the legislature. (...emphasis supplied)”

Another three Judges’ Bench in a judgment reported as Asif Hameed Vs. State of J & K 1989 Supp. (2) SCC 364, has held to the following effect:

“17. Before adverting to the controversy directly involved in these appeals we may have a fresh look on the inter se functioning of the three organs of democracy under our Constitution. Although the doctrine of separation of powers has not been recognised under the Constitution in its absolute rigidity but the Constitution makers have meticulously defined the functions of various organs of the State. legislature, executive and judiciary have to function within their own spheres demarcated under the Constitution. No organ can usurp the functions assigned to another. The Constitution trusts to the judgment of these organs to function and exercise their discretion by strictly following the procedure prescribed therein. The functioning of democracy depends upon the strength and independence of each of its organs. legislature and executive, the two facets of people’s will, they have all the powers including that of finance. Judiciary has no power over sword or the purse nonetheless it has power to ensure that the aforesaid two main organs of State function within the constitutional limits. It is the sentinel of democracy. Judicial review is a powerful weapon to restrain unconstitutional exercise of power by the legislature

and executive. The expanding horizon of judicial review has taken in its fold the concept of social and economic justice. While exercise of powers by the legislature and executive is subject to judicial restraint, the only check on our own exercise of power is the self-imposed discipline of judicial restraint.

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21. The High Court's directions for constituting "Statutory Independent Body" obviously mean that the State Legislature must enact a law in this respect. The Constitution has laid down elaborate procedure for the legislature to act thereunder. The legislature is supreme in its own sphere under the Constitution. It is solely for the legislature to consider as to when and in respect of what subject-matter, the laws are to be enacted. No directions in this regard can be issued to the legislature by the courts. The High Court was, therefore, patently in error in issuing directions in *Jyotshana Sharma case* and reiterating the same in the judgment under appeal." (emphasis supplied)

Still later, another three Judges' Bench in Union of India Vs.

Deoki Nandan Aggarwal, 1992 Supp. (1) SCC 323, has held as under:

"14. We are at a loss to understand the reasoning of the learned Judges in reading down the provisions in paragraph 2 in force prior to November 1, 1986 as "more than five years" and as "more than four years" in the same paragraph for the period subsequent to November 1, 1986. It is not the duty of the court either to enlarge the scope of the legislation or the intention of the legislature when the language of the provision is plain and unambiguous. The court cannot rewrite, recast or reframe the legislation for the very good reason that it has no power to legislate. The power to legislate has not been conferred on the courts. The court cannot add words to a statute or read words into it which are not there. Assuming there is a defect or an omission in the words used by the legislature the court could not go to its aid to correct or make up the deficiency. Courts shall decide what the law is and not what it should be. The court of course adopts a construction which will carry out the obvious intention of the legislature but could not legislate itself. But to invoke judicial activism to set at naught legislative judgment is subversive of the constitutional harmony and comity of instrumentalities. Vide *P.K. Unni v. Nirmala Industries (1990) 2 SCC 378*, *Mangilal v. Suganchand Rathi AIR 1965 SC 101*, *Sri Ram Ram*

Narain Medhi v. State of Bombay AIR 1959 SC 459, Hira Devi (Smt) v. District Board, Shahjahanpur AIR 1952 SC 362, Nalinakhya Bysack v. Shyam Sunder Haldar AIR 1953 SC 148, Gujarat Steel Tubes Ltd. v. Gujarat Steel Tubes Mazdoor Sabha (1980) 2 SCC 593, G. Narayanaswami v. G. Pannervelam (1972) 3 SCC 717, N.S. Vardachari v. G. Vasantha Pai (1972) 2 SCC 594, Union of India v. Sankal Chand Himatlal Sheth (1977) 4 SCC 193 and CST v. Auriaya Chamber of Commerce, Allahabad (1986) 3 SCC 50. Modifying and altering the scheme and applying it to others who are not otherwise entitled to under the scheme, will not also come under the principle of affirmative action adopted by courts sometimes in order to avoid discrimination. If we may say so, what the High Court has done in this case is a clear and naked usurpation of legislative power.” (...emphasis supplied)

In a recent judgment reported as Pravasi Bhalai Sangathan Vs. Union of India (2014) 11 SCC 477, the Hon’ble Supreme Court held as under:

“20. Thus, it is evident that the legislature had already provided sufficient and effective remedy for prosecution of the authors who indulge in such activities. In spite of the above, the petitioner sought reliefs which tantamount to legislation. This Court has persistently held that our Constitution clearly provides for separation of powers and the court merely applies the law that it gets from the legislature. Consequently, the Anglo-Saxon legal tradition has insisted that the Judges should only reflect the law regardless of the anticipated consequences, considerations of fairness or public policy and the Judge is simply not authorised to legislate law. “If there is a law, Judges can certainly enforce it, but Judges cannot create a law and seek to enforce it.” The court cannot rewrite, recast or reframe the legislation for the very good reason that it has no power to legislate. The very power to legislate has not been conferred on the courts.

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22. Be that as it may, this Court has consistently clarified that the directions have been issued by the Court only when there has been a total vacuum in law i.e. complete absence of active law to provide for the effective enforcement of a basic human right. In case there is inaction on the part of the executive for whatsoever reason, the court has stepped in, in exercise of its constitutional obligations to enforce

the law. In case of vacuum of legal regime to deal with a particular situation the court may issue guidelines to provide absolution till such time as the legislature acts to perform its role by enacting proper legislation to cover the field. Thus, direction can be issued only in a situation where the will of the elected legislature has not yet been expressed.”

It may be stated that a Division Bench of this Court in a judgment reported as Model Town Residents Vs. State of Punjab & others (22002) 3 PLR 88 directed the State Legislature to amend the law relating to determination of Annual Value for the purpose of property tax. The Hon’ble Supreme Court in an appeal reported as Municipal Committee, Patiala Vs. Model Town Residents Association & others (2007) 8 SCC 669 set aside the said direction, when it held to the following effect:

“20. Before concluding, we have serious objections to the manner in which direction has been given by the Division Bench of the High Court to the Legislature. In this connection, we quote the last paragraph of the impugned judgment, which is as follows:

“...Sections 3(1)(b) and 3(8aa) of the Act are declared unconstitutional and struck down..... The State shall be free to suitably amend Section 3(1) to provide for levy of house tax by adopting a uniform criteria for determination of annual value of similarly situated properties. The State shall also be free to amend Section 3(1) and lay down a uniform criteria for determination of annual value of properties occupied by the tenants as well as the owners in the light of the judgment of the Supreme Court in State of Bihar Vs. Sachidanand Kishore Prasad Sinha [(1995)3 SCC 86] and observations made in this order. It is, however, made clear that any such enactment shall not effect the assessments made prior to the amendment of section 3 by Punjab Act No. 11 of 1994 and the old cases, if any pending shall be decided in accordance with the unamended provision.” (...emphasis supplied)

In the above judgment, the High Court directs the State Legislature to amend the law relating to determination of annual value by classifying that any such amendment shall not be retrospective. We

have serious reservations regarding such a direction. It is not open to the High Court under Article 226 of the Constitution, particularly in the matter of taxation directing it not to amend the law retrospectively. Such a direction is unsustainable, particularly in a taxing statute. It is always open to the State Legislature, particularly in tax matters, to enact validation laws which apply retrospectively. The High Court cannot take away the power of the State Legislature to amend the tax law retrospectively. The basis of the law can always be altered retrospectively.

In the said case, another Member of the Bench concluded with the said view, but also observed as under:

“30. The court cannot usurp the functions assigned to the legislative bodies under the Constitution and even indirectly require the legislature to exercise its power of law making in particular manner. The court cannot assume to itself a supervisory role for the law making power of the legislature under the provisions of the Constitution. The High Court must ensure that while exercising its jurisdiction which is supervisory in nature it should not over step the well recognized bounds of its own jurisdiction.”

In view of thereof, though the Hon'ble Supreme Court has not issued any direction for framing of a legislation in a particular manner, but keeping in view the separation of power to legislate on the subjects reserved for the State Legislature in List II of 7th Schedule, we find that the impugned Ordinance falls within the exclusive domain of the Legislature and cannot be impugned on the ground that it is contrary to the model legislation circulated by the Government of India or against the directions of the Hon'ble Supreme Court.

Consequently, we do not find any merit in the present writ petition. The same is dismissed.

(HEMANT GUPTA)
JUDGE

16.11.2015
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(RAJ RAHUL GARG)
JUDGE