

(2003) 04 KAR CK 0041

In the Karnataka High Court

Case No : W.A. No's. 2219 and 2558/99

Doddamahadevaiah

APPELLANT

Vs

New Mangalore Port Trust and Others

RESPONDENT

Date of Decision : 03-04-2003

Acts Referred:

Mangalore Port Trust Act, 1963 — Section 126, 28

Citation : (2003) ILR (Kar) 2324 : (2003) 4 KCCR 263 SN

Hon'ble Judges : S.R. Nayak, J;K. Ramanna, J

Bench : Division Bench

Advocate : R.L. Patil, Patil and Patil and Yatheesh Kumar and R.S. Kadibagil, for the Appellant; B.L. Acharya, for R1, Respondents 2 and 5, R. Yetheesh and R.S. Kadi Bagil for R2 and R.L. Patil, for R2, R3, R4 and R5, for the Respondent

Final Decision : Allowed

Judgement

Nayak, J.—Both these writ appeals are preferred against the same order of the learned Single Judge dated 10.3.1999 in W.P. No. 19846/1996. Hence both the writ appeals were clubbed and heard together and they are being disposed of by this common judgment.

2. The short question that arises for our decision is whether the selection and appointment of Sri Doddamahadevaiah, who is the appellant in Writ Appeal No. 2219 of 1999 to the post of Deputy Traffic Manager by the management of the New Mangalore Port Trust, Mangalore (for short "the management") is in accordance with law or not.

3. The facts are not in controversy. The feeder cadre to the promotional post of Deputy Traffic Manager is Assistant Traffic Manager. The appellant Doddamahadevaiah and appellant in Writ Appeal No. 2255 of 1989, namely, A. Sundara Raman belong to SC community. In the final seniority list of Assistant Traffic Managers, Doddamahadevaiah is placed at Sl. No. 8, whereas Sundara Raman is placed at Sl. No. 2. The post of Deputy Traffic Manager in terms of

cadre and recruitment rules, has to be filled up by way of promotion by selection. When a vacancy in the post of Deputy Traffic Manager, earmarked for the SC community arose in terms of roster, the Departmental Promotion Committee (D.P.C.) constituted by the management assessed the relative merits of the Sriyuths Doddamahadevaiah and Sundara Raman and selected Doddamahadevaiah for the post of Deputy Traffic Manager and accordingly he was appointed to that post by the management.

4. The appointment of Doddamahadevaiah as Deputy Traffic Manager was called in question before this Court in W.P. No. 19846 of 1996 by Sundara Raman on several grounds inter alia contending (i) that the candidature of Doddamahadevaiah should not have been considered in terms of recruitment regulations inasmuch as at the relevant point of time he was placed at Sl. No. 8 in the final seniority list of Assistant Traffic Manager; (ii) the D.P.C. did not assess relative merits of the candidates properly and there was no proper application of mind on the part of members of the D.P.C. in recommending the candidature of Doddamahadevaiah; (iii) the participation of Sri B.K. Mohanti as a member of the D.P.C. vitiated the selection and appointment of Doddamahadevaiah; (iv) since Doddamahadevaiah and Sundara Raman were appointed to the feeder post of Assistant Traffic Manager on the same day, the D.P.C. was not justified in selecting Doddamahadevaiah and rejecting the lawful claim of Sundara Raman though admittedly he was senior in the feeder cadre.

5. The learned Single Judge having heard the learned Counsel for the parties and taking into account the materials placed before the Court, did not find any merit in any of the contentions advanced on the behalf of the writ petitioner except the contention that the Departmental Promotion Committee ought not to have considered the candidature of Doddamahadevaiah because he was admittedly placed at Sl. No. 8 in the final seniority list of Assistant Traffic Manager in terms of Regulation 30 of New Mangalore Port Trust Employees (Recruitment), Seniority and Promotion Regulations, 1980 (for short "the Regulations") and certain clarifications issued by the Government of India by way of administrative instructions. In the premises of that holding, the learned Single Judge allowed the Writ Petition and quashed the selection and appointment of Doddamahadevaiah and directed the management to consider the case of Sundara Raman to the post of Deputy Traffic Manager within a period of one month.

6. Doddamahadevaiah being aggrieved by the order of the learned Single Judge preferred W.A. No. 2219 of 1999, whereas even Sundara Raman though succeeded in the Writ Petition being aggrieved by the findings recorded by the learned Single Judge with regard to several other contentions has preferred Writ Appeal No. 2558 of 1999.

7. We have heard learned Counsel for the parties. Sri R.L. Patil, learned Counsel for the appellant in W.A. No. 2219 of 1999 contended that the opinion of the learned Single Judge suffers from an error apparent on its face inasmuch as by

no stretch of imagination it could be held that in selecting and appointing a candidate to a post which is exclusively reserved for candidates belonging to SC community, even non-SC candidates could come under zone of consideration. Sri Patil further contended that since the promotional post in question is required to be filled up by way of selection, it necessarily involves assessment of relative merits of candidates who come under zone of consideration, such selection does not involve assessment of relative merits of non-SC candidates and, therefore, the learned Single Judge erred in holding that even non-SC candidates in the feeder cadre should have been taken into account for determining zone of consideration placing reliance on certain administrative instructions issued by the Government of India which instructions are apparently in conflict with the recruitment regulations. Sri Patil would submit that it is well settled that the administrative instructions issued by Government or an executive authority in exercise of its executive power can only supplement statutory rules or regulations and cannot supplant the statutory rules or regulations. On the otherhand, learned Counsel appearing for the Appellant in W.A. No. 2558 of 1999 would draw our attention to the provisions of Regulation 30 of Mangalore Port Trust Employees (Recruitment, Seniority and Promotion) Regulations and would maintain that the management of New Mangalore Port Trust is bound by the orders issued by the Government of India, therefore, the clarification issued by the Government of India also binds the management and in that view of the matter, no exception can be taken to the opinion of the learned Single Judge.

8. It is trite that since the promotional post of Deputy Traffic Manager in terms of Recruitment Regulations has to be filled up by the method known as "promotion by Selection" the process necessarily involves assessment of relative merits of candidates who come under zone of consideration. It is true that seniority in feeder post is one of the important factors for making promotions when the recruiting agency has to adopt the method of seniority - cum-merit or seniority - cum-suitability. But, seniority would have only a marginal role to play where the post has to be filled by way of selection. Speaking for a Division Bench of the High Court of Judicature of Andhra Pradesh, one of us (S.R.Nayak, J) A. VEMA REDDY v. CONTROLLER GENERAL OF DEFENCE ACCOUNTS, NEW DELHI AND ORS. (2001) 5 ALD 131 (DB) observed:-

"... There are two well known methods which are adopted in the recruitment rules for making promotions and they are (1) Seniority -cum-fitness or sometimes called, seniority - cum-merit; (2) promotion by selection. While the method of seniority - cum-fitness is generally prescribed for promotions in the lower cadres, the method of promotion by selection is adopted in making promotion to the higher echelons of service. There is a clear cut distinction between the two methods of promotion.

9. In the case of promotion by seniority - cum-fitness, every civil servant is entitled to the consideration of his case for promotion according to his seniority, either in the provisional seniority list or final seniority list, as the case may be.

The promoting authority has to consider the cases of all eligible officers who come within the zone of consideration strictly according to the seniority. If the seniormost official due for promotion is found fit for promotion he has to be promoted and there is no question of comparing his merit with those of his juniors in terms of relative merit. In other words, unless the senior official is found unfit for promotion either on account of adverse service record or does not satisfy other conditions or qualifications prescribed under the rules, he has a right to be promoted. It is only after reaching the conclusion that the seniormost official is unfit for promotion, the promoting authority could proceed to consider the case of the next senior and so on, on each occasion for promotion. In the case of promotion by selection, on the other hand, merit is the sole consideration from among the eligible officials who came within the zone of consideration for promotion. In this mode, generally speaking, whether an officer is senior or junior is immaterial. If, under the rules, an official is eligible for promotion, he has a right for consideration of his case. The authority making the selection has to make the selection on the basis of comparative merit among the eligible candidates. In other words, selection of a candidate for promotion would depend upon the assessment of his superior relative merit among the officials who come within the zone of consideration. But, even in a case where promotion is by way of selection, seniority has relevance where merit of two or more candidates is equal. In such case, seniority should be the basis in making selection and appointment, as held by the Supreme Court in *UNION OF INDIA v. ML. CAPOOR* AIR 1974 SC 74. But, where the merit is unequal promotion by selection has to be made according to merit only. Thus, it can be safely said that seniority by itself is no basis to make promotion in either of the methods."

10. In the premise of the above well settled position, let us have a look at Regulation 30 which reads as follows:-

"30. Field of selection for promotions:-

(1) Where promotion is to be made to a non-selection post, the employees, who are seniormost in the gradation list of the cadre from which promotions are made, shall ordinarily be considered for selection. Where selection is to be made to a selection post, the field of selection shall not be less than three times and shall not be more than five times the number of vacancies subject to employees with necessary qualifications and experience being available. The Departmental promotion Committee may, at its, discretion, alter these limits to suit exceptional circumstances.

(2) The following principles and procedure shall normally be observed for making departmental promotions, namely:-

(a) No employee shall be promoted to a higher post, unless his record shows that he possesses the necessary positive qualifications for the higher post such as personality, initiative strength of character and readiness to assume individual responsibilities;

(b) In the case of promotion to a non-selection post, no employee who possesses the positive qualifications referred to in Clause (a) shall be passed over by a person junior to him unless the Chairman otherwise directs for special reasons to be recorded in writing.

(c) In the case of promotion to a selection post, the Departmental Promotional Committee shall assess the merits of the employees concerned and grade them as "outstanding", "very good" and "good" and arrange their names on the relative select list in the order of their seniority, all those graded "outstanding" shall, however, be senior on the select list to those graded as "very good" and those graded "very good" shall be senior to those graded as "good" and so on;

(d) In assessing the merits of employees on comparative basis for the purpose of principles laid down in Clauses (a) and (c), the ability, energy, initiative, integrity, sense of responsibility, etc., of the employee concerned shall be taken into consideration for a period of time (when possible, for not less than three years) and judgment shall be formed wherever possible, after carefully considering the reports of three different superior officers;

(e) The Departmental Promotion Committee shall, from time to time, prepare in respect of posts which are required to be filled by promotion, select lists of eligible employees from the cadre from which promotions are to be made;

(f) The select list shall be prepared generally having regard to the provisions contained in Clauses (a), (b), (c) and (d);

(g) With a view to providing for casualties and for some unforeseen vacancies, the number of employees in each select list shall normally be slightly more than the number of vacancies which are likely to arise in the higher posts in the following twelve months."

11. Sub-regulation (1) of Regulation 30 determines zone of consideration wherever the posts are required to be filled up by way of selection. In terms of the said regulation, the field of selection should not be less than three times and shall be more than four times the number of vacancies which are going to be filled up at a time. In the instant case, there was only one vacancy and that vacancy was exclusively meant for the candidates belonging to the S.Cs. In the final seniority list of feeder cadre, Sundara Raman and Doddamahadevaiah were placed at Sl.Nos. 2 and 8 respectively. Another candidate belonging to SC was placed at Sl. No. 4. The crux of the argument advanced on behalf of Sundara Raman is that in determining the zone of consideration the management ought to have gone by the rankings given in the seniority list of the feeder cadre in strict seriatum irrespective of the fact whether a candidate belongs to SC community or not. We cannot accept this contention. It will be travesty of justice if we were to accept that argument. We say this, because, the non-SCs have nothing to do with a post which is exclusively meant for SCs. If that is so, for the purpose of assessing relative merit, the zone of consideration or field of consideration should comprise only those candidates belonging to SC community

and none else, and if this hypothesis could be sustained on the touchstone of rationality and rule of purposive interpretation of statutes, there was nothing wrong on the part of the management in including only those candidates belonging to SC community within the zone of consideration. Such procedure is not only reasonable but also in consonance with the goal of protective discrimination envisaged by the Constitution. The interpretation of the learned Single Judge, if it is accepted, would defeat the very purpose of providing reservation in promotions in favour of the SCs and STs. Such interpretation cannot be adopted if we keep in mind the well settled principles governing interpretation/construction of the provisions of social welfare and beneficial legislations. The interpretation should be "purposive", not pedantic. The Court must "suit the action to the word, the word to the action" to maintain the integrity of law and sub-serve the constitutional goals of equality and socialism.

12. The further contention advanced on behalf of Sundar Raman is that in selecting a candidate to the post of Deputy Traffic Manager, the management of the Mangalore port was bound by the administrative instructions/clarifications issued by the Government of India by virtue of the power conferred on it under Regulation 30. The Regulations are the delegated legislation framed by virtue of the power conferred by Section 126 read with Section 28 of Mangalore Port Trust Act, 1963. It is nobody's case that Regulation 30 has been amended by the Government of India by exercise of its rule making power. The instructions of the Government of India to which the learned Single Judge has made reference in extenso in the course of the order in support of his finding are mere administrative instructions issued by Government of India in exercise of the executive power. Having carefully perused the provisions of Regulation 30, we do not find any limitation now prescribed by the Government of India by issuing administrative instructions. Regulation 30 does not direct that in determining zone of consideration or field of consideration to fill up a post meant for SCs to STs, even the candidates belonging to other groups or classes, could be taken into account. It is trite, administrative instructions can undertake only "filling-in" job, but, they cannot be allowed to supplant or amend the statute or statutory rule concerned. This position is well settled.

13. In the case of Chief Settlement Commissioner, Rehabilitation Department, Punjab and Others, etc. Vs. Om Prakash and Others etc., the Apex Court held as follows:

" In this context it is essential to emphasise that under our constitutional system the authority to make the law is vested in the Parliament and the State Legislatures and other law making bodies and whatever legislative power the executive administration possesses must be derived directly from the delegation of the legislature and exercised validly only within the limits prescribed. The notion of inherent or autonomous law-making power in the executive in the executive administration is a notion that must be emphatically rejected. As observed by Jackson, J. in a recent American case - Youngstown

Sheet and Tube Co. v. Sawyer (1952) 343 US 579 at p. 655 - "With all its defects, delays and inconveniences men have discovered no technique for long preserving free government except that the Executive be under the law, and that the law be made by parliamentary deliberations". In our constitutional system, the central and most characteristic feature is the concept of the rule of law which means, in the present context, the authority of the law courts to test all administrative action by the standard of legality. The administrative or executive action that does not meet the standard will be set aside if the aggrieved person brings the appropriate action in the competent Court. The rule of law rejects the conception of the Dual State in which governmental action is placed in a privileged position of immunity from control by law. Such a notion is foreign to our basic constitutional concept".

14. In the case of State of Haryana, Vs. Shamsheer Jang Bahadur, etc. etc., the Apex Court observed thus:

"7. It may be noted that herein we are dealing only those who were promoted from the cadre of clerks in the Secretariat. The first question arising for decision is whether the Government was competent to add by means of administrative instructions to the qualifications prescribed under the Rules framed under Article 309. The High Court and the courts below have come to the conclusion that the Government was incompetent to do so. This Court has ruled in Sant Ram Sharma Vs. State of Rajasthan and Another, that while the Government cannot amend or supersede the statutory rules by administrative instructions, if the rules are silent on any particular point, the Government can fill up the gaps and supplement the rules and issue instructions, if the rules are silent on any particular point, the Government can fill up the gaps and supplement the rules and issue instructions not inconsistent with the rules already framed. Hence we have to see whether the instructions with which we are concerned, so far as relate to the clerks in the Secretariat amend or alter the conditions of service prescribed by the rules framed under Article 309. Undoubtedly the instructions issued by the Government add to those qualifications. By adding to the qualifications already prescribed by the rules, the Government has really altered the existing conditions of service. The instructions issued by the Government undoubtedly affect the promotion of concerned officials and therefore they relate to their conditions of service. The Government is not competent to alter the rules framed under Article 309 by means of administrative instructions. We are unable to agree with the contention of the State that by issuing the instructions in question, the Government had merely filled up a gap in the rules. The rules can be implemented without any difficulty. We see no gap in the rules.

15. Similar view has been taken by the Supreme and High Courts in large number of other cases. We do not wish to burden our judgment with more case law.

16. At the time of hearing, the learned Counsel for the appellant in W.A. No. 2558/99, submitted that he would not press that writ appeal for decision under

instructions from his client.

In the result, for the foregoing reasons, we allow Writ Appeal No. 2219 of 1999 and set aside the order of the learned Single Judge dated 10th March, 1999 and dismiss W.P. No. 19846 of 1996 with no order as to costs. Writ Appeal No. 2558 of 1999 is dismissed as not pressed with no order as to costs.