
(2001) 05 RAJ CK 0120

In the Rajasthan High Court

Case No : Civil Writ Petition No. 819 of 1990

Jagdish Prashad Chandelía

APPELLANT

Vs

The State of Rajasthan

RESPONDENT

Date of Decision : 18-05-2001

Acts Referred:

Constitution of India, 1950 — Article 14, 16, 311

Citation : (2001) 4 RLW 665 : (2001) 4 WLN 393

Hon'ble Judges : J.C. Verma, J

Bench : Single Bench

Final Decision : Allowed

Judgement

J.C. Verma, J.—The petitioner was appointed in the Rajasthan Administrative Service (here-in-after called RAS) on 17.10.1974 vide Annexure-1 as having been selected by the Rajasthan Public Service Commission. He was promoted to the senior scale on urgent temporary basis on 29.2.1979, but later on the recommendations of the selection committee, was put on senior scale vide letter dated 11.10.1984 (Annexure-2) against the quota of 1980 and again promoted to the post of selection scale on urgent temporary basis vide order Annexure-3 dated 7.2.1987. Because of the reason that certain other persons had been promoted to the selection scale regularly vide order dated 6.12.1986, but the petitioner was not considered and, therefore, being aggrieved the petitioner filed an appeal before the Rajasthan Civil Service Appellate Tribunal which appeal was decided on 22.7.1987 and a direction was given to the respondent to convene a meeting of the DPC for promotion of the petitioner to selection scale relating to the year 1983-84 and on the basis of that judgment, the petitioner was substantively promoted to the selection scale against the quota of 1983-84 vide Annexure-4, meaning thereby, that he was deemed to have been promoted on the selection scale on 1.4.1983 regularly in view of Rule 28-B (11-A) of the Rajasthan Administrative Service Rules, 1954. Rule 8 provides for reservation of vacancies for the Scheduled Castes and the Scheduled Tribes. Rule 9 lays down

that there shall be determination of vacancies yearwise. Rule 28-B deals with revised criteria, eligibility and procedure for promotion to Junior, Senior and other posts encadred in the service.

2. Rule 28-B provides that as soon as the appointing authority determines the number of vacancies under Rule 9 and decides that a certain number of posts are required to be filled in by promotion, it shall, prepare a correct and complete list of senior most persons who are eligible and qualified under the rules and on the basis of seniority-cum-merit or on the basis of merit to class of post concerned and only those persons who are included in the list are to be considered. Only confirmed persons on the lowest post of service were to be considered. It was further mentioned that first post for promotion in the service is to be made on the basis of seniority cum merit and second promotional post is to be filled up on the basis of merit in the proportion of 50:50. For one vacancy five eligible persons were to be considered; for two vacancies eight eligible persons were to be considered, for three vacancies ten eligible persons were to be considered and for four or more vacancies, three times the number of vacancies are to be put in zone of consideration.

3. Rule 11(a) provides that the committee shall consider the cases of all senior most persons who are eligible and qualified for promotion to the class of posts concerned and shall prepare a list containing names of the persons found suitable. Sub-rule (b) of Rule 11 provides that the committee shall also prepare a separate list on the basis of seniority cum merit and/or on the basis of merit as the case may be, as per the criteria for promotion laid down in these rules.

4. Rule 11-A provides that if in any subsequent year, after promulgation of these Rules, vacancies relating to any earlier year are determined under Sub-rule (2) of rule relating to determination of vacancies which were required to be filled by promotion, the DPC shall consider cases of all such persons who would have been eligible in the year to which the vacancies relate irrespective of the year in which the meeting of the DPC is held and such promotions shall be governed by the criteria and procedure for promotion as was applicable in a particular year.

5. Vide Annexure-5, an amendment in Rule 32 was made on 17.7.1987 wherein for the existing expression "senior scale and selection grade post" occurring in between the words "laid down in Rule 9, appointment to" and "shall be made by Government" the expression "Senior scale, selection scale and supertime scale" was substituted in the ratio of 1:2. In pursuance of the said amendment vide Annexure-6 dated 30.4.1988, Annexure-7 dated 23.3.1989 and Annexure-8 dated 16.10.1989 certain officers were appointed in supertime scale on temporary promotions. Vide order Annexure-9 dated 21.10.1988, the government had issued instructions to the effect that the supertime scale shall only be granted to those officers who had three years of experience having been regularly selected in the selection grade and who have put in 20 years of experience in service w.e.f. 1.4.1988. This amendment in the rules was added by substituting it vide notification dated 12.12.1989 as published on 18.1.1990,

copy of which is attached as Annexure-10. The notification is reproduced as under:

AMENDMENT

The existing proviso (ia) of Rule 31 of the said rules shall be substituted with effect from 1.4.1988 by the following, namely:

(ia) No member of the service who has not completed 3 years service on the selection scale posts and 20 years service in all on the posts included in the service shall be eligible for appointment on the super time scale posts.

6. Seniority list was prepared of super time scale candidates, and selection scale candidates as it existed on 1.6.1989 and circulated vide Annexure-11 on 1.8.1989, wherein 25 persons have been shown in the super time scale. The name of the petitioner was appearing at No. 65 in the list of selection scale candidates. However, two senior persons out of the seniority list of selection scale, one G.P.Nagar and Askaran Agarwal had already been promoted to IAS. The petitioner's name was not considered because of the circular dated 21.10.1988 (Annexure-9) which had ultimately culminated in the amendment in the rules as mentioned above. It is stated that against 17 vacancies filled up of the quota of 1989-90, the zone of consideration would have been 85 for the members of Scheduled Castes and Scheduled Tribe and, therefore, the petitioner who belongs to reserve class, his name ought to have been considered in the zone of consideration specially when his record was outstanding. It is stated that Annexure-9 dated 21.10.1988 cannot be made applicable retrospectively as to add the qualification for the purpose of determination of eligibility for promotion and thus the petitioner challenges the circular Annexure-9 being of no effect. He also challenges the amendment dated 12.12.1989 stating, therein that the selection scale officers of RAS have been divided into two categories namely those who have completed three years service in the selection scale, but have not completed 20 years service in RAS and those who have completed three years service in selection scale and have also completed 20 years of service. It is stated that the qualifications for putting on senior scale and selection scale was only 5 years experience in each cadre and further submits that the requirement of total service of 20 years has no rationale or nexus with the object of selection scale and thus a part of amendment Annexure-11 so far it provides 20 years total service is violative of Articles 14 and 16 of the Constitution of India. He also challenges the retrospective operation given to the amendment dated 12.12.1989 in depriving the petitioner from super time scale. It is the submission that he was eligible for such promotion under existing rules as on 1.4.1988 against the vacancies of 1988-89 and on 1.4.1989 against the vacancies of 1989-90 and thus the retrospective amendment in the rules attending the vested right of the petitioner is arbitrary. Prayer has been made to quash the order dated 16.10.1989 and with the direction to the respondent to consider the case of the petitioner in super time scale of RAS w.e.f. 1.4.1989 with all consequential benefits. Further prayer has been made to quash the amendment dated

12.12.1989 as mentioned above.

7. In the reply, it is stated that the circular dated 31.10.1988 was issued by the government in anticipation of the proposed amendment in the rules. It is further submitted that the powers of the executive cannot be denied to issue circular in anticipation of amendment in the rules and that the provision had been made with a view to rationalise the scheme of promotion to the higher grades with the purpose to confer the eligibility only on such selection scale officers who have completed minimum of three years service and to have the experienced persons with 20 years of experience in total service.

It is also stated in the written statement that the petitioner was not possessing the requisite experience on the post of selection scale on 1.4.1988 as per circular dated 21.10.1988 and as such he was not entitled for consideration for promotion and primarily for that reason there was no question of inclusion of his name in the zone of consideration even though for reserved candidates five persons are to be considered for one vacancy.

8. By an additional affidavit, the petitioner has stated that because of the aforesaid anomaly, the junior persons in the seniority list i.e. P.C. Agarwal at No. 69, V.P.Goyal at No. 70 and C.D. Deval at No. 71 (the petitioner's name finds place at No. 65 in the seniority list) have since been promoted to senior scale of RAS and were further promoted in IAS Cadre on 24.7.1992 as per Annexures A, B and C attached to the additional affidavit and thus he has been rendered junior to his juniors who were placed lower than him in the selection scale.

It is further submitted that in view of the interim orders passed by this Court has candidature was considered for promotion in super time scale against the vacancies of 1990-91 but while making the recommendations it was ordered that the recommendations are subject to the decision of the writ petition. The persons mentioned above at Sr. Nos. 69, 70 and 71 were considered along with the petitioner in the quota of 1990-91 and had been promoted.

9. As per seniority list issued on 1.8.1989 (Annexure-A) attached to the additional affidavit, for selection grade, petitioner's name finds place at No. 65 and that of Mr. Goyal and Mr. Deval finds place at Nos. 69, 70 and 71 respectively.

10. Counsel for the petitioner on the submission relies on 1998 (2) WLN 446, 1984 (2) SLR 97 , Anguswamy and Another Vs. State of Tamil Nadu, .

11. In the case of Ex Capt. K.C. Arora and Anr. v. State of Haryana and Ors. 1984 (2) SLR 97 , it was held that even though state was competent to frame rules with retrospective effect, but the rules cannot take away the acquired rights and if the said rules prejudicially effect the persons who had acquired such right, the rules are to be declared ultravires. The petitioner in K.C. Arora's case had served the Army for more than five years and was appointed in the service of State of Haryana as temporary Assistant Engineer against the posts reserved for Ex-emergency commissioner officers. The Government had issued notification on

9.8.1976 making amendment in the definition of expression "military service" which amounted to retreat from their previous commitments. Notification was issued with retrospective effect on 1.11.1966 and restricted the benefits of military service upto 10.1.1968 i.e. the date on which the first emergency was lifted with the result that the vested rights which accrued to the petitioners in 1969, 1970 and 1971 had been taken away. It was contended on behalf of the petitioners that the benefit acquired could not be taken away by the amendment with retrospective effect and the amendment was discriminatory and retrospective effect given to the provisions of amending Act could not cure the discrimination introduced by the Act. Relying on the case of A.A. Calton Vs. Director of Education and Another, it was observed as under:

The legislation is pure and simple, self-deceptive, if we may use such an expression with reference to a legislature made law. The legislature is undoubtedly competent to legislate with retrospective effect to take away or impair any vested right acquired under existing laws but since the laws are made under a written Constitution, and have to conform to the dos and don'ts of the Constitution, neither prospective nor retrospective laws can be made so as to contravene fundamental rights. The law must satisfy the requirements of the Constitution today taken into account the accrued or acquired rights of the parties today. The law cannot say, 20 years ago the parties had no rights, therefore, the requirements of the Constitution will be satisfied if the law is dated back by 20 years. We are concerned with today's rights and not yesterday's. A legislature cannot legislate today with reference to a situation that obtained 20 years ago and ignore the march of events and the constitutional rights accrued in the course of the 20 years. That would be most arbitrary unreasonable and a negation of history... Today's equals cannot be made unequal by saying that they were unequal 20 years ago and we will restore that position by making a law today and making it retrospective. Constitutional rights, constitutional obligations and constitutional consequences cannot be tampered with that way. A law which if made today would be plainly invalid as offending constitutional provisions in the context of the existing situation cannot become valid by being made retrospective. Past virtue (constitutional) cannot be made to wipe out present vice (constitutional) by making retrospective laws. We are, therefore, firmly of the view that the Gujarat Panchayats (Third Amendment) Act, 1978 is unconstitutional, as it offends Articles 311 and 14 and is arbitrary and unreasonable.

While amending Act of 1978 in regard to Ex-Municipal employees who had been allocated to Panchayat Service as Secretary and officers and servants of Gram and Nagar Panchayat and had achieved the status of Government servant; their status as government servants could not be extinguished, so long as the posts were not abolished and their services were not terminated in accordance with the provisions of Article 311 of the Constitution.

12. In the case of Chairman, Railway Board and Ors. v. C.R. Rangadhamaiah and

Ors. (1977) 6 SCC 623, while dealing with the reduction of pension retrospectively, it was held that it was unreasonable and arbitrary and violative of Articles 14 and 16 of the Constitution of India and pension as admissible under the rules in force at the time of retirement cannot be reduced as it affects the right already vested with the service. It was further held that a rule which operates in futuro so as to govern future rights of those already in service cannot be assailed on the ground of retrospectively as being violative of Articles 14 and 16 of the Constitution but a rule which seeks to reverse from an anterior date, a benefit which has been granted or availed, e.g. promotion or pay scale, can be assailed as being violative of Articles 14 and 16 of the Constitution to the extent it operates retrospectively. The expression "vested rights" or "accrued rights" are used in the context of a right following under the relevant rule which was sought to be altered with effect from an anterior date and thereby taking away the benefits available under the rule in force at that time. Such an amendment having retrospective operation which has the effect of taking away a benefit already available to the employee under the existing rule is arbitrary, discriminatory and violative of the rights guaranteed under Articles 14 and 16 of the Constitution.

13. In the case of A.A. Calton Vs. Director of Education and Another, it was held as under:

It is no doubt true that the Act was amended by U.P. Act 26 of 1975 which came into force on August 18, 1975 taking away the power of the Director to make an appointment u/s 16-F(4) of the Act in the case of minority institutions. The amending Act did not, however, provide expressly that the amendment in question would apply to pending proceedings u/s 16-F of the Act. Nor do we find any words in it which by necessary intendment would affect such pending proceedings. The process of selection u/s 16-F of the Act commencing from the stage of calling for applications for a post upto the date on which the Director becomes entitled to make a selection u/s 16-F(4) (as it stood then) is an integrated one. At every stage in that process certain rights are created in favour of one or the other of the candidates. Selection 16-F of the Act cannot, therefore, be construed as merely a procedural provision. It is true that the legislature may pass laws with retrospective effect subject to the recognised constitutional limitations. But it is equally well settled that no retrospective effect should be given to any statutory provision so as to impair or take away an existing right, unless the statute either expressly or by necessary implication directs that it should have such retrospective effect. In the instant case admittedly the proceedings for the selection had commenced in the year 1973 and after the Deputy Director had disapproved the recommendations made by the Selection Committee twice the Director acquired the jurisdiction to make an appointment from amongst the qualified candidates who had applied for the vacancy in question. At the instance of the appellant himself in the earlier writ petition filed by him the High Court had directed the Director to exercise that power. Although the Director in the present case exercised that power subsequent to August 18,

1975 on which date the amendment came into force, it cannot be said that the selection made by him was illegal since the amending law had no retrospective effect. It did not have any effect on the proceedings which had commenced prior to August 18, 1975. Such proceedings had to be continued in accordance with the law as it stood at the commencement of the said proceedings. We do not, therefore, find any substance in the contention of the learned Counsel for the appellant that the law as amended by the U.P. Act 26 of 1975 should have been followed in the present case.

14. In the case of *Y.V. Rangaiah and Others Vs. J. Sreenivasa Rao and Others*, , amendment dispensing with the original provision for considering L.D.Cs. along with U.D.Cs. for promotion, consequently promotional chances of the eligible L.D.Cs. adversely affected and they were superseded by their juniors in the panel prepared in accordance with the amendment. It was held that the vacancies in the promotional posts occurring prior to the amendment have to be filled up in accordance with the unamended rules. The panel prepared for filling those vacancies under the amended rules was set aside and fresh panel under the old rules directed to be prepared.

15. In the case of *Union of India v. Tushar Ranjan Mohanty and Ors.* JT (1994) SC 397, under Rule 8(1)(b)(i) of the rules, it was provided that all Grade-IV officers who have completed four years of service on regular basis were entitled to be considered for promotion to Grade-III on the basis of their seniority provided they are not found unfit by the Controlling Authority. The rule gives a statutory right to Grade-IV officers to be considered for promotion in the order of their seniority. It was further strengthened by the proviso when it makes it obligatory that when a junior officer in Grade-IV is eligible and is considered for promotion all officers senior to him in that grade shall also be considered for promotion. Even otherwise, "to be considered for promotion" is a guaranteed right under Article 16(1) of the Constitution of India. Rule 13 was amended in 1989 wherein, it was provided that appointments to the service shall be made subject to the orders relating to reservation for SCs and STs issued by the Central Government from time to time. Even though the rule was amended in 1989, but it was made retrospective w.e.f. 27.11.1972. It was held in *Union of India and Ors. v. Tusha Ranjan Mohanty and Ors.* (supra) that the retrospective operation of amended Rule 13 takes away the vested rights of the general category candidates senior to respondents and as such the amendment of the rule to the extent it had been made operative retrospectively was held to be unreasonable, arbitrary and as such violative of Articles 14 and 16 of the Constitution of India.

16. The petitioner had joined as RAS in the year 1974; he was promoted to senior scale on 29.2.1979 on urgent temporary basis and promoted as senior scale vide order dated 11.10.1984; he was promoted as selection scale against 1983-84 vide order dated 12.1.1988. Vide circular dated 21.10.1988, the State Government had decided that the names of the incumbent shall not be

considered for grant of super-time scale until and unless such officer had completed three years of service in selection grade and also minimum of 20 years of service on 1.4.1988. This executive instructions had been ultimately notified as per Annexure-10 and have been made effective from 1.4.1988. Vide amendment dated 17.7.1987 (Annexure-5) the super-time scale was introduced in Rule 9 i.e. had there been no amendment under Annexure-10, the incumbent was entitled for consideration of promotion to super-time scale as per promotional rules. Rule 11-A provided that DPC shall consider the cases of all such persons who would have been eligible in the year to which the vacancies relate irrespective of year in which the meeting of DPC is held. Annexures-6 and 7 related to super-time scale of the year 1987-88 and 1988-89. For the year 1987-88, the petitioners name did fall under the zone of consideration, but it was not considered. He had completed the required three years service, was on seniority and was, therefore, entitled to be put under the zone of consideration.

17. His right of consideration could not have been taken away by the executive instructions dated 21.10.1988 (Annexure-9) in anticipation of the amendment of the rules. The rule for consideration for the purpose of promotion was already there in the statute as discussed above. A vested right had already accrued to the petitioner to be considered on 1.4.1988. No doubt the Government is competent to amend the rules retrospectively, but if any right had already accrued to a person for consideration on a particular date, that right cannot be taken away either by issuing executive instructions as has been done vide Annexure-9 and then by issuing notification dated 18.1.1990 to effect the right of the petitioner as was available to him on 1.4.1988. Consequent to the above-said executive instructions Annexure-9 and the amendment from retrospective effect, the certain junior persons to the petitioner who were awarded the selection scale and were junior in the seniority became entitled to grant of super-time scale by ignoring the right of the petitioner and thus the petitioner even being senior in the selection grade had become Junior for the purpose of grant of super time scale; such action of the respondent does violate the right of the petitioner and is violative of Articles 14 and 16 of the Constitution of India and cannot be sustained in the eyes of law.

18. For the above-said discussion and reasons, the executive instructions Annexure-9 dated 21.10.1988 which virtually amounted to amendment in the rules itself and subsequent amendment published on August 1990 so far its retrospective effect is concerned, cannot be sustained in the eyes of law and is quashed. Consequently the petition succeeds with the direction that the petitioner shall be entitled to consideration of super-time scale under the then existing rules by ignoring the executive instructions Annexure-9 and the retrospective effect of the amendment of rule (Annexure-10) with all such consequential reliefs.

19. The writ petition is allowed. No order as to costs.