

A

A.P. SHOWKATH ALI & ORS.

v.

STATE OF KERALA & ORS.

(Civil Appeal No. 2827 of 2010)

B

AUGUST 10, 2017

[KURIAN JOSEPH AND R. BANUMATHI, JJ.]

Kerala State and Subordinate Service Rules, 1958:

C *rr. 13AA and 39 – Special recruitment of thirty-seven Assistant Sub-Inspectors of SC/ST category – For declaration of probation they were required to pass special test – The test not conducted for twelve years – In the meantime provisional promotion granted to them – Invoking r. 39, Government order passed exempting them from passing the special test – Exemption order challenged by appellants by filing writ petition – Petition dismissed by High Court*
D *– On appeal, held: Though r. 13AA makes the passing of the test obligatory, and order of the Government dated 5.02.2000 ruled that SC/ST employees are not entitled to any test exemption, but r. 39 is to operate notwithstanding anything prescribed under 1958 Rules or Special Rules or any Government order – Also in the facts*
E *of the case, an equitable relief deserved to be granted by invoking r. 39 – Thus, order granting exemption is justified – Service Law – Probation – Equity.*

Equity:

F *Purpose of and applicability of equity – Purpose of equity jurisdiction is to prevent injustice and promote justice – Equity shall overpower technicality where human justice is at stake – There is difference between equity exercised by law-maker and the equity jurisdiction exercised by the Court – Residuary power is reserved by the law-maker to be used in a situation which are not otherwise*
G *prescribed under law – Even the courts to exercise equity jurisdiction when there is no law operating in the field.*

Dismissing the appeal, the Court

HELD: 1. No doubt, under Rule 13AA of Kerala State and Subordinate Service Rules, 1958, the passing of test is obligatory

H

for members of the Scheduled Caste and Scheduled Tribe below the rank of Sub-Inspectors in the Police Department. But it has to be seen that it is Rule 39 of 1958 Rules, which is an exception to the exemption contemplated under Rule 13AA. Rule 39 is to operate notwithstanding anything prescribed not only in the Kerala State and Subordinate Services Rules or the Special Rules but even in any Government Order. The whole purpose of such residuary power is to remedy an otherwise unjust and inequitable situation. Therefore, the Government Order dated 05.02.2000 (which has ruled that Scheduled Caste and Scheduled Tribe employees who entered the service on or after 1.1.1986, are not entitled to any test exemption) also does not stand in the way of the Government invoking Rule 39. That apart, Rule 13AA operates in the matter of promotion whereas in the instant case, Rule 39 is operated in the matter of probation. [Para 10] [706-C-E]

2. The whole purpose of equity jurisdiction is to prevent injustice and to promote justice. Equity shall overpower technicality where human justice is at stake. There is a lot of difference between the court exercising equity jurisdiction and the law-maker itself exercising it. A residuary power is reserved by the law maker, namely the Government, to be used in certain situation which are not otherwise prescribed under law. However, such power does not clothe the Executive to supplement a prescribed provision or to act in violation of the same. "Equity steps in where the law has left yawning gaps". Even for courts, equity jurisdiction is meant to be exercised when there is no law operating in the field. [Para 14] [709-B-D]

Roshanlal Kuthalia v. R. B. Mohan Singh Oberoi (1975) 4 SCC 628; [1975] 2 SCR 491; *Charles K. Skaria v. C. Mathew* (1980) 2 SCC 752 : [1980] 3 SCR 71; *Bola v. Sardana* (1997) 8 SCC 522 : [1997] 2 Suppl. SCR 507; *Shiv Kumar Sharma v. Santosh Kumari* (2007) 8 SCC 600 : [2007] 10 SCR 17 – relied on.

3. In ascertaining equity and justice in the present case, the simple question to be addressed is what would happen to those thirty seven Assistant Sub-Inspectors in service, in case

A the exemption is not granted. For no fault on their part, should they have to continue as Assistant Sub-Inspectors only till their retirement? Is there any point, nay, does it even appeal to common sense, to subject them to the test after more than twelve years of entering service and serving in promoted posts as well?

B Certainly, to remedy such a situation, an equitable relief deserves to be granted to such employees in the interest of justice by invoking rule 39. That is what has been done by the Government as per the impugned Order dated 17.11.2000. [Para 15] [709-E-F]

C *Sherafuddin v. State of Kerala* 2004 (2) KLT 731/MANU/KE/0103/2004 – approved.

T.C. Sreedharan Pillai and Others v. State of Kerala and Others 1973 KLJ 187/MANU/KE/0299/1972 – referred to.

D

Case Law Reference

[1975] 2 SCR 491 relied on Para 14

[1980] 3 SCR 71 relied on Para 14

E [1997] 2 Suppl. SCR 507 relied on Para 14

[2007] 10 SCR 17 relied on Para 14

F CIVIL APPELLATE JURISDICTION : Civil Appeal No. 2827 of 2010.

From the final Judgment and Order dated 10.08.2007 of the High Court of Kerala at Ernakulam in O.P. No.31168 of 2001.

G Shyam Divan, Jaideep Gupta, Chander Uday Singh, V. Giri, Sr. Advs., S.V. Raj, K. Vijayan, K. Rajeev, V.K. Biju, Himanshu Singh Yadav, Abhay Pratap Singh, G. Prakash, Jishnu M.L., Ms. Priyanka Prakash, Ms. Beena Prakash, Jayanth Muth Raj, Manu Krishnan G., P.S. Sudheer, M.P. Vinod, Atul Shankar Vinod, Dileep Pillai, Advs. for the appearing parties.

H

The Judgment of the Court was delivered by A

KURIAN, J. 1. What is equity and justice in a situation where a few employees face adverse consequences for not passing an obligatory test which was never conducted, is the short question arising for consideration in this case.

2. In a special recruitment, thirty-seven Assistant Sub-Inspectors belonging to the Scheduled Caste/Scheduled Tribe community were appointed by the Government of Kerala during 1988. It is the requirement of the Special Rule that they should pass the special test conducted by the Kerala Public Service Commission for declaration of probation. Rule 9 of the Special Rules, to the extent relevant, reads as follows: B

“9. TEST- C

a) Every person appointed under these rules shall, pass the test on the subjects mentioned in Annexure III to these rules at or before the fifth of such tests held after such appointment the maximum number of chances shall be limited to three. D

Note: The examination will generally be conducted half-yearly by the Kerala Public Service Commission.”

3. For over twelve years, the test was not conducted by the Commission. In the meanwhile, those Assistant Sub-Inspectors approached the High Court and obtained orders for provisional promotion to higher posts along with their juniors. E

4. While the Assistant Sub-Inspectors continued to enjoy provisional promotions, the Government felt that there should be a one-time solution for the issue regarding the passing of the test under the Special Rules since the test had not been conducted. In such circumstances, the Government passed an Order dated 17.11.2000 invoking Rule 39 of the Kerala State and Subordinate Services Rules, 1958 (hereinafter referred to as ‘the Rules’) exempting those thirty-seven directly recruited Assistant Sub-Inspectors from passing the test prescribed under the Special Rules. Since the order is self-explanatory, we shall extract the same as such: F

“ORDER G

As per Government Order read as first paper above, Government issued Special Rules for Special Recruitment from among H

A members of scheduled castes / scheduled tribes to the post of Assistant Sub Inspector in the general Executive Branch (Local Police) in the Police Department. Subsequently the Director General of Police proposed certain modifications to the above Government order during 1988, the following are the gist of the proposals:-

- B
1. the Note under rule 9(a) of the said rules shall be deleted and the Department may be authorized to conduct the tests and declare the results as in the case of other trainees in the Police Department.
 - C 2. Every person appointed to the Police force is required to execute a bond to the effect that he shall serve the Department for a minimum period of 5 years after practical training.
 - D 3. the period of training of Assistant Sub Inspectors shall not count as duty for increment and probation, duty for the limited purpose of calculation of leave eligibility as a special case as in the case of Police Constables and Sub Inspectors.

E The above proposal of the Director General of Police was considered by Government in detail and draft amendment notification in this regard was forwarded to the Kerala Public Service Commission for their advice on 6.1.1989. Initially the Kerala Public Service Commission did not agree to the amendment proposal. But during 1993 the Kerala Public Service Commission sought clarifications for certain points and the reply to the clarifications sought by the Kerala Public Service Commission was furnished to them. Final decision on the proposal is yet to be taken.

F

G Consequent on the issuance of the Government Order read as 1st paper above, 37 persons belonging to SC/ST Community were directly recruited as Assistant sub Inspectors during 1988 and they joined training from 1.11.1988 onwards. According to Rule 9(a) of the Special Rules issued as per the above Government Order all the 37 Assistant Sub-Inspectors should pass the test prescribed thereunder to be conducted by the Kerala Public Service Commission for declaring the satisfactory completion of

H

their probation and for earning increments. But unfortunately, no test was conducted by the Kerala Public Service Commission till date probably because proposals to amend the provisions in the Special Rules regarding the conduct of the test and certain other matters had been under consideration. As a result, these 37 officers did never get an opportunity to appear for the test and hence the satisfactory completion of probation of the above mentioned 37 Assistant Sub Inspectors has not been declared so far. This created a situation during 1991 when Assistant Sub Inspectors who were juniors to these 37 officers were promoted as Sub-Inspectors. Some among the 37 Assistant Sub Inspector approached the Hon'ble High Court by filing OP No. 12822/91 and based on the directions of the Hon'ble High Court all the 37 officers were provisionally promoted as Sub Inspector.

Though, based on the directions of the Hon'ble Court, all the 37 Assistant Sub Inspectors were promoted as Sub Inspectors, the question of passing of the test for declaration of their probation in the category of Assistant Sub Inspector remains unsolved. The Director General of Police has reported that the seniority of these officers could not be fixed so far. Further these officers are being denied annual increment due to them as passing of the test is necessary for increment also. The Director General of Police has further reported that all the above-mentioned 37 Assistant Sub Inspector have become senior Sub Inspectors who can be considered for promotion as Circle Inspectors. If the issue regarding the passing of the test and declaration of probation is not solved immediately, these officers are likely to be superseded in the promotion of this post of Circle Inspectors. The situation as described above has arisen for no fault of these officers. Though passing of the test has been prescribed for the declaration of their probation, the test prescribed has never been conducted though 12 years have passed since their recruitment. They were appointed as Assistant Sub-Inspectors 12 years ago and they are at present working as (Provisional) Senior Sub Inspectors still getting the minimum of the scale of pay of the Assistant Sub Inspector. Now after a lapse of 12 years, insisting on the passing of the test by these officers is quite unjustified. Now that they will be working as Sub Inspectors for the last several years, insistence on a test

A

B

C

D

E

F

G

H

A which was to decide then suitability for confirmation in the rank
of Assistant Sub Inspector is illogical also. In order to sort out an
immediate solution to the above problem, the Director General of
Police has proposed that this is a fit case of invoking powers of
B the Government under Rule 39 of the KSSRs, 1958 taking into
account the extraordinary circumstances under which these
officers have suffered seriously for so long. He has, therefore,
recommended that the Government may invoke General Rule 39
and exempt these officers from passing the test prescribed under
Rule 9(a) of the special Rules.

C Having examined the proposal in detail, Government are pleased
to exempt the 37 directly recruited Assistant Sub Inspectors from
passing the test prescribed under Rule 9(a) of the Special Rules
issued as per Government Order read as first paper, as a Special
Case, by invoking Rule 39 of the General Rules.”

(Emphasis supplied)

D 5. The above Order was challenged by the appellants before the
High Court of Kerala. The High Court, as per the impugned Order,
dismissed the writ petition, holding that:

E “9. The reasons stated by the Government disclose an
extraordinary situation and the injustice that was meted out to the
Assistant Sub Inspectors of Police, warranting invocation of its
powers under Rule 39 of K.S. & S.S.R. Reasoning of the
Government that it was illogical and unjustified to ask the Assistant
Sub Inspectors of Police to appear for the test after rendering
service of 12 years in the post also cannot be said to be
F unreasonable. We are satisfied that Government was justified in
invoking the power under Rule 39 of K.S. & S.S.R. and in our
considered view, there is nothing illegal in Ext.P6 order of the
Government.”

G 6. Aggrieved, the appellants are before this Court.

7. Shri Shyam Divan, learned Senior Counsel appearing for the
appellants submits that under Rule 13AA of the Rules, no exemption
can be granted to the members of the Scheduled Castes and Scheduled
Tribes from passing the tests prescribed for the purpose of promotion in
the case of Executive staff below the rank of Sub-Inspectors in the

Police Department. It is contended that the said Rule has to operate notwithstanding anything contained in the Rules, and therefore, it is an exception to Rule 39. It is also contended that the Government Order dated 05.02.2000 has specifically ruled that Scheduled Caste and Scheduled Tribe employees who entered the service on or after 01.01.1986, are not entitled to any test exemption. It was also contended, placing reliance on the Full Bench decision of the Kerala High Court in T.C. Sreedharan Pillai and others v. State of Kerala and others¹ that there is no equity and justice in exempting certain employees from passing the obligatory test. Finally, it was contended that in any case it is not a case for granting exemption.

7. Heard Shri Jaideep Gupta, Shri V. Giri and Shri C.U. Singh, learned Senior Counsel appearing for the contesting respondents and Shri Shyam Divya, learned Senior Counsel and Shri V. K. Biju, learned Counsel appearing for the State who have supported the Government Order granting exemption.

8. In order to appreciate the rival contentions, it is necessary to refer to Rule 13AA and Rule 39, which read as follows:

"13AA. Notwithstanding anything contained in these rules, the Government may, by order, exempt for a specified period, any member or members, belonging to a Scheduled Caste or Scheduled Tribe, and already in service, from passing the tests referred to in rule 13 or rule 13 A of the said Rules:

Provided that this rule shall not be applicable to tests prescribed for purposes of promotion of the executive staff below the rank of Sub-Inspectors belonging to the Police Department."

xxx

xxx

xxx

xxx

"39. Notwithstanding anything contained in these rules or in the Special Rules or in any other Rules or Government Orders the Government shall have power to deal with the case of any person or persons serving in a civil capacity under the Government of Kerala or any candidate for appointment to a service in such manner as may appear to the Government to be just and equitable:

A *Provided that where such rules or orders are applicable to the case of any person or persons, the case shall not be dealt with in any manner less favourable to him or them than that provided by those rules or orders.*

B *This amendment shall be deemed to have come into force with effect from 17th December 1958."*

C 10. We do not think that it needs any elaborate discussion to note that Rule 39 of the Rules is to operate notwithstanding anything contained in the Rules or Special Rules or Government Orders. No doubt, under Rule 13AA, the passing of test is obligatory for members of the Scheduled Caste and Scheduled Tribe below the rank of Sub-Inspectors in the Police Department. But it has to be seen that it is Rule 39 which is an exception to the exemption contemplated under Rule 13AA. Rule 39 is to operate notwithstanding anything prescribed not only in the Kerala State and Subordinate Services Rules or the Special Rules but even in any Government Order. The whole purpose of such residuary power is to remedy an otherwise, unjust and inequitable situation. Therefore, the Government Order dated 05.02.2000 also does not stand in the way of the Government invoking Rule 39. That apart, Rule 13AA operates in the matter of promotion whereas in the instant case, Rule 39 is operated in the matter of probation.

E 11. The reliance placed on the Full Bench decision in **T.C. Sreedharan Pillai and others** (supra), according to us, is of no avail to the appellants. The Full Bench has summarized the law on Rule 39 in paragraphs-20 and 21, which read as follows (paragraph numbers are given as they appear in MANU/KE/0299/1972):

F "20. We may now summarise the conclusions that emerge from the preceding discussion. We hold that R. 39 is valid and that it does not suffer from the vice of arbitrariness or excessive delegation. We are of the view that the said Rule does not warrant the passing of any general order with respect to any undefined or large group of persons exempting them from the operation of any existing rule or granting a relaxation of the rules in favour of such a group. The rule only authorises the authority designated therein to deal with any specific case or cases of individual officers and to pass orders in a just and equitable manner after a full application of the mind of the authority to all the relevant

H

facts and circumstances necessary for a proper determination of the question as to what would constitute justice and equity. In exercising this power it is open to the authority to relax the rigour of the rules to such extent as may be necessary to ensure justice and equity, but it cannot completely nullify the operation and effectiveness of the rules in the guise of relaxing their rigour. If, however, special circumstances do exist warranting a valid classification of the particular case or cases it will also be open to the authority exercising the power under R. 39 to accord a special treatment in respect of such exceptional cases even by exempting the person or persons concerned from the operation of any particular rule. In saying this we consider it necessary to emphasise that such a course will be permissible only in those rare cases where very strong grounds exist justifying a valid classification of the cases of the officers in question for the purposes of Art. 14 and 16 of the Constitution. In determining what is 'just and equitable' the authority should take into account the overall effect that the proposed order would have in relation not merely to the particular officers whose cases are specifically dealt with by it but also to all others belonging to the same service, category or class. The mere fact that the enforcement of a rule creates hardship to an officer or a group of officers will be no ground for invoking the power under R. 39, because it must be assumed that the possibility of the causation of any such hardship must have been duly taken into account at the time when the rule in question was made and the rule making authority has nevertheless thought it fit to enact such a provision.

21. Though it was strongly contended on behalf of the petitioners that the power under R. 39 can under no circumstances be exercised in such a way as to affect the rights of any of the other persons in the service, we find it difficult to uphold the said contention when it is stated in such a wide form. While explaining the scope of R. 39 we have already held that it is permissible under the said rule to grant a relaxation of the rigour of the rules or even an exemption from any provision contained in the rules in favour of any officer or officers, in regard to whom the facts and circumstances are such that a valid classification for according special treatment would be justified under Art. 14 and 16 of the

A
B
C
D
E
F
G
H

A Constitution. It is quite possible that when such an order is passed
it may directly or indirectly have repercussions regarding the
seniority, rank or chances of promotion of some of the other officers
in service. That, however, has to be regarded as an inevitable
incident of service flowing from the exercise of the power under
B R. 39 which is as much a rule regulating the conditions of service
of all the officers in the service of the State as the other provisions
contained in the Kerala State and Subordinate Services Rules.
C The rights conferred on the members of service by the earlier
Rules Nos. 1 to 38 in the Kerala State and Subordinate Services
Rules are not absolute in character but are inherently subject to
the contingent liability of being affected by any order validly passed
under R. 39.”

(Emphasis supplied)

D 12. Close to the facts, a situation where the Government had not
conducted the tests, had arisen for consideration before the Kerala High
Court in Sherafuddin v. State of Kerala², where at paragraph-9,
it was held that (paragraph numbers are given as they appear in MANU/
KE/0299/1972):

E “9. The Government having never conducted the examination, it
will be unjust and inequitable to deny the service benefits to the
incumbents if they are otherwise fit for such benefits. In fact the
very purpose of the rule is to tide over such situations. There is no
point in requiring the incumbents to perform an impossibility. They
are required to pass the examination if only it is held. Admittedly
it was never held. Therefore, the invocation of Rule 39 in such
F circumstances is justifiable in terms of justice and equity. The
purpose of the rule is to use the principles of justice to supplement
law in a fair and reasonable manner and for a just and equitable
cause. The action/ inaction of the Government shall not prejudice
an incumbent who is otherwise fit for service benefits and hence
the order is perfectly justifiable.”

G and at paragraph-13, it has been further held:

“13. When there is failure of justice resulting in inequity and
injustice, Rule 39 of the General Rules is to be invoked in the

² 2004 (2) KLT 731/MANU/KE/0103/2004

interests of equity and justice. Such power can be exercised even with retrospective effect for doing complete equity.” A

13. We respectfully endorse the views expressed by the Kerala High Court.

14. The whole purpose of equity jurisdiction is to prevent injustice and to promote justice. In the words of Krishna Iyer, J., in **Roshanlal Kuthalia v. R. B. Mohan Singh Oberoi**³, “.....equity is the moral dimension of law”. Thus, equity shall overpower technicality where human justice is at stake⁴. There is a lot of difference between the court exercising equity jurisdiction and the law-maker itself exercising it. As in the instant case, a residuary power is reserved by the law maker, namely the Government, to be used in certain situations which are not otherwise prescribed under law. However, such power does not clothe the Executive to supplement a prescribed provision or to act in violation of the same. As stated by this Court in **Bola v. Sardana**⁵, “Equity steps in where the law has left yawning gaps”. Even for courts, equity jurisdiction is meant to be exercised when there is no law operating in the field⁶. B C D

15. Back to the facts, in ascertaining equity and justice, the simple question to be addressed is what would happen to those thirty seven Assistant Sub- Inspectors in service, in case the exemption is not granted. For no fault on their part, should they have to continue as Assistant Sub- Inspectors only till their retirement? Is there any point, nay, does it even appeal to common sense, to subject them to the test after more than twelve years of entering service and serving in promoted posts as well? Certainly, to remedy such a situation, an equitable relief deserves to be granted to such employees in the interest of justice by invoking Rule 39. That is what has been done by the Government as per the impugned Order dated 17.11.2000. E F

16. Application for impleadment is allowed.

17. In that view of the matter, we do not find any merit in this appeal and the same is accordingly dismissed. However, we make it clear that we have only dealt with the issue of validity of the G

³ (1975) 4 SCC 628

⁴ Charles K. Skaria v. C. Mathew, (1980) 2 SCC 752

⁵ (1997) 8 SCC 522

⁶ Shiv Kumar Sharma v. Santosh Kumari, (2007) 8 SCC 600

A Government Order dated 17.11.2000 issued under Rule 39 of the Rules, and in case the appellants have other grievances, it is for them to pursue the same, if permitted under law, through appropriate proceedings before appropriate forum.

18. There shall be no order as to costs.

B

Kalpana K. Tripathy

Appeal dismissed.