A SECRETARY TO THE GOVT. AND ANR.

v.

M. SENTHIL KUMAR

FEBRUARY 28, 2005

B [ARIJIT PASAYAT AND S.H. KAPADIA, JJ.]

Practice and Procedure :

C *Pleadings—Issue not raised in pleadings cannot be adjudicated by Court—On facts, validity of policy decision not having been challenged before Tribunal, High Court erred in invalidating the same.*

Applications were invited for the post of Police Constable, in which 10% of posts were for reserved category. Applicant-Respondent applied D **but was not selected. He filed Original application before the Central Administrative Tribunal, and the Tribunal held that respondent had failed to get selected because his performance was not satisfactory and that he was not entitled for any preferential treatment. There was no finding as to validity of policy of reservation. Respondent filed a writ petition before High Court and Single Judge while holding that the respondent had not** E **come out successful in tests, held that reservation provided for was unconstitutional.**

In appeal to this Court, Appellant-State contended that there was no challenge to the policy by anybody; that in fact the respondent was relying on the policy and that Tribunal had also not expressed any opinion F **on the constitutional validity of the provision.**

Allowing the appeal, the Court

HELD: 1. There was no challenge to nor express view expressed regarding the validity of the policy decision by the Tribunal as wrongly G **concluded by the High court. The application before the Tribunal was disposed of primarily on the ground that the respondent was not suitable for selection. High Court could not have made out a case for adjudication which was not even part of the pleadings. [439-C, D]**

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2. Since there was no challenge to the policy decision the respondent did not get any opportunity to place his stand before the High Court. Therefore, it was not open to the High Court to dismiss the application on the additional ground that the policy decision was unconstitutional, overlooking the fact that the respondent-applicant was seeking relief under the policy decision. [440-D]

Yogendra Pal Singh **v.** *Union of India,* **AIR (1987) SC 1015;** *V.K. Majotra* **v.** *Union of India,* **[2003] 8 SCC 40;** *State of Maharashtra* **v.** *Jalgaon Municipal Council,* **[2003] 9 SCC 731 and** *The President, Poornathravisha Seva Sangham, Thripunithura* **v.** *K. Thilakan Kavenal and Ors.,* **(2005) 2 SCALE 1, referred to.**

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 1453 of 2005.

From the Judgment and Order dated 6.2.2004 of the Madras High Court in W.P. No. 26637 of 2003.

K.K. Venugopal, Ms. Seema Bengani and Subramonium Prasad for the Appellants.

The Judgment of the Court was delivered by

ARIJIT PASAYAT, J. Leave granted.

The Government of Tamil Nadu questions legality of the judgment rendered by the Madras High Court holding that the policy of the State Government in providing 10% special quota to the children/wards of serving/ retired/deceased personnel of police and like forces is invalid.

A brief reference to the factual issue would suffice.

The Tamil Nadu Service Recruitment Board (in short 'Recruitment Board') published a Notification in several local dailies on 5.3.2000 calling for applications filling up 1155 posts of Police Constables, Grade II. In the Notification the Board had stated that 10% of the posts were reserved for legal heirs of serving personnel, for ministerial staff and also for legal heirs of those persons who had been invalidated on medical grounds. The respondent (hereinafter referred to as the 'applicant') filed an Original Application before the Central Administrative Tribunal (in short the 'Tribunal'). The respondent-applicant was not found successful as he had not faired well in the written test as well as the physical test. He was, therefore, not held to be qualified

A for selection.

The Tribunal held that since the applicant had not qualified he was not fit for selection. He had failed to get selected because his performance was not satisfactory. It was further held that he was not entitled for any preferential treatment. It is to be noted that there was no challenge by the applicant before B the Tribunal to validity of the policy because he himself wanted to avail benefits under the policy. The respondent-applicant filed a Writ Petition before the Madras High Court. A learned Single Judge of the Madras High Court dismissed the writ petition on the ground that writ petitioner had not come out successful in the tests. But at the same time held that the preference C which was being sought for on the ground of descent was prohibited by Article 16(2) of the Constitution of India, 1950 (in short the 'Constitution'). It was held by relying on a decision of this Court in *Yogendra Pal Singh* v. *Union of India,* AIR (1987) SC 1015 that there cannot be any reservation on the basis of descent. It was held that the reasoning of the Tribunal that reservation provided for wards of police personnel is unconstitutional was in D order. It was further noted that though the reservation provided by the State had been applied in the case of many persons wrongly, it would not be proper to invalidate the appointments already made. Though it was urged by learned counsel for the State that the constitutional validity of concerned policy was not in issue, the High Court felt that in view of the declaration E of law by this Court the matter could be taken note of by it.

Mr. K.K. Venugopal, learned senior counsel appearing for the State submitted that there was no challenge to the policy by anybody. In fact the respondent-applicant was relying on the policy. The Tribunal came to the conclusion that the respondent-applicant before it was not entitled for any F preferential treatment. It did not express any opinion on the constitutional validity of the provision. The High Court erroneously declared the policy to be constitutionally invalid.

Though the service of notice had been duly effected, there is no appearance on behalf of the respondent.

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We find that there was no challenge to the constitutional validity of the policy providing for 10% special quota to the children/wards of serving/ retired/deceased personnel of police and like forces. The relevant portion of the Government Order dated 10.9.2001 containing the policy is as follows :

H "The Government also direct that 10% quota be provided for

dependents of the serving police personnel and the wards/dependents of retired, deceased and medically invalidated police personnel so as to boost up the morale and strengthen the loyalty of the force. In case, it is not possible to fill up the sports quota of 10%, the Government permit the filling up of the gap by the dependents of the serving personnel so that the total percentage does not exceed 20%."

Subsequently, on 26.3.2002 the aforesaid Government Order was amended and the benefit was extended to the children/wards/dependents of the ministerial staff of the Police Departments. The application before the Tribunal was disposed of primarily on the ground that the applicant was not suitable for selection. There was only one additional observation which reads as follows :

"He is not entitled for any preferential treatment also."

Therefore, there was no express view expressed regarding the validity of the policy decision by the Tribunal as wrongly concluded by the High Court. Obviously, the High Court could not have made out a case for adjudication which was not even part of the pleadings. In *V.K. Majotra* v. *Union of India,* [2003] 8 SCC 40 this Court observed as under :

"....Counsel for the parties are right in submitting that the point on which the writ petition has been disposed of was not raised by the parties in their pleadings. The parties were not at issue on the point decided by the High Court....."

In *State of Maharashtra* v. *Jalgaon Municipal Council,* [2003] 9 SCC 731 this Court at page 757 observed as under :

"..In the absence of any challenge having been laid, the constitutional validity of the amendment cannot be gone into....."

Recently, in *The President, Poornathrayisha Seva Sangham, Thripunithura* v. *K. Thilakan Kavenal and Ors.,* (2005) 2 SCALE 1 in para 9 it was observed as under :

"Above being the position, we feel that nothing further remains to be done in this appeal except noticing that certain observations made, as regards the functioning of the appellant-society and its credibility were unnecessary. For the purpose of adjudication of the dispute before the High Court which only related to the permission granted

A to use Oottupura, other observations and views expressed by the Division Bench are, therefore, treated as inoperative. Since disputed facts were involved, the High Court should not have gone into them even in respect of the primary grievances of the writ petitioner".

Since there was no challenge to the policy decision contained in the B two Government Orders the applicant did not get any opportunity to place his stand before the High Court.

Learned counsel for the appellant has submitted that facts involved in *Yogendra Pal's* case (supra) are clearly distinguishable from the facts of the present case. The policy decision has been taken taking note of the several C special features which would have made the case of *Yogendra Pal* clearly distinguishable. We need not go into the question about the applicability of *Yogendra Pal's* case (supra) on the sole ground that there was no challenge to the policy decision in the petition filed before the Tribunal or before the High Court. Therefore, it was not open to the High Court to dismiss the D application on the additional ground that the policy decision was unconstitutional, overlooking the fact that the respondent-applicant was seeking relief under the policy decision. We have, therefore, not expressed any opinion on the validity or otherwise of the policy decision providing for 10% special quota to a particular group of candidates. We set aside that part of the order of the High Court which invalidates the policy decision. Other part of the E order which deals with lack of merits stands affirmed as there is no challenge to it by the respondent.

The appeal is allowed with no order as to costs.

D.G. Appeal allowed.