Andhra High Court
Perambaduru Murali Krishna And ... vs State Of Andhra Pradesh And Ors. on 20 December, 2002
Equivalent citations: 2003 (1) ALD 597, 2003 (1) ALT 127
Author: B S Reddy
Bench: B S Reddy, G Mohammed

JUDGMENT B. Sudershan Reddy, J.

1. These writ petitions may be disposed of by a common order since they are directed against the common order dated 1-8-2001 made in O.A. No. 7226 of 2000 and Batch (petitioners herein are the applicants in O.A. Nos.6849 of 2000 and 7636 of 2000 respectively) by the Andhra Pradesh Administrative Tribunal at Hyderabad, whereunder the Tribunal did not grant any relief whatsoever to the petitioners herein.

2, The petitioners herein are the visually handicapped persons. They have applied for the post of Secondary Grade Teacher/School Assistant in pursuance of DSC-2000 notification dated 3-7-2000 issued by the second respondent herein, which was published in the newspapers on 4-7-2000. The said notification is for recruitment of various categories of posts. There is no dispute whatsoever that 597 Secondary Grade Teacher posts were notified in respect of Cuddapah District, out of which 485 posts are in the Government/Zilla Parishad Schools and 112 posts are in Cuddapah and Proddatur Municipalities. It is not necessary to notice the further details and particulars mentioned in the notification. There is no dispute whatsoever that the authorities while issuing the notification inviting applications from the eligible candidates including the physically handicapped candidates followed the Andhra Pradesh State and Subordinate Service Rules as amended by G.O. (P) No. 65, General Administration (Ser.D) Department, dated 15-2-1997. Those Rules were in vogue even at the time of selection of candidates in DSC-2000. The rules inter alia provide for three per cent reservation to the physically handicapped candidates. The said Rules at the relevant time did not provide 1:1:1 reservation for visually handicapped, hearing handicapped and Orthopaedically handicapped candidates. The fact remains that the notification dated 3-7-2000, with which we are concerned for the present, admittedly did not provide for 1:1:1 reservation in favour of visually handicapped, hearing handicapped and Orthopaedically handicapped candidates.

3. However, it appears that in respect of the very same recruitment in adjoining district of Kurnool, 1:1:1 reservations were provided. The Government vide G.O. Ms. No. 115, Women's Development, Child Welfare and Labour (WH.DESK) Department, dated 30-7-1991 provided reservation of posts in favour of the physically handicapped persons, in direct recruitment, in the State and Subordinate Service and accordingly directed all the Heads of Departments to strictly implement the reservation in the ratio of 1:1:1 for the blind, deaf/dumb and Orthopaedically Handicapped persons. It is no doubt true that the said instructions are in the nature of guidelines and precisely for the said reason, it is mentioned in the very said G.O., that "necessary amendments to the respective special or ad hoc Rules shall be obtained by the respective Heads of Departments from their administrative departments of Secretariat in this regard." The fact remains that no such amendments were made and on the other hand those executive instructions were clearly ignored while making the necessary amendments to the A.P. State and Subordinate Service Rules vide G.O. (P) No. 65, dated 15-2-1997

and no categorisation for visually handicapped, deaf/ dumb and Orthopaedically Handicapped was made. The Government appears to have realised the need for making further amendments and accordingly Rule 22(2) of the Andhra Pradesh State and Subordinate Service Rules, 1996 was further amended providing 1:1:1 reservations vide G.O. Ms. No. 385, General Administration (Ser.D) Department, dated 18-11-2000.

4. The petitioners herein invoked the jurisdiction of the Andhra Pradesh Administrative Tribunal challenging the selections of teachers made in pursuance of the notification issued on 3-7-2000 on various grounds. It was contended that the respondents are bound to make selections for three per cent quota meant for the persons with disabilities on the basis of 1:1:1 for blind, deaf/dumb and Orthopaedically handicapped persons. It was contended that the respondents were required, in law, to make such categorisation.

5. The Tribunal did not agree with any of the contentions that were urged before it and accordingly dismissed the Original Applications filed by the petitioners.

6. In these writ petitions learned Counsel for the petitioners contends that the impugned Notification and the Rules made in G.O. (P) No. 65, GAD, dated 15-2-1997 providing three per cent reservations in favour of the persons with disabilities without there being any further categorisation is contrary to the provisions of the Persons with Disabilities (Equal Opportunities, Protection of Rights and Full Participation) Act, 1995 (for short 'the Act 1 of 1996'). It is submitted that the impugned Notification and the Rules are in direct conflict with the provisions of the Act 1 of 1996 and, therefore, void. The learned Counsel submitted that the provisions of the Act 1 of 1996 shall prevail over the Rules made by the Government of Andhra Pradesh in purported exercise of the power under proviso to Article 309 of the Constitution of India. The learned Counsel also submitted that there has been a large-scale fraud in the matter of selection and appointment of handicapped persons and, therefore, the whole selections are vitiated. It is also contended that the respondents, at the cost of merit even amongst the physically handicapped candidates, made appointments on the basis of bogus certificates issued by the authorities.

7. We must make it clear that those allegations are not based upon any material made available on record and, in the circumstances; we shall not examine those contentions. However, we are required to examine whether the impugned Notification and the Rules framed by the Government are void and inoperative and as to what is the effect of the provisions of the Act 1 of 1996 qua the rules framed by the State Government.

Brief survey of provisions of Act 1 of 2996:

8. Act 1 of 1996 has been enacted by the Union Parliament to give effect to the Proclamation of the Full Participation and Equality of the People with Disabilities in the Asian and Pacific Region, The Economic and Social Commission for Asia and Pacific convened a meeting to launch the Asian and Pacific Decade of Disabled Persons 1993-2002 at Beijing on 1st to 5th December, 1992. The meeting adopted the Proclamation on the full participation and equality of people with disabilities in the Asian and Pacific Region. India is a signatory to the said proclamation. Having considered that it is

necessary to implement the said proclamation, the Union Government introduced the Bill and accordingly Act No. 1 of 1996 has been enacted. The Act is a self-contained code ensuring equality of people with disabilities and their participation in all spheres of activity. It mandates the appropriate Governments, which includes the State and Central Government and local authorities, to provide the children with disabilities free education. The provisions of the Act 1 of 1996 command promotion and setting up of special schools in Government and private sector and for providing accessories to such schools. Section 32 of the Act 1 of 1996 commands the appropriate Governments to identify posts, in the establishments, which can be reserved for the persons with disabilities. Section 33 of the Act 1 of 1996, which is a crucial one, directs every appropriate Government to appoint in every establishment such percentage of vacancies not less than three per cent for persons or class of persons with disability of which one per cent each shall be reserved for persons suffering from- (i) blindness or low vision; (ii) hearing impairment; and (iii) locomotor disability or cerebral palsy, in the posts identified for each disability.

9. Section 36 of the Act 1 of 1996 provides that where in any recruitment year any vacancy under Section 33, cannot be filled up due to non-availability of a suitable person with disability or, for any other sufficient reason, such vacancy shall be carried forward in the succeeding recruitment year and if in the succeeding recruitment year also suitable person with disability is not available, it may first be filled by interchange among the three categories and only when there is no person with disability available for the post in that year, the employer shall fill up the vacancy by appointment of a person, other than a person with disability.

10. A plain reading of Section 33 of the Act 1 of 1996 makes it clear that it commands the Central Government or any establishment wholly or substantially financed by that Government, or a Cantonment Board constituted under the Cantonment Act, 1924; a State Government or any of its establishments, wholly or substantially financed by it; and the local authorities to make the reservation of posts in their establishments such percentage of vacancies not less than three per cent for persons or class of persons with disability and such reservation is required to be trifurcated. That is in broad the scheme of the Act 1 of 1996.

11. The learned Additional Advocate General contended that so far as the Rules framed by the State Government providing reservations to the persons with disabilities in the services of the State fall within the competence of State Legislature. The Rules essentially are traceable to Entry 41 of List II and, therefore, the question of there being any repugnancy between the Rules framed by the State Government in purported exercise of power under proviso to Article 309 of the Constitution of India and the provisions of Act 1 of 1996 does not arise. The substance of the legislation falls within the State List. It is contended that it is only where the legislation is on a matter in Concurrent List, it would be relevant to apply the test of repugnancy.

12. The Andhra Pradesh State and Subordinate Service Rules, 1996, which provide for reservation in the State and Subordinate Service in favour of the persons with disabilities, undoubtedly, is a piece of legislation traceable to Entry 41 of List II. Its legislative competency cannot be doubted. It is essentially a legislation in respect of State services. The Union Parliament has no legislative competency to make any law in respect of the services under the State.

13. The question that falls for consideration is as to what is the nature of the Act 1 of 1996 enacted by the Union Parliament? Whether the provisions of the Act 1 of 1996 shall prevail over the Andhra Pradesh State and Subordinate Service Rules insofar as providing 1:1:1 reservations in favour of the persons with disabilities in the services of the State?

Constitutional Scheme: Relations between the Union and States:

14. Before we proceed to consider the submissions advanced, it would be convenient to notice the relevant Articles of the Constitution and they read as follows:

Article 245. Extent of laws made by Parliament and by the Legislatures of States:--(1) Subject to the provisions of this Constitution, Parliament may make laws for the whole or any part of the territory of India, and the Legislature of a State may make laws for the whole or any part of the State.

(2) No law made by Parliament shall be deemed to be invalid on the ground that it would have extra-territorial operation.

Article 246. Subject-matter of laws made by Parliament and by the Legislatures of States:--(1) Notwithstanding anything in Clauses (2) and (3), Parliament has exclusive power to make laws with respect to any of the matters enumerated in List I in the Seventh Schedule in this Constitution referred to as the "Union List".

(2) Notwithstanding anything in Clause (3), Parliament and, subject to Clause (1), the Legislature of any State also, have power to make laws with respect to any of the matters enumerated in List III in the Seventh Schedule in this Constitution referred to as the "Concurrent List".

(3) Subject to Clauses (1) and (2), the Legislature of any State has exclusive power to make laws for such State or any part thereof with respect to any of the matters enumerated in List II in the Seventh Schedule in this Constitution referred to as the "State List".

(4) Parliament has power to make laws with respect to any matter for any part of the territory of India not included in a State notwithstanding that such matter is a matter enumerated in the State List.

Article 253. Legislation for giving effect to international agreements :--Notwithstanding anything in the foregoing provisions of this Chapter, Parliament has power to make any law for the whole or any part of the territory of India for implementing any treaty, agreement or convention with any other country or countries or any decision made at any international conference, association or other body.

Article 254. Inconsistency between laws made by Parliament and laws made by the Legislatures of States :--(1) If any provision of a law made by the Legislature of a State is repugnant to any provision of a law made by Parliament which Parliament is competent to enact, or to any provision of an existing law with respect to one of the matters enumerated in the Concurrent List, then, subject to

the provisions of Clause (2), the law made by Parliament, whether passed before or after the law made by the Legislature of such State, or, as the case may be, the existing law, shall prevail and the law made by the Legislature of the State shall, to the extent of the repugnancy, be void.

(2) Where a law made by the Legislature of a State with respect to one of the matters enumerated in the Concurrent List contains any provision repugnant to the provisions of an earlier law made by Parliament or an existing law with respect to that matter, then, the law so made by the Legislature of such State shall, if it has been reserved for the consideration of the President and has received his assent, prevail in that State:

Provided that nothing in this clause shall prevent Parliament from enacting at any time any law with respect to the same matter including a law adding to, amending, varying or repealing the law so made by the Legislature of the State.

15. The above Articles occur in Part XI of the Constitution of India, which deals with relations between the Union and the States.

16. We shall now refer to the Entries 13 and 14 in List I of the Seventh Schedule.

"Entry 13.- Participation in international conferences, associations and other bodies and implementing of decisions made thereat.

Entry 14.- Entering into treaties and agreements with foreign countries and implementing of treaties, agreements and conventions with foreign countries."

Special Features of Article 253 of the Constitution:

17. Article 253 of the Constitution confers power upon Parliament to make any law for the whole or any part of the territory of India for implementing any treaty, agreement or convention with any other country or countries or any decision made at any international conference, association or other body,

18. It is a special provision conferring legislative competence on Parliament to make any law for the whole or any part of the territory of India to give effect to the international agreements or conventions. The competency of the Union Parliament is so wide to make laws under Article 253 of the Constitution of India and includes competency to legislate even in respect of the entries in List II provided such law is enacted in order to implement the treaties, agreements or international conventions. The competency of the Legislature of any State and exclusive power to make laws for the whole of the State or any part thereof with respect to any of the matters enumerated in List II in the Seventh Schedule, referred as the State List in the Constitution, itself is subject to the power of Parliament to make any law for the whole or any part of the territory of India for implementing any treaty, agreement or convention with any other country or countries or any decision made at any international conference, association or other body. This power is available to Parliament notwithstanding the division of powers between Union and States effected by Article 246 read with

Seventh Schedule of the Constitution.

19. In Ref. By President of India under Article 143(1), , the Supreme Court observed:

"Entry 14 in List I of the Seventh Schedule reads thus: "entering into treaties and agreements with foreign countries and implementing of treaties, agreements and conventions with foreign countries". Article 253 occurs in Part XI which deals with relations between the Union and the States. It provides that "notwithstanding anything in the foregoing provisions of the said Chapter, Parliament has power to make any law for the whole or any part of the territory of India for implementing any treaty, agreement or convention with any other country or countries or any decision made at any international conference, association or other body". This power is conferred on Parliament by reference to Entry 14. Besides there are three other Articles in the same part which are relevant. Article 245(1) empowers Parliament to make laws for the whole or any part of the territory of India; Article 245 (2) provides that no law made by Parliament shall be deemed to be invalid on the ground that it would have extra-territorial operation; Article 246 prescribes the subject-matter of laws which Parliament can make; and Article 248 provides for the residuary powers of legislation in Parliament. Article 248 lays down that Parliament has power to make any law with respect to any matter not enumerated in the Concurrent List or State List. There is thus no doubt about the legislative competence of Parliament to legislate about any treaty, agreement or convention with any other country and to give effect to such agreement or convention." (Emphasis is of ours).

20. In Maganbhai v. Union of India, , it has been observed by the Supreme Court that "the Executive authority in the State cannot acquire new rights against the citizens by making treaties with foreign powers. Therefore whenever peace treaties involved municipal execution many statutes had to be passed. Again new offences cannot be created by the mere fact of conventions entered into with other powers. Both principles obtain in India. The Indian statute book contains numerous examples of conventions which have led to the passing of Municipal Laws. The Civil Court Manual devotes many pages to such statutes, too numerous to be mentioned here and the penal law of India also affords examples."

21. In the same judgment. Shah, J., while adverting to the scope of Article 253 of the Constitution observed:

"The effect of Article 253 is that if a treaty, agreement or convention with a foreign State deals with a subject within the competence of the State Legislature, the Parliament alone has, notwithstanding Article 246(3), the power to make laws to implement the treaty, agreement or convention or any decision made at any international conference, association or other body. In terms, the Article deals with legislative power: thereby power is conferred upon the Parliament which it may not otherwise possess." (Emphasis is of ours).

22. It is thus clear that Article 253 of the Constitution of India confers power upon Parliament, which it may not otherwise possess, to make any law which otherwise may be within the exclusive competence of the State Legislature.

23. Undoubtedly, Act 1 of 1996 has been enacted in order to give effect and implement the proclamation adopted at Beijing on 1st to 5th December, 1992 for providing full participation and equality of people with disabilities in the Asian and Pacific Region. It is a treaty legislation.

24. The law, i.e., Act 1 of 1996 so made by the Union Parliament even in respect of the State services, so far as it concerns making of reservations in favour of the persons with disabilities, prevails over the Andhra Pradesh State and Subordinate Service Rules, whereunder three per cent reservations are made in favour of the persons with disabilities, but without further categorisation. The category-wise reservation is required to be provided by the State Government and the Local authorities in favour of the persons with disabilities in the public posts under their control.

25. In S. Jagannath v. Union of India, , the Supreme Court while construing the provisions of the Environment (Protection) Act, 1986 observed that "the Act being a Central legislation has overriding effect." It is observed that "Parliament has enacted the Act under Entry 13 of List I, Schedule VII read with Article 253 of the Constitution of India. The CRZ Notification having been issued under the Act shall have overriding effect and shall prevail over the law made by the Legislatures of the States."

26. Those observations were made while adverting to the question as to whether the provisions of the State Legislations including that of the State of Tamil Nadu regulating the coastal aquaculture industries set up in the coastal areas were required to be in conformity and in consonance with CRZ Notification issued by the Government of India under Section 3(3) of the Environment (Protection) Act, 1986. The Supreme Court held that "the Central Legislation enacted to implement the decisions taken at the United Nations' Conference on the Human Environment held at Stockholm in June, 1972 shall have overriding effect and shall prevail upon the State Legislations."

27. The competence of the State Legislature to make a law providing reservations in favour of the persons with disabilities in State services is to be read along with the power conferred under Article 253 of the Constitution of India upon the Parliament to make laws with respect to matters enumerated in Entries 13 and 14 of Union List Whenever the Union Government enters into a treaty or agreement, then in respect of the implementation thereof it is for the Parliament alone to pass a law, which deals with the matters which are otherwise in the State List.

28. The problem, with which we are concerned in these cases, is not one of repugnancy between the law made by Parliament and the law made by the State Legislature with reference to the entries in Concurrent List. It is a peculiar problem where both the laws made by the Union Parliament as well as the State Legislature respectively are within their exclusive competence.

Nature and scope of law made by Parliament in exercise of the power under Article 253 read with Entries 13 and 14 in List I of the Seventh Schedule of the Constitution:

29. The question is as to which law shall take precedence and prevail in case of any conflict between the laws so made?

30. The heart of the Indian Federal Constitution is distribution of legislative powers between the Union Parliament on one hand and Provincial Legislatures on the other hand. Laws of both actual and potential have been separated into certain classes and those classes respectively are assigned either to the Central or to the Provincial authority. As has been observed, Article 253 of the Constitution of India makes an exception to that general rule and but for the exception so made, the Parliament could not legislate as to those classes of subjects, which have been assigned exclusively to the Provincial Legislation.

31. In A.G. of Canada v. A.G. of Ontario, AIR 1937 PC 82, while comparing the unlimited powers possessed by the Legislature in a unitary State with that of federal Legislature, which does not possess such absolute authority and whose authority is limited by a Constitutional document and where the power is divided up between different Legislatures in accordance with the class of the subject matter submitted for legislation, the Privy Council observed that "the problem to be a complex one". It is held that "the legislation as to those classes of subjects that have been assigned exclusively to the Provincial Legislation, the Dominion Parliament could not legislate on the said subjects with an intention to give effect to a treaty or convention."

It is observed:

"There being no such thing as treaty legislation but only a distribution of legislative powers between the Dominion and the Provinces, the distribution being based on classes of subjects and it being one of the essential conditions in the inter-provincial compact to which the B.N.A. Act gives effect, the Dominion Parliament could not be said to have power to legislate for obligation arising out of treaty and make the same binding on the Provinces in face of Sections 91 and 92 of the Act."

32. The Privy Council took the view that the federation had no power to make any law in respect of the matters, which fell within the exclusive jurisdiction of the provinces. This was so held in the light of Section 92 of the British North America Act, 1867.

33. It is fairly well settled that when the Constitutional validity of a law is challenged, we must seek to ascertain its full or total meaning. In part, this exercise involves the process of classifying facts, and in part it calls for determining the effects of doing what the law requires. Thus, a given law can be classified in many different ways. True enough, the Indian Judges do not have to consider the substantive merit of a challenged law and they are not concerned with whether, such a law is good or bad, necessary or unnecessary.

34. In somewhat similar situation, in Munro v. Nat. Capital Comm., 57 DLR (2d) 753, it is observed that "the true test must be found in the real subject matter of the legislation: if it is such that it goes beyond local or provincial concern or interests and must from its inherent nature be the concern of the Dominion as a whole (as, for example, in the Aeronautics case and the Radio case), then it will fall within the competence of the Dominion Parliament as a matter affecting the peace, order and good Government of Canada, though it may in another aspect touch on matters specially reserved to the provincial Legislatures."

35. Hogg, in Constitutional Law of Canada observed that "once it has been determined that a federal law is inconsistent with a provincial law, the doctrine of federal paramountcy stipulates that the provincial law must yield to the federal law. The most usual and most accurate way of describing the effect on the provincial law is to say that it is rendered inoperative to the extent of the inconsistency. Notice that the paramountcy doctrine applies only to the extent of the inconsistency. The doctrine will not affect the operation of those parts of the provincial law which are not inconsistent with the federal law, unless of course the inconsistent parts are inseparably linked up with the consistent parts. There is also a temporal limitation on the paramountcy doctrine. It will affect the operation of the provincial law only so long as the inconsistent federal law is in force. If the federal law is repealed then the provincial law will automatically "revive" (come back into operation) without any re-enactment by the provincial Legislature."

36. The well known doctrine of "dominion paramountcy" developed by Judges in Canada to facilitate the making of necessary decisions in judicially reviewing the overlapping of federal and provincial categories of laws may logically be relevant and applicable in India to resolve the complex problem of similar in their nature,

37. The division of powers jurisprudence is replete with instances where the subjects in one aspect and for one purpose fall within the Union List, may in another aspect and for another purpose fall within the State List. Under such situation, there may be both a valid federal law and valid provincial law directed to the same persons concerning the same things, but require from them different courses of conduct and thus having certain different effect. In case of two enactments called for inconsistent behaviour from the same people, they are in conflict or in collusion and both cannot be obeyed. In these circumstances, the doctrine of dominion paramountcy would be applicable and the federal law is to prevail and the provincial one becomes inoperative and need not be observed. The provincial law remains under suspension so long as there is a federal law inconsistent with the provincial law. Thus, it is a principle of our Constitution that in the event of collusion between the federal law and provincial law, each valid, the federal features of the former law are considered in the last analysis more important than the provincial features of law. The doctrine of 'dominion paramountcy' is inbuilt into Article 253 of the Constitution of India. It would be legitimate to presume that our founding fathers were actually aware of the complexities and accordingly incorporated Article 253 in Part XI of the Constitution. In the light of this Article, it is evident that the situation similar to the one arising in Canada by virtue of 1937 decision aforementioned may not arise.

38. We have already noticed that the impugned Rules and the employment Notification issued by the respondents provided for three per cent reservations in favour of the persons with disabilities in the matter of selection and appointment of Secondary Grade Teachers, whereas Section 33 of the Act 1 of 1996 commands every appropriate Government to make appointment in every establishment such percentage of vacancies not less than three per cent for persons or class of persons with disability of which one per cent each shall be reserved for persons suffering from (i) blindness or low vision; (ii) hearing impairment; and (iii) locomotor disability or cerebral palsy, in the posts identified for each disability. The provision thus commands that 1:1:1 reservations are required to be made in favour of the said three classes amongst the persons with disabilities.

Admittedly, the impugned Rules and the employment Notification are not in conformity with the mandatory provisions of the Act 1 of 1996.

39. The impugned Rules and the Notification issued may be perfectly valid except to the extent of their inconsistency with Section 33 of the Act 1 of 1996, which mandates the appropriate Government to make reservations in favour of the persons with disabilities in the manner provided therein. Making provision for reservation of three per cent in favour of the persons with disabilities as provided under the impugned Rules is clearly inconsistent with Section 33 Act 1 of 1996. The impugned Notification issued making three per cent block reservation in favour of the persons with disabilities is undoubtedly void.

40. But the question that falls for consideration is as to what is the relief to be granted to the petitioners?

41. The petitioners have neither challenged the Rules nor the Notification before their participation in the selection process. They have appeared for the test and interview in terms of the Notification issued by the respondents. Selections and appointments of teachers have taken place a long time ago.

42. The State Government vide G.O. Ms. No. 385, GAD, dated 18-11-2000 further amended the Rule 22(2) of the Andhra Pradesh State and Subordinate Service Rules, 1996 providing 1:1:1 reservations for visually handicapped, hearing handicapped and orthopaedically handicapped. The said Rule so amended is in conformity with the provisions of the Act 1 of 1996. No conflict between both the laws remain after 18-11-2000.

43. Be it be noted that even if the selections and appointments were to be made in accordance with the provisions of Act 1 of 1996 only one petitioner (petitioner No. 1 in WP No. 4041 of 2002) would have been selected and appointed as Secondary Grade Teacher. This is clear from the statement showing the marks secured by the visually handicapped candidates in DSC-2000.

44. In the circumstances we are not inclined to quash the very Notification and consequential appointments.

45. Since the petitioner No. l in WP No. 4041 of 2002 has been deprived of his legitimate right for such selection and appointment, we consider it appropriate to direct the respondents herein to create a supernumerary post and accordingly appoint him as Secondary Grade Teacher. There shall be a direction accordingly.

46. The writ petitions are accordingly disposed of. No order as to costs.