STATE OF SIKKIM

v.

DORJEE TSHERING BHUTIA AND ORS.

AUGUST 20, 1991

[KULDIP SINGH AND K. RAMASWAMY, JJ.]

Constitution of India, 1950: Article 162—Executive power of the State—Exercise of—In the field already occupied by legislation—Statutory provisions non-operative—Whether executive power could be exercised.

Civil Services: Sikkim State Civil Service Rules, 1977.

Rules 4 and 5—Special recruitment for inducting already serving officers—Issue of notification—Constitution of Selection Committee—Public Service Commission coming into being later—Requisite conditions—Existence of exigencies of service—Consultation with Public Service Commission—Fulfilment of—Validity of the Notification.

The Sikkim State Civil Service was constituted in 1977, under the Sikkim State Civil Service Rules, 1977. The Rules provided for two methods of recruitment viz., competitive examination and selection from amongst persons serving in connection with the affairs of the State. On the basis of representations from officers who were not being considered for induction into the service at its initial constitution, the Petitioner-State decided to afford an opportunity to them. On 16.9.81 the State Government issued a notification for special recruitment and constituted a Selection Committee. Written examination-cum-viva-voce test was adopted as the method of recruitment, and the Selection Committee prepared a merit list, on the basis of which 29 officers were appointed to the service in December, 1982.

The Respondent who was working as Under Secertary to the State Government compete in the test but was not successful. He filed a Writ Petition before the High Court, challenging the notification dated 16.9.1981 and the consequent selection. The main contention raised by him was that the exercise of power under Rule 4(3) on the basis of which the said notification was issued, was illegal on the ground of excessive delegation, since the requisite conditions of existence of exigencies of service and consultation with the Public Service Commission were not satisfied. The Petitioner-State contended that the Rules though

A enforced, were inoperative since Public Service Commission was not in existence in the State, and the Government could issue the notification in exercise of its executive power under Article 162 of the Constitution of India; that the conditions precedent for holding the selection under Rule 4(3) were satisfied as the necessary opinion to issue the notification was formed on the basis of the reasons contained in the Cabinet B Memorandum dated 10.8.1981; that the consultation with the Public Service Commission under the Rules was directory and in any case the Service Commission was not in existence at the relevant time and that the Respondent having appeared in the written examination and *viva voce* test was estopped from challenging the selection.

C Rejecting the contentions of the State, the High Court held that the notification was violative of the Rules and quashed the selection and the consequent appointments.

Aggrieved by the High Court's decision, the State Government and the selected officers preferred the present appeals by special leave. D The same contentions as were raised in the High Court were urged before this Court.

Allowing the appeals, this Court,

HELD: 1. The State Government was justified in issuing the E notification in exercise of its executive power and the High Court fell into error in quashing the same. [642F]

2. The executive power of the State cannot be exercised in the field which is already occupied by the laws made by the legislature. It is settled law that any order, instruction, direction or notification issued F in exercise of the executive power of the State which is contrary to any statutory provisions, is without jurisdiction and is a nullity. In the instant case, the Sikkim State Civil Service Rules, 1977 though enforced, remained unworkable for about five years. The Public Service Commission, which was the authority to implement the said Rules, was not in existence during the said period. There is nothing on record to show as G to why the Public Service Commission was not constituted during all those five years. In the absence of any material to the contrary it is assumed that there were justifiable reasons for the delay in constituting the Commission. The executive power of the State being divided amongst various functionaries under Article 166(3) of the Constitution of India there is possibility of lack of co-ordination amongst various limbs of the H Government working within their respective spheres of allocation. The

object of regulating the recruitment and conditions of service by statutory provisions is to rule out arbitrariness, provide consistency and crystalise the rights of employees concerned. The statutory provisions which are unworkable and inoperative cannot achive these objectives. Such provisions are non-est till made operational. It is the operative statutory provisions which have the affect of ousting executive power of the State from the same field. When in a peculiar situation, the statutory provisions could not be operared, there was no bar for the State Government to act in exercise of its executive power. The notification to hold special selection was issued almost four years after the enforcement of the Rules. It was done to remove stagnation and to afford an opportunity to the eligible persons to enter the service. [642A-E]

3. The fact that the State Government purported to act under rule 4(3) of the Rules in issuing the notification is of no consequence. When the source of power can be validly traced then the State action in the exercise of such power cannot be struck down on the ground that it was labelled under a different provision. [642G]

4. After the constitution of the Sikkim Public Service Commission, the Chairman of the Commission was made to preside over the Selection Committee which took the *viva voce* test. Thereafter the merit list was sent to the Public Service Commission and the appointment was made with the approval of the Commission. The selection was thus finally approved by the Commission which is an independent authority. There could be no infirmity or illegality in the process of selection or in preparing the merit list. [642H; 643A-B]

CIVIL APPELLATE JURISDICTION: Civil Appeal Nos. 5061-62 of 1985.

From the Judgment and Order dated 24.9.1985 of the Sikkim High Court in W.P. No. 1 of 1983.

K. Swami, T. Topgay, A. Subba Rao (N.P.) B. Parthasarthi and Parijat Sinha for the appearing parties.

The Judgment of the Court was delivered by

KULDIP SINGH, J. The Sikkim State Civil Service (hereinafter called the 'Service') was constituted with effect from July 1, 1977 by the rules, framed under article 309 of the Constitution of India, called the Sikkim State Civil Service Rules, 1977 (hereinafter called the

'Rules'). The question for our consideration in these appeals is whether the special recruitment made by the State Government in the year 1981/82 and the consequent appointment of 29 officers to the service is violative of the rules and as such is liable to be quashed.

The Sikkim Government by a notification dated September 16, 1981 decided to make special recruitment to the service on the basis of written examination-cum-*viva voce* test. The notification mentioned 'exigencies of service' as a ground for holding the special recruitment. As a result of the selection, 29 officers were appointed to the service by an order dated December 13, 1982.

Dorjee Tshering Bhutia who was working as Under Secretary to the Government of Sikkim competed for the selection but failed. He challenged the notification dated September 16, 1981 and the consequent selection by way of a writ petition under Article 226 of the Constitution of India before the Sikkim High Court. The learned single Judge of the High Court allowed the writ petition and quashed the notification and the selection. At the relevant time there being no division bench in the Sikkim High Court to hear the appeal, the State of Sikkim and the selected candidates have, against the judgment of the Learned Single Judge, come-up to this court via Article 136 of the Constitution of India. Hence these two appeals.

Before dealing with the points involved in the appeals it is necessary to notice the provisions of the rules in some detail. Rule 3 deals with the initial constitution of the service. It provides that the persons holding the posts mentioned therein would be deemed to be members of the service on the enforcement of the rules. Rule 4 which provides for the method of recruitment to the service is as under:

> 4. *Method of Recruitment to the Service*: (1) Recruitment to the service after the publishment of these rules shall be by the following methods, namely:—
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> (a) Competitive Examinations to be held by the Commission;
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> (b) Selection from among persons serving in connection with the affairs of the State of Sikkim.
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> (2) The proportion of vacancies to be filled in any year in accordance with clauses (a) and (b) above, shall be 50: 50 respectively:

Provided that the number of persons, recruited under Clause (b) above, shall not at any time exceed 50 percent of the total strength of the Service.

(3)Notwithstanding anything contained in sub-rule (I), if in the opinion of the Government exigencies of the service so require, the Government may, after consultation with the Commission, adopt such method of recruitment to the Service other than those specified in the said sub-rule, as it may by Notification in this behalf, prescribe.

Rule 5 provides for the constitution of a Selection Committee, consisting of Chairman, Sikkim Public Service Commission and three other officers, to make recruitment under Rule 4(1)(b). Under Rule 6 the merit list prepared by the Selection Committee is to be forwarded to the Sikkim Public Service Commission for its final approval, Rule 8 lays down that the competitive examination for recruitment to the service is to be conducted by the Sikkim Public Service Commission. Rule 9, 10 and 11 provide for eligibility and other qualifications for admission to the competitive examination. Rule 12 states that the decision of the Commission as to the eligibility or otherwise of a candidate for admission to the competitive examination shall be final.

The Rules provide for two methods of recruitment, competitive examination and by selection from amongst persons serving in connection with the affairs of the State of Sikkim. In respect of both these methods, it is the Sikkim Public Service Commission which is the authority under the Rules to make recruitment to the service. The competitive examination is to be held by the Commission. The Selection Committee for recruitment under Rule 4(1)(b) is to be presided over by the Chairman of the Public Service Commission and finally the merit list has to be approved by the Public Service Commission. It is thus obvious that the Rules can only operate through the Sikkim Public Service Commission. Without the existence of a Public Service Commission in the State of Sikkim the Rules could not have become functional. It is not disputed that on July 1, 1977 when the Rules came into force there was no Public Service Commission in the State. It was for the first time that one Shri K.R.K. Menon was appointed as chairman of the Commission by a notification dated November 20, 1981 and he took over as such on January 11, 1982. It is, thus, the admitted position that from July 1, 1977 till January 11, 1982 the Public Service Commission in the State of Sikkim had not been constituted and as such was not functioning.

A On August 10, 1981 a Cabinet Memorandum was issued by the Sikkim Government suggesting the necessity of inducting officers working with the Sikkim Government into the service by way of selection. The reasons for holding the said selection as stated in the memorandum are as under:

B "Officers, who had not been considered for induction into the Sikkim State Civil Service at its initial constitution in 1977, have been representing from time to time for induction into the Sikkim State Civil Service. Presently these Officers have been grouped in the category of 'GENERAL'. In order to give them chance for appointment to the State Civil Service, the Government may consider the C modalities for selection and the determination of seniority of the officers as proposed in the draft Notification and the draft order enclosed. The following salient points are submitted for the consideration of the cabinet."

D The Memorandum was considered by the Cabinet in its meeting held on September 1, 1981 and it was decided to hold a written examination and *viva voce* test for selection to the Service. Consequently, the notification dated September 16, 1981 was issued, the operative part of which is reproduced hereunder:

E *"NOTIFICATION*

In pursuance of sub-rule (3) of rule 4 of the Sikkim State Civil Service Rules, 1977, the Government being of opinion that the exigencies of the Service as require, hereby adopts the method written examination-cum-*viva* F *voce* test as a method of recruitment to the service for that purpose constitutes a Selection Committee and prescribe the conditions of eligibility and regulation of seniority among the selected officers as follows:

1. *Constitution of the Selection Committee.*

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There shall be a Selection Committee comprising of the following officers, namely:

1. Chief Secretary	Chairman
H 2. Home Secretary	Member

3. Development Commissioner	Member	A
4. Finance Secretary	Member	
5. Establishment Secretary	Member	

The Deputy Secretary in the Establishment Department shall act as the Secretary to the Selection Committee. B

2. *Functions of the Selection Committee*:

The Selection Committee shall arrange to hold a written examination-cum-*viva voce* test for the eligible officers with a view to assess their suitability for appointment to Service. C

Provided that any officer who fails to obtain forty per cent of the total marks at the written examination-cum-*viva voce* test shall not be considered for appointment to Service. D

3. Officers eligible to appear at the written Examination-cum-*viva voce* test—(1) Every person who on the 1st day of August, 1981 is a gazetted officer under the Government of Sikkim not possessing the technical qualifications as specified in the Notification of the Government of Sikkim in the Establishment Department No. 350/GEN/EST dated 3rd Feb., 1978 shall be eligible to appear at the Written examination-cum-*viva voce* test. E

By a subsequent notification dated April 24, 1982 the constitution of the Selection Committee was changed and the Chairman, Sikkim Public Service Commission was made to preside over the Interview Board. The merit list prepared as a result of selection was sent to the Sikkim Public Service Commission for approval and thereafter 29 officers were appointed to the service by a notification dated December 13, 1982. F G

Dorjee Bhutia challenged the notification dated September 16, 1981 and the consequent selection before the Sikkim High Court on the following grounds:

1. The exercise of power, in issuing the impugned notification, H

A under Rule 4(3) of the Rules was illegal as the requisite conditions namely the existence of exigencies of service and consultation with the Public Service Commission, were not satisfied.

2. The method of selection provided under the notification being contrary to the statutory rules was bad in law.

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3. Rule 4(3) of the Rules was liable to be struck-down on the ground of excessive delegation.

4. The Selection Committee was changed from time to time so much so that the Committee which took the written examination was different from the one which took the *viva voce* test.

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The learned Advocate General appearing for the State of Sikkim raised the following points before the High Court:

1. The rules, though enforced, were inoperative due to non-
D existence of Public Service Commission in the State of Sikkim. The Government could, therefore, issue the notification in exercise of its executive power under Article 162 of the Constitution of India.

2. The conditions precedent for holding the selection under
E Rule 4(3) were satisfied. Necessary opinion to issue the impugned notification was formed on the basis of the reasons contained in the Cabinet Memorandum dated August 10, 1981. The High Court could not have gone into the sufficiency of reasons. Consultation with the Public Service Commission under the Rules was directory. In any case there being no Commission
F in existence it was not possible to do so.

3. Dorjee Bhutia having appeared in the written examination and the *viva voce* test was estopped from challenging the selection.

G 4. The writ petition was liable to be dismissed on grounds of laches.

The High Court rejected the arguments advanced on behalf of the State of Sikkim. It was held by the High Court that the impugned notification was violative of the Rules, the Government could not have
H acted in its executive power when the statutory rules were holding the

field, the two conditions-precedent under Rule 4(3) of the Rules were mandatory, there was no material before the State Government to form an opinion that exigencies of service required the issuance of the impugned notification and the Public Service Commission was not consulted. On these findings the High Court quashed the selection and the consequent appointments.

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The learned counsel for the appellant contended that the Rules came into force in the year 1977 which provided recruitment to the service through the Public Service Commission. The service constituted under the Rules consisted of the top-ranking posts in the State-Service. It also served as a feeder-cadre for appointments to the Indian Administrative Service. After its initial constitution no further appointments were made to the service under the Rules because in the absence of the Public Service Commission there was no mechanism to operate the Rules. According to him when recruitment to the service was not made for a long period there were representations from number of officers seeking opportunity to enter the service. It was under these circumstances that the cabinet decision to hold the special selection was taken and the impugned notification was issued. The learned counsel vehemently contended that the Rules being inoperative the State Government was within its executive power to issue the notification. He also justified the Government action under Rule 4(3) of the Rules. According to him the necessary opinion regarding existence of 'Exigencies of Service' was formed by the Government on the basis of the reasons contained in the Cabinet Memorandum (quoted above) and the High Court could not have gone into the sufficiency of the said reasons. He further argued that the requirement of consultation with the Public Service Commission was directory and its non-compliance could not have rendered the selection illegal.

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The executive power of the State under Article 162 of the Constitution of India extends to the matters with respect to which the legislature of the State has power to make laws. The Government business is conducted under Article 166(3) of the Constitution in accordance with the Rules of Business made by the Governor. Under the said Rules the Government business is divided amongst the ministers and specific functions are allocated to different ministries. Each ministry can, therefore, issue orders or notifications in respect of the functions which have been allocated to it under the Rules of Business.

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A The executive power of the State cannot be exercised in the field which is already occupied by the laws made by the legislature. It is settled law that any order, instruction, direction or notification issued in exercise of the executive power of the State which is contrary to any statutory provisions, is without jurisdiction and is a nullity. But in this case we are faced with a peculiar situation. The Rules, though B enforced, remained unworkable for about five years. The Public Service Commission, which was the authority to implement the Rules, was not in existence during the said period. There is nothing on the record to show as to why the Public Service Commission was not constituted during all those five years. In the absence of any material to the contrary we assume that there were justifiable reasons for the delay in constituting the Commission. The executive power of the C State being divided amongst various functionaries under Article 166(3) of the Constitution of India there is possibility of lack of co-ordination amongst various limbs of the Government working within their respective spheres of allocation. The object of regulating the recruitment and conditions of service by statutory provisions is to rule out arbitrari- D ness, provide consistency and crystilise the rights of employees concerned. The statutory provisions which are unworkable and inoperative cannot achieve these objectives. Such provisions are non-est till made operational. It is the operative statutory provisions which have the effect of ousting executive power of the State from the same field. When in a peculiar situation, as in the present case, the statutory E provisions could not be operated there was no bar for the State Government to act in exercise of its executive power. The impugned notification to hold special selection was issued almost four years after the enforcement of the Rules. It was done to remove stagnation and to afford an opportunity to the eligible persons to enter the service. In our view the State Government was justified in issuing the impugned F notification in exercise of its executive power and the High Court fell into error in quashing the same.

The fact that the State Government purported to act under rule 4(3) of the Rules in issuing the impugned notification is of no consequence. When the source of power can be validly traced then the State G action in the exercise of such power cannot be struck down on the ground that it was labelled under a different provision.

The view we have taken—it is not necessary to go into any other question. It is not disputed that after the constitution of the Sikkim Public Service Commission, the Chairman of the Commission was H made to preside over the Selection Committee which took the *viva*

voce test. There after the merit list was sent to the Public Service Commission and the appointment of 29 appellants, in the year 1982, was made with the approval of the Commission. The selection was thus finally approved by the Commission which is an independent authority. No infirmity or illegality has been pointed out in the process of selection or in preparing the merit list. A B

We, therefore, allow the appeals, set aside the judgment of the High Court and dismiss the writ petition by Dorjee Tshering Bhutia. There shall be no order as to costs.

G.N. Appeals allowed.