

HON'BLE THE ACTING CHIEF JUSTICE RAMESH RANGANATHAN

AND

HON'BLE SMT JUSTICE KONGARA VIJAYA LAKSHMI

WRIT APPEAL Nos.656 & 658 OF 2018

COMMON JUDGMENT: (Per the Hon'ble The Acting Chief Justice Ramesh Ranganathan)

These appeals are preferred, under Clause 15 of the Letters Patent, against the common order passed by the Learned Single Judge in W.P.Nos.35785 of 2017 and 35786 of 2017 dated 12.04.2018. The appellant herein is the 5th respondent in both the Writ Petitions. The 1st respondent in both these appeals filed the said Writ Petitions seeking a *Mandamus* to declare the G.O.Rt.No.221 dated 25.09.2017, issued by the Government of Andhra Pradesh, appointing the appellant herein as the Assistant Government Pleader for the Junior Civil Judge Court, Cheepurupalli, Vizianagaram, as illegal, arbitrary, in violation of Articles 14, 19 and 21 of the Constitution of India, in violation of G.O.Ms.No.187 dated 6.12.2000, and in violation of principles of natural justice.

The case of the respondent-Writ Petitioners, before the Learned Single Judge, was that their names were included in the panel sent to the State Government in the first instance; but it was, however, deleted thereafter. The petitioner in W.P.No.35785 of 2017 is a member of the Scheduled Castes, and a lady advocate practising at Cheepurupalli. It is the case of the respondent-Writ Petitioners that both of them had applied to the post of Assistant Government Pleader on 30.12.2013; their names were

recommended by the Junior Civil Judge, Cheepurupalli to the Principal District Judge, Vizianagaram along with three others; the file was returned by the Government without assigning reasons, with a request that a fresh panel be sent; thereafter, by proceedings dated 7.6.2016 and 13.6.2016, fresh applications were invited for appointment to the post of Assistant Government Pleader, Cheepurupalli; the Principal District Judge recommended five names to the District Collector; while the name of the appellant and the petitioner in W.P.No.35786 of 2017, were included in the said panel, the name of the petitioner in W.P.No.35785 of 2017 was not; and, thereafter, the appellant was appointed as an Assistant Government Pleader for the Court of Junior Civil Judge, Cheepurupalli vide G.O.Rt.No.221 dated 25.09.2017.

The contentions urged, on behalf of the respondent-Writ Petitioners, before the Learned Single Judge, were that the appellant held the post of Assistant Government Pleader, in the said Court, from 2000 to 2003, and again from 2003 to 2007, for two consecutive terms; in terms of Clause (8) of the Instructions issued in G.O.Ms.No.187 dated 16.12.2000, the appellant was ineligible for appointment as an Assistant Government Pleader for a third term, except in exceptional cases; there was no such exceptional circumstance warranting his appointment for a third term; his appointment as an Assistant Government Pleader, for a third term, was not in conformity with G.O.Ms.No.187 dated 06.12.2000; the appellant had appeared for the plaintiffs in O.S.No.48 of 2009 on 26.10.2017, and in O.S.No.87 of 2017 on

17.11.2017; both these Suits were instituted against the Government; and the continued appearance of the appellant in cases instituted against the Government, even after he joined duty as an Assistant Government Pleader on 26.10.2017, would amount to professional misconduct necessitating his discontinuance in the post of Assistant Government Pleader.

On the other hand the case of the appellant, before the Learned Single Judge, was that G.O.Rt.No.221 dated 25.9.2017 was issued by the Government appointing him as an Assistant Government Pleader; on 26.10.2017 the appellant had submitted his joining report; the District Collector had, however, issued proceedings dated 21.11.2017, and he joined duty only thereafter on 23.11.2017; and, consequently, his appearance on 26.10.2017, and on 17.11.2017, in Suits instituted against the Government cannot be held to be a professional misconduct necessitating his being held disentitled to continue to hold the office of an Assistant Government Pleader.

In the order under appeal, the Learned Single Judge observed that the executive instructions, issued in G.O.Ms.No.187 dated 16.12.2000, enabled appointment of an Assistant Government Pleader for a third term only in exceptional cases; no such exceptional circumstance, warranting appointment of the appellant as an Assistant Government Pleader, was shown; he could not, therefore, have been appointed as an Assistant Government Pleader; and in addition thereto, though he gave a joining report on 26.10.2017, he continued to appear against the State Government even thereafter, which amounted to

professional misconduct. Both the Writ Petitions were allowed, G.O.Rt.No.221 dated 25.09.2017 was set aside, and the respondent-officials were directed to consider all eligible persons, for appointment to the post of Assistant Government Pleader, within eight weeks.

Before us, Sri T. Nageswara Rao, learned counsel for the appellant, would submit that, while the appellant was no doubt appointed vide G.O.Rt.No.221 dated 25.9.2017 and had submitted his joining report on 26.10.2017, the District Collector had issued proceedings, permitting him to join duty, only on 21.11.2017; he took charge only on 23.11.2017; the mere fact that his name is reflected in the cause list of 26.10.2017 and 17.11.2017, as having appeared on behalf of the plaintiffs and against the Government, is of no consequence; he cannot be faulted for having appeared against the Government before he took charge as an Assistant Government Pleader on 23.11.2017; while the executive instructions, in G.O.Ms.No.187 dated 16.12.2000, no doubt requires appointment of an Assistant Government Pleader to be made for a third term only in exceptional cases, the State Government, after taking an overall view of the matter, was satisfied that the appellant's case was an exceptional case necessitating his appointment as an Assistant Government Pleader for a third term.

On the other hand, Sri N. Aswani Kumar, learned counsel for the respondent-Writ Petitioner, would submit that a bare reading of the order of the District Collector dated 21.11.2017 would show that the appellant had joined duty as an

Assistant Government Pleader on 26.10.2017 itself; one of the conditions stipulated in G.O.Ms.No.187 dated 16.12.2000 is that an Assistant Government Pleader cannot appear against the State Government; the fact that the appellant continued to appear against the State Government, even after he joined duty on 26.10.2017, is evident from the cause lists of 26.10.2017 and 17.11.2017; such appearance would amount to a disqualification; the appellant's appointment as an Assistant Government Pleader, vide G.O.Rt.No.221 dated 25.9.2017, is liable to be set aside on this ground alone; and it is only if G.O.Rt.No.221 dated 25.09.2017 reflects appointment of the appellant, as an Assistant Government Pleader, for a third term as having been made as an exceptional case, would his appointment be valid.

G.O.Rt.No.221 dated 25.09.2017 records that the appellant was appointed as an Assistant Government Pleader, for the Junior Civil Judge Court, Cheepurupalli, Vizianagaram District, to look after civil cases, on behalf of the Government, for a period of three years from the date of assumption of charge of the post, or till termination of his services, whichever is earlier; his conditions of service shall be in accordance with the instructions issued in G.O. Ms.No.187 dated 16.12.2000, as amended from time to time; he shall be paid a consolidated honorarium of Rs.10,000/- per month; and the date of his assumption of charge of the post was required to be intimated to the Government.

It is no doubt true that G.O.Rt.No.221 dated 25.9.2017 stipulates that appointment of the appellant, as an Assistant Government Pleader for a period of three years, would commence

from the date he assumes charge of the said post. While Sri T. Nageswara Rao, learned counsel for the appellant, would submit that the appellant took charge only on 23.11.2017, Sri N. Aswini Kumar, learned counsel for the respondent-Writ Petitioner, would draw our attention to the proceedings dated 21.11.2017 to contend otherwise. In the proceedings dated 21.11.2017, the District Collector has himself recorded that the appellant had joined duty as an Assistant Government Pleader, in the Junior Civil Judge's Court, Cheepurupalli, in the forenoon of 26.10.2017 in the existing vacancy; and the previous Assistant Government Pleader was relieved from duties with effect from 26.10.2017 onwards. The proceedings of the District Collector dated 21.11.2017 shows that the appellant had, in fact, taken charge of the post of Assistant Government Pleader on 26.10.2017 itself, and not on 23.11.2017 as contended before us. As it is not in dispute that the appellant appeared in two Suits, instituted against the Government, on 26.10.2017 and 17.11.2017, it does appear that the appellant continued to appear against the Government even after he assumed charge as an Assistant Government Pleader.

Sri T. Nageswara Rao, learned counsel for the appellant, would rely on a judgment of this Court, in **T. Kumar Babu v. Government of Andhra Pradesh and others**¹, to contend that the burden is on the respondent-Writ Petitioners to show that the appellant does not fall under the "exceptional cases"

¹ 2009(5) ALD 474

category. In **T. Kumar Babu**¹, a Learned Single Judge of this Court observed:-

“.....The petitioner has not made any allegations of inefficiency or lack of integrity against any of the Government Pleaders, who are impleaded as respondents 2 to 11. His contention is that they ought not to have been appointed for the purported third term without being satisfied about their exceptional efficiency, success and performance. *While it was necessary for respondent No.1 to have undertaken the exercise for finding out the efficiency, high rate of success and the good performance of the Government Pleaders through a method evolved for this purpose, the fact remains that no such method was evolved by the Government. For its failure to do so, respondents 2 to 11 cannot be penalised. It would quite well be that it would be open to the private respondents to say that had respondent No.1 undertaken such an exercise, each one of them would have satisfied the criteria mentioned in instruction No.8 for their appointment for a second or third term, as the case may be. This is where absence of any material against these respondents produced by the petitioner raises a presumption in their favour that they satisfied all those requirements contained in instruction No.8.....*”(emphasis supplied)

Judicial review, of appointment to the posts of Assistant Government Pleaders in subordinate Courts, is concerned with whether the incumbent possesses the qualifications prescribed for the appointment, *the manner in which the appointment came to be made*, and whether the procedure adopted for appointment was fair, just and reasonable. While the Government has the discretion to appoint an eligible and suitable advocate as an Assistant Government Pleader in subordinate Courts, there is no such thing as absolute or untrammelled discretion, the nursery of despotic

power, in a democracy based on the rule of law. (**A. Mohambaram v. M.A. Jayavelu**²; **United States v. M. Wunderlich**³). Exercise of discretionary administrative power will be set aside if there is manifest error in its exercise or such exercise is manifestly arbitrary. In the purported exercise of his discretion the authority must act in good faith, must have regard to all relevant considerations, must not be influenced by irrelevant considerations, must not seek to promote purposes alien to the letter or to the spirit of the Executive instructions that gives it power to act, and must not act arbitrarily or capriciously. (**Indian Railway Construction Co. Ltd. v. Ajay Kumar**⁴; **State of U.P. v. Renusagar Power Co**⁵; **Professor de Smith in his classical work Judicial Review of Administrative Action, 4th Edn., at pp. 285-87**). If the authority exercising his discretion takes into account matters which the Courts consider improper for the guidance of his discretion, then, in the eye of law, the authority cannot be said to have exercised that discretion. When considerations, extraneous to the suitability of a person for appointment, are taken into account in making the appointment, there is an abuse of discretionary power, and the exercise of power exceeds the bounds of authority. While adjudging the suitability of a person to an office may well be within the discretion of the appointing authority, the discretion must be exercised bona fide. (**A. Mohambaram**²; **Maxwell on the Interpretation of Statutes, 11th Edition, page 118**). While Courts will not interfere with the

² AIR 1970 Madras 63

³ (1951) 342 US 98

⁴ (2003) 4 SCC 579

⁵ (1988) 4 SCC 59

choice of an individual with reference to an appointment made in the due exercise of its discretion by the Government, without shutting out of consideration the claims of others for the post, Courts will certainly stand guard, against flagrant abuse of powers, on the simple and sound principle that the Constitution 'cannot have intended powers to be abused beyond what might be called the inevitable area where opinions may legitimately differ'. **(A. Mohambaram²)**.

Clause (8) of the Executive Instructions, issued in G.O.Ms.No.187 dated 16.12.2000, stipulates that a Law Officer should, ordinarily, be appointed for a term of three years; the Law Officer so appointed may be considered for a second term, if the Government is satisfied that he has proven efficiency, high rate of success and good performance; and he can be appointed for a third term only in exceptional cases. The requirement of Clause (8), for appointment of an Advocate to the post of Assistant Government Pleader for a second term, is the satisfaction of the Government that the Advocate has proven efficiency, a high rate of success, and a record of good performance. The exceptional cases, justifying appointment of an Advocate as an Assistant Government Pleader for a third term under Clause (8) of G.O.Ms.No.187 dated 6.12.2000, is that the Advocate should have proven efficiency, a rate of success and good performance of a higher degree than what is required for an Advocate to be appointed as an Assistant Government Pleader for a second term. Neither does G.O.Rt.No.221 dated 25.9.2017 record that the appellant falls under the “*exceptional cases*” category, nor does the

counter affidavit disclose the basis on which the Government was satisfied that the appellant fell under the said “*exceptional cases*” category justifying his appointment as an Assistant Government Pleader for a third term.

G.O.Ms.No.187 dated 16.12.2000 is in the nature of Executive Instructions issued by the State Government in the exercise of its powers under the Article 162 of the Constitution of India. In the absence of any statutory provision or rule to the contrary, governing the field, it is always open to the Government to issue executive instructions on matters in which the State Legislature has the power to make laws. While a Writ of *Mandamus* cannot be sought from this Court for enforcement of such executive instructions, as they do not have statutory sanction, the Government would, nonetheless, be required to adhere to the executive instructions issued by it. An executive authority must be rigorously held to the standards by which it professes its actions to be judged, and it must scrupulously observe those standards on pain of invalidation of an act in violation of them. He that takes the procedural sword shall perish with the sword. (**Ramana Dayaram Shetty v. International Airport Authority of India**⁶; **B.S. Minhas v. Indian Statistical Institute**⁷; **Amarjit Singh Ahluwalia v. State of Punjab**⁸; **Sukhdev Singh v. Bhagatram Sardar Singh Raghuvanshi**⁹). When the State lays down executive instructions for taking action, it is imperative on its part to scrupulously follow the same, to

⁶ (1979) 3 SCR 1014

⁷ (1983) 4 SCC 582

⁸ AIR 1975 SC 984

⁹ AIR 1975 SC 1331

avoid arbitrariness and ensure fair-play. (**B.S. Minhas**³). Executive Instructions issued by the State are binding on it. (**Swaran Singh Chand v. Punjab State Electricity Board**¹⁰; **H.V. Nirmala v. Karnataka State Financial Corpn**¹¹). Having professed to abide by the executive instructions the Government cannot, in the absence of any statutory provision, act contrary thereto. (**N. Kannapan v. State (Union Territory) Andaman & Nicobar Islands**¹²; **Harjit Singh v. State of Punjab**¹³). On the appointment of the appellant for a third term being challenged on the ground that he does not fall under the “*exceptional cases*” category, it is for the Government to disclose the basis on which they arrived at the satisfaction that he falls under the “*exceptional cases*” category. As the respondent-Writ Petitioners contend that the appellant does not, the onus cannot be placed on them to establish the negative. Reliance placed on **T. Kumar Babu**¹ is, therefore, misplaced.

A feeble submission is made by the learned Government Pleader for Home that the words “*third term*” in Clause (8) of G.O.Ms.No.187 dated 6.12.2000 should be read as “*three consecutive terms*”. As the said Clause does not use the word “*consecutive*” it would be wholly impermissible for this Court, in the exercise of its powers of judicial review under Article 226 of the Constitution of India, to add or delete words from such executive instructions issued by the State Government in the exercise of its powers under Article 161 of the Constitution of India.

¹⁰ (2009) 13 SCC 758

¹¹ (2008) 7 SCC 639

¹² (2013) 2 SCC 177

¹³ (2007) 9 SCC 582

Yet another submission of the learned Government Pleader for Home is that the satisfaction of the Government, in appointing an Assistant Government Pleader, is subjective. Appointment of the appellant, as an Assistant Government Pleader, for a third term cannot be justified by the State Government on the ground that the exercise of power is based on its subjective satisfaction. Formation of opinion must be preceded by application of mind as regards consideration of relevant factors and rejection of irrelevant ones. (**Hindustan Petroleum Corpn. Ltd. v. Darius Shapur Chenai**¹⁴; **Devinder Singh v. State of Punjab**¹⁵). The competent authority is required to form an opinion from circumstances suggesting what is set out in the Executive instructions issued in G.O.Ms. No.187 dated 06.12.2000. Even if the formation of opinion is subjective, the existence of circumstances, relevant to the inference as the sine qua non for action, must be demonstrable. (**Barium Chemicals Ltd. v. Company Law Board**¹⁶; **Swadeshi Cotton Mills v. Union of India**¹⁷). If the satisfaction, in regard to the existence of any of the conditions stipulated in the Executive Instructions, is based on irrelevant considerations, the Court will be justified in quashing such an illegal order. (**Swadeshi Cotton Mills**¹⁷).

In the formation of opinion regard must be had to all the factors relevant for the exercise of that power. Formation of opinion must be based on objective considerations. (**India**

¹⁴ (2005) 7 SCC 627

¹⁵ (2008) 1 SCC 728

¹⁶ AIR 1967 S.C. 295

¹⁷ (1981) 1 SCC 664

Cement Ltd. v. Union of India¹⁸, Rajesh Kumar v. Dy. CIT¹⁹).

There must exist circumstances which, in the opinion of the competent authority, suggest what has been set out in the Executive Instructions. Existence of such circumstances is a condition precedent for formation of the required opinion and, if the existence of those conditions is challenged, Courts are entitled to examine whether those circumstances existed when the order was made. (**Rohtas Industries Ltd v. S.D. Agarwal²⁰**). If it is shown that the circumstances do not exist, or that they are such that it is impossible for any one to form an opinion therefrom, the opinion can be challenged on the ground of non-application of mind or perversity or on the ground that it was formed on collateral grounds and was beyond the scope of the Executive Instructions. (**Barium Chemicals Ltd¹⁶**). Formation of opinion by the State Government, that the appellant should be appointed as an Assistant Government Pleader for a third term, falls foul of the Executive Instructions issued in G.O.Ms. No.187 dated 06.12.2000. Subjective satisfaction does not justify whimsical application of the extant instructions.

As noted hereinabove, neither the order of appointment of the appellant in G.O.Rt.No.221 dated 25.9.2017, nor the counter affidavit filed by the Government, disclose the basis of which the appellant was found to come under the “*exceptional cases*” category, a standard higher than the proven efficiency, rate of success and good performance prescribed for appointment of an

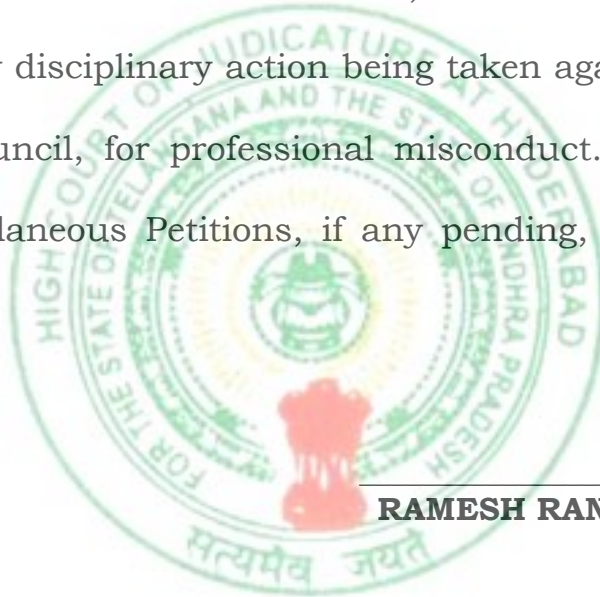
¹⁸ (1990)4 SCC 356

¹⁹ (2007)2 SCC 181

²⁰ AIR 1969 SC 707

Advocate, as an Assistant Government Pleader, for a second term of office.

Viewed from any angle, we do not find any legal infirmity in the common order of the Learned Single Judge warranting interference in an *Intra Court* Appeal under Clause 15 of the Letters Patent. Both the appeals fail and are, accordingly, dismissed. As the observations made in the common order under appeal, and the common judgment now passed by us, are in the context of the appellant's ineligibility to be appointed/continued as an Assistant Government Pleader, these observations would not justify any disciplinary action being taken against him, by the State Bar Council, for professional misconduct. No order as to costs. Miscellaneous Petitions, if any pending, shall also stand closed.



RAMESH RANGANATHAN, ACJ

KONGARA VIJAYA LAKSHMI, J

25 April, 2018
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HON'BLE THE ACTING CHIEF JUSTICE RAMESH RANGANATHAN

AND

HON'BLE SMT JUSTICE KONGARA VIJAYA LAKSHMI

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