

(2008) 09 AP CK 0006
In the Andhra Pradesh High Court
Case No : Writ Petition No. 2113 of 2003

K. Venkateswara Rao

APPELLANT

Vs

Sri I.V. Nageswara Rao, Senior Assistant, Govt. Polytechnic for women, Commissioner of Technical Education, Govt. of A.P., Principal, G.I.P.D.C.E.T. and Regional Joint Director of Technical Education

RESPONDENT

Date of Decision : 24-09-2008

Acts Referred:

Administrative Tribunals Act, 1985 — Section 20(2), 21, 21(1), 21(3)
Andhra Pradesh State and Subordinate Service Rules, 1962 — Rule 4, 5
Andhra Pradesh State and Subordinate Service Rules, 1996 — Rule 23, 5, 6, 7, 8
Constitution of India, 1950 — Article 141, 142, 226, 32

Citation : (2009) 1 ALD 707 : (2009) 1 ALT 532

Hon'ble Judges : Ghulam Mohammed, J;G. Bhavani Prasad, J

Bench : Division Bench

Advocate : P.V.S.S.S. Rama Rao, for the Appellant; D. Linga Rao and SSGP for Services I for Respondent Nos. 2 to 4, for the Respondent

Final Decision : Allowed

Judgement

Ghulam Mohammed, J.—This writ petition is filed seeking to quash the order, dated 9.1.2003 in O.A. No. 6899 of 2001 on the file of the Andhra Pradesh Administrative Tribunal (for short "the Tribunal") by virtue of which the Tribunal has directed to review the promotions of respondent No. 1 and the petitioner as Senior Assistant as per their relevant seniority and eligibility according to Rules and regulate the consequential promotions as Superintendents accordingly.

2. The case of the petitioner is that he was appointed as Junior Assistant on 10.5.1986 in the Department of Technical Education and then he passed the Accounts Test for Subordinate Officers Part-I in the month of November, 1988 and he is eligible for promotion to the post of Senior Assistant. As per the General Rule 4(ii) of Andhra Pradesh State and Subordinate Rules, 1962, a panel was prepared consisting of all the eligible candidates for the year 1989-90

including his name, for promotion to the post of Senior Assistant. The name of the first respondent was not included in the panel prepared for the year 1989-90, as he could not pass the Accounts Test for Subordinate Officers Part-I, which is a pre-requisite qualification for promotion to the post of Senior Assistant. As there were vacancies which had arisen on 10.5.1990, petitioner's name was considered for promotion to the post of Senior Assistant and, accordingly, he was promoted to the post of Senior Assistant by orders of the second respondent dated 12.09.1990 and subsequently, he was promoted to the post of Superintendent vide proceedings of the second respondent dated 25.9.2001.

3. The petitioner's promotion to the post of Senior Assistant was not challenged by the first respondent at any point of time and waited till he got his promotion to the post of Superintendent and after a lapse of considerable period, the first respondent filed O.A. No. 6899 of 2001 before the Tribunal challenging the proceedings dated 25.09.2001. The relief sought for by the first respondent is very ambiguous, as he is not sure in which post his seniority to be fixed. The case of the petitioner is that the first respondent has not challenged his promotion to the post of Senior Assistant in O.A.No.6899 of 2001, but he challenged the proceedings dated 25.09.2001 whereunder he was promoted to the post of Superintendent. Though the first respondent has not challenged his promotion to the post of Senior Assistant, the Tribunal has erroneously directed the official respondents to review the promotions of the petitioner and the first respondent in the category of Senior Assistant and regulate the consequential promotions. Even though, the claim of the first respondent about the seniority in the category of Senior Assistant is barred by limitation as per Section 21(i)(a) of the Administrative Tribunal Act, 1985, the Tribunal has erroneously entertained the O.A. The presumption of the Tribunal that no panel is required to be prepared for promotion to the post of Senior Assistant is contrary to the General Rule 4(ii) of the Andhra Pradesh State and Subordinate Service Rules, 1962. The petitioner's name was included in the panel period from 1.11.1989 to 30.4.1990 and also panel period from 1.5.1990 to 31.8.1990 for the post of Senior Assistant, but due to administrative delay, he was promoted by order dated 12.9.1990 and in fact his promotion has to be preponed to the above said panel period as the vacancies of Senior Assistant post were available during the said panel period and he was fully qualified to hold the post. Therefore, the impugned order dated 9.1.2003 passed by the Tribunal is liable to be set-aside.

4. The first respondent filed his counter stating that he was appointed as Junior Assistant in the Department of Technical Education on 11.8.1982 and subsequently, he passed Accounts Test for Subordinate Officers Part-I in June,1990 and he was promoted as Senior Assistant vide proceedings dated 1.7.1991 and he joined as Senior Assistant on 13.7.1991. It is stated that in spite of passing of the Accounts Test for Subordinate Officers Part-I in June, 1990, the petitioner was promoted as Senior Assistant on 12.9.1990 ignoring his seniority, which is in contravention of rule of Promotion and Rule of Seniority. It is stated that for making promotions to the posts of Senior Assistant and

Superintendent which are non-gazetted, no panels are required to (sic) and the persons eligible as on the date of promotion are to be considered on the basis of seniority-cum-fitness as provided under Rule 5(b) of State and Subordinate Service Rules. The posts of Senior Assistants and Superintendents being non-selection posts, preparation of panels and relative merits do not arise. The first respondent should have been promoted with effect from 12.9.1990, the date on which the petitioner was promoted to the post of Senior Assistant as he has passed the requisite Accounts Test earlier to the said date. The first respondent had made several representations to the Commissioner of Technical Education to fix up his seniority over and above the petitioner in the cadre of Senior Assistant and promote him to the post of Superintendent, but however, no orders have been issued and instead the petitioner was promoted to the post of Superintendent by proceedings dated 25.09.2001.

5. It is further stated that no interse seniority list was prepared in the cadre of Junior Assistant or Senior Assistant before making promotion to the post of Senior Assistant. Thus, taking in to consideration the facts and circumstances of the case, the Tribunal has rightly directed to review the promotions of the first respondent and the petitioner as Senior Assistant as per their relevant seniority and eligibility according to rules and regulate the consequential promotions as Superintendents accordingly, and the order does not call for any interference by this court and the writ petition is liable to be dismissed.

6. Respondents 2 to 4 filed counter stating that the petitioner was appointed as Junior Assistant on 10-5-1986 and passed the Account Test for Subordinate Officers Part-I in the month of November, 1988. There were 2 vacancies of Senior Assistant in zone-I during the Half Yearly Panel with effect from 1-11-1989 to 31.4.1990 and also one vacancy arose on 10.5.1990. As on the date of 1st November, 1988, respondent No. 1 did not pass the Account Test for Subordinate Officers Part-I, which is requisite qualification for promotion to the post of Senior Assistant, whereas the petitioner had passed Account Test for Subordinate Officers Part-I during the month of November, 1988 and eligible to include his name in the Half Yearly Panel commencing from 1st November, 1989 as per G.O.Ms. No. 456 G.A.(Ser-B) Department, dated 9-8-1989. Subsequently, Government in their G.O.Ms. No. 4, G.A. (Ser.D) Department, dated 3.1.1990 issued orders dispensing of Half Yearly Panels and G.O.Ms.No.438 G.A. (Ser.D) Department, dated 16.7.1990 ordered that the list in operation on the date of commencement of the yearly panel shall continue to be valid and operative till 31-5-1990 and whereas the list that has to be prepared on the basis of reckoning yearly panels shall be prepared 1st November,1989 which shall also ceased to be in force as on 31.8.1990. Accordingly, a panel has to be prepared reckoning 1st November, 1989 is the qualifying date for promotion to the post of Senior Assistant. Respondent No. 1 passed Account Test Part-I during the month of August,1990 and he is not eligible to include his name, for the panel period 1989-90, whereas the petitioner is fully qualified to promote in the panel period from 1st November, 1989 to 30-04-1990 and also panel period from 1-5-1990 to

31.08.1990. The promotion of petitioner was ordered on 26.9.1990 due to Administrative delay and in fact his promotion has to be preponed to the panel period from 1.11.1989 to 31.5.1990 as the vacancies of Senior Assistant were available during the said panel period and the petitioner was fully qualified to hold the post.

7. Further, it is stated that respondent No. 1 did not challenge the promotion orders of the petitioner from the post of Junior Assistant to Senior Assistant but all of a sudden he challenged the further promotion order of the petitioner as Superintendent and also to review the promotions in the category of Senior Assistant. As per General Rule 4(ii) of Andhra Pradesh State Subordinate Rules, 1962, the panels are relevant for the purpose of promotions. During the panel year 1989-90, respondent No. 1 was not qualified for promotion to the post of Senior Assistant, therefore, his name was not taken into consideration, whereas the petitioner was fully qualified to hold the post of Senior Assistant, hence, his name was considered for the panel period 1989-90 and promoted as Senior Assistant. As the petitioner having all requisite qualifications for the promotional posts, accordingly he was promoted from Junior Assistant to Senior Assistant and further promoted from Senior Assistant to Superintendent and said promotions were effected as per seniority, eligibility and as per Rules and said promotional orders are valid and justified.

8. The learned Counsel for the petitioner contended that as per Section 21(i) of the Administrative Tribunal Act, 1985, the Tribunal ought not to have admitted the O.A., which was not filed within one year from the date on which final order has been made. He relied on decisions of Apex Court in Ramesh Chand Sharma Vs. Udham Singh Kamal and Others, wherein it was held as under:

On a perusal of the materials on record and after hearing Counsel for the parties, we are of the opinion that the explanation sought to be given before us cannot be entertained as no foundation thereof was laid before the Tribunal. It was open to the first respondent to make proper application u/s 21(3) of the Act for condonation of delay and having not done so, he cannot be permitted to take up such contention at this late stage. In our opinion, the O.A. filed before the Tribunal after the expiry of three years could not have been admitted and disposed of on merits in view of the statutory provision contained in Section 21(1) of the Administrative Tribunal Act, 1985. The law in this behalf is now settled See Secretary to Govt. of India v. Shivram Mahadu Gaikwad 1995 Supp (3) 231 : 1995 SCC L&S 1148 : (1995) 30 ATC 635.

9. He also relied on a decision in Dr. A.K. Mitra, DG, C.S.I.R. and Anr Vs. D. Appa Rao and Anr, wherein it was held as under:

We do not find any difficulty in holding that the Tribunal went wrong in appreciating the facts placed before it while coming to the above conclusion. First of all, the Tribunal failed to appreciate the fact that the first respondent's representation about his non-selection to the post of Assistant (General) in April,

1972 was rejected by the appellants and the same question was again reopened by the first respondent when the subject of further promotion was considered and again the representation of the first respondent was turned down by the appellants. The Tribunal by the impugned order has allowed the first respondent to reopen the issue that was settled in the year 1972 in an indirect manner holding that the first respondent must be deemed to have been appointed to the post of Assistant (General) w.e.f. 11.4.1972. For coming to that conclusion, no provision of law or any other material was shown to support the same by the Tribunal. The Tribunal was not justified in entertaining the claim of the first respondent to reopen an issue relating to the year 1972 in the year 1988. It must be noted that after the appointment of third respondent as Office Assistant (General) in the year 1972, the first respondent was regularly promoted to the post of Office Assistant only on 6-4-1983 and that being the position and he having accepted the promotion without challenge, it was not open to him to contend that he must be deemed to have been promoted as Assistant (General) w.e.f. 11.4.1972 when the third respondent was appointed by direct recruitment to that post. Furthermore, the first respondent in response to the advertisement for the ex cadre post for direct recruitment, applied and appeared for the examination and took a chance and thereafter made representation that he should be promoted to the post of Assistant (General) as a departmental candidate which was rejected immediately by the appellants.

10. He further contended that the observation of the Tribunal that no panel is required to be prepared for promotion to the post of Senior Assistant and that the date of filling up the vacancy alone has to be taken into consideration is erroneous. As per Rule 4(ii) of the Andhra Pradesh State and Subordinate Service Rules, 1962, panels are relevant for the purpose of promotion. It is the legal obligation on the part of the competent authority to prepare the panel and fill up the vacancies from the eligible candidates included in the panel. He also further contended that the Tribunal ought to have considered that the petitioner passed the Account Test for Subordinate Officers Part-I in the month of November, 1988, which is a pre-requisite qualification for promotion to the post of Senior Assistant, and the petitioner's name was included in the panel period 1989-90. The Tribunal failed to see that even though the first respondent was appointed prior to the petitioner in the category of Junior Assistant, the first respondent did not pass the Account Test during the relevant period and his name was not included in the panel period for 1989-90. He lastly contended that the Tribunal has grossly erred in directing the official respondents to review the promotions of the petitioner and the first respondent as Senior Assistant as per their relevant seniority and eligibility according to rules and regulate the consequential promotions as Superintendents, and the impugned order is contrary to the Service Rules and is liable to be set-aside. Therefore, he prays to allow the writ petition.

11. The learned Counsel for respondent No. 1 vehemently contended that the respondent No. 1 was appointed prior to the petitioner in the category of Junior

Assistant and respondent No. 1 had passed the Account Test for Subordinate Officers Part-I, which is prerequisite qualification for promotion to the post of Senior Assistant, as on the date of giving promotion to the petitioner as Senior Assistant, and that instead of giving promotion to respondent. 1 as Senior Assistant, petitioner was promoted as Senior Assistant, which is in contravention of rule of promotion and rule of seniority and the Tribunal has rightly allowed the O.A. observing that no panel is required to be prepared for promotion to the post of Senior Assistant and the impugned order does not suffer from any infirmity and the writ petition is liable to be dismissed. He further contended that respondent No. 1 challenged the order passed by the authorities promoting the petitioner as Superintendent and also the seniority and since the post of Senior Assistant is a non-selection post, seniority alone is criteria to give promotions. He also further contended that the jurisdiction of this court under Article 226 of the Constitution of India is very limited to interfere with such an order.

12. He relied on a decision in I.C.A.R. and another Vs. T.K. Suryanarayan and others, , wherein it was held as under:

We are, however, unable to accept the submission made by the learned Counsel appearing in both these SLPs. Even if in some cases, erroneous promotions had been given contrary to the said Service Rules and consequently such employees have been allowed to enjoy the fruits of improper promotion, an employee cannot base his claim for promotion contrary to the statutory Service Rules in law courts. Incorrect promotion either given erroneously by the department by misreading the said Service Rules or such promotion given pursuant to judicial orders contrary to Service Rules cannot be a ground to claim erroneous promotion by perpetrating infringement of statutory Service Rules. In a court of law, employees cannot be permitted to contend that the Service Rules made effective of 1st October, 1975 should not be adhered to because in some cases erroneous promotions had been given. The statutory Service Rules must be applied strictly in terms of the interpretation of rules as indicated in the decision of Three Judges Bench of this Court in Khetra Mohan's case AIR 1994 SCW 4154. When the said Service Rules were introduced w.e.f. 1st October, 1975, one time exercise was required to be made to decide the fitment of the employees in different grades. Except in case of fitment in grade T-1-3 of Category I and consequential accelerated promotion to grade T-2-3 of Category 2, on the basis of qualification in no other case accelerated promotion on the basis of educational qualification is permissible. If relaxation of educational qualification is made effective on the date of enforcement of the said service Rules it will be a case of review of initial fitment. In all other cases, promotion is to be given in accordance with the said Service Rules and not otherwise. The respondents in these appeal were not entitled to initial fitment in grade T-1-3. As a matter of fact, they got initial fitment in grade lower than Grade T-1-3 of Category 1. Therefore, they are not entitled to accelerated promotion on the basis of educational qualification consequent upon the initial fitment in Grade T-1-3 of Category 1. The impugned decisions of the Tribunal, therefore, cannot be

sustained.

13. He also relied on a decision in *Raju Ramsing Vasave v. Mahesh Deorao Bhivapurkar and Ors.* 2008 (1) Decisions Today (SC) (INRC) 551 wherein it was held as under:

Schedule Tribe Caste certificate scrutiny committee order- whether a co-employee of the respondent No. 1 who was working as a Field Officer with the Maharashtra Pollution Control Board can maintain an independent special leave questioning the judgment of a High Court setting aside an order of the Schedule Tribe Caste Certificate Scrutiny Committee is the question involved herein. A SLP ordinarily would not have been entertained at the instance of the appellant. Validity of appointment or otherwise on the basis of a caste certificate granted by a committee is ordinarily a matter between the employer and the employee. This Court, however, when a question is raised, can take cognizance of a matter of such a grave importance suo motu. It may not treat the SLP as a public interest litigation, but, as a public law litigation. It is, in a proceeding of that nature, permissible for the court to make a detailed enquiry with regard to the broader aspects of the matter although it was initiated at the instance of a person having a private interest. A deeper scrutiny can be made so as to enable the court to find out as to whether a party to a lis is guilty of commission of fraud on the Constitution. If such an enquiry sub serves the greater public interest and has a far reaching effect on the society, in our opinion, this Court will not shirk its responsibilities from doing so. We could have dismissed this application on the simple ground that the appellant has no locus standi. We did not do so because as a constitutional court we felt it to be our duty to lay down the law correctly so that similar mistakes are not committed in future. Apart from the general power of the superior courts vested in it under Article 226 or Article 32 of the Constitution of India, this Court is bestowed with a greater responsibility by the makers of the Constitution in terms of Articles 141 and 142 of the Constitution. Decisions are galore wherein this Court unhesitatingly exercised such jurisdiction to resort to the creative interpretation to arrive at a just result in regard to the societal and/or public interest. We thought that it is a case of that nature. Invoking our jurisdiction under Article 142 of the Constitution of India, keeping in view the long history of the case and its backdrop, we are of the opinion that whereas it would not be proper for us to disturb the very appointment of the appellant but it must be declared that his appointment shall be treated to be that of a general category in the matter of promotion or otherwise. He shall not be eligible to any benefits as a member of a Schedule Tribe.

14. The learned Counsel for the first respondent also further contended that official respondents ought to have filed writ petition against the judgment of the Tribunal, but not the writ petitioner herein, who is a co-employee.

15. He drawn the attention of this court to Rule 5 of the Andhra Pradesh State and Subordinate Service Rules, 1996, which reads as under:

Selection Posts: (a) All first appointments to a State Service and all promotions/ appointment by transfer in that service shall be made on grounds of merit and ability, seniority being considered only where merit and ability are approximately equal, by the appointing authority as specified in Sub-rule (a) of Rule 7 from the panel of candidates. Such panel shall be prepared as laid down in Rule 6 by the appointing authority or any other authority empowered in this behalf.

(b) Non-selection posts: No non-gazetted post should be treated as selection post. Promotion and appointment by transfer to higher posts other than those mentioned in Sub-rule (a) shall be made in accordance with seniority-cum-fitness, unless

(i) such promotion or appointment by transfer of a member has been withheld as a penalty; or

(ii) a member is given special promotion for conspicuous merit and ability.

16. He also drawn the attention of this court to Rule 23 of the Andhra Pradesh State and Subordinate Service Rules, 1996, which reads as under:

Appeal Revision and Review of Orders of Appointment (including Promotion) to Higher Posts: An order appointing a member of a service or class of service or category, to a higher post by transfer or by promotion may, within a period of six months from the date of such order, be revised by an authority to which an appeal would lie against the order of dismissal passed against a member of a service, class or category, such revision may be made by the appellate authority aforesaid, either on its own motion or on an appeal filed by the aggrieved member of the service, class or category;

Provided that the Government may, irrespective of whether they are the appellate authority or not, revise such order of appointment after the expiry of the period of six months aforesaid, for special and sufficient reasons to be recorded in writing.

17. He also further drawn the attention of this court to Rule 8 of the Andhra Pradesh State and Subordinate Service Rules, 1996, which reads as under:

Eligibility for promotion or appointment by transfer: For appointment to a higher post either by promotion from one category to another within a service or by appointment by transfer from one service to another service, a member of a service or class of a service, shall have satisfactorily completed his probation in the category from which he is proposed to be promoted or appointed by transfer to such higher post.

18. He lastly contended that the Tribunal after going through the material on record and taking into consideration the facts and circumstances of the case, has rightly come to the conclusion that respondent No. 1 is entitled for promotion to the post of Senior Assistant and consequently to the post of Superintendent over and above the petitioner and therefore, there is no illegality or irregularity in the

impugned order to interfere with and the writ petition is liable to be dismissed and he prayed for dismissal of the writ petition.

19. On the other hand, the learned Government Pleader appearing for the respondents 2 to 4 has drawn our attention to a decision in P.S. Sadasivaswamy Vs. State of Tamil Nadu, wherein it was held as under:

Where a Government Servant slept over the promotions of his juniors over his head for fourteen years and then approached the High Court with writ petition challenging the relaxation of relevant rules in favour of the juniors, the writ petition is liable to be dismissed in limine. Such an aggrieved person should approach the Court at least within six months or at the most a year of promotion of his juniors.

20. Heard the learned Counsel for the petitioner, the learned Counsel for the first respondent and the learned Government Pleader for Service-I appearing for respondents 2 to 4.

21. Having regard to the facts and circumstances of the case and the submissions made by the respective Counsel, it appears that the petitioner was appointed as Junior Assistant on 10-05-1986, whereas the first respondent was appointed on 11.08.1982 in the Department of Technical Education. The petitioner had passed the Accounts Test for Subordinate Officers Part-I in the month of November, 1988, whereas the first respondent had passed the Accounts Test for Subordinate Officers Part-I in the month of June, 1990 and Account Test for Subordinate Officers Part-I is pre-requisite qualification for promotion to the post of Senior Assistant. As per the General Rule 4(ii) of the Andhra Pradesh State and Subordinate Service Rules, 1962, a panel has to be drawn for promotion to the post of Senior Assistant and include all the eligible candidates for every year. Accordingly, a panel was prepared for the year 1989-90 and as the petitioner was eligible as on the date of constitution of the panel, his name was included in the panel for promotion to the post of Senior Assistant. Whereas the first respondent as on the date of constitution of panel for the year 1989-90, was not qualified for promotion to the post of Senior Assistant. Accordingly, the petitioner was promoted on 12-09-1990 as Senior Assistant due to administrative delay on the part of the official respondents and in fact, his promotion has to be preponed to the panel period from 01-11-1989 to 31-05-1990 as the vacancies of Senior Assistant were available during the said panel period and the petitioner was fully qualified to hold the post of Senior Assistant.

22. Subsequently, as the first respondent had passed the Accounts Test for Subordinate Officers Part-I, in the month of June, 1990, he was promoted as Senior Assistant on 1.7.1991. It is to be noted that the first respondent did not challenge the promotion orders of the petitioner from the post of Junior Assistant to the post of Senior Assistant and he challenged the promotion order of the petitioner as Superintendent and also to review the promotion in the category of

Senior Assistant, in the year 2001 before the Tribunal after a long lapse of time i.e. after 10 years. As per Section 21(1)(a) of the Administrative Tribunals Act, 1985, the Tribunal shall not admit an application, in a case where a final order such as is mentioned in Clause (a) of Sub-section (2) of Section 20 has been made in connection with the grievance unless the application is made, within one year from the date on which such final order has been made. Therefore, we are of the opinion that the O.A. filed by the first respondent was not in time and the same was barred by limitation. The contention of the learned Counsel for the first respondent that the first respondent had made representations dated 25-07-1995 and 25-09-2001 for revival of his seniority in the category of Senior Assistant as the petitioner was junior to him in the Junior Assistant cadre, cannot be sustained as those representations were made after five years of promotion of the petitioner to the post of Senior Assistant.

23. It is pertinent to note that when the panels were constituted for the promotions to the posts of Senior Assistant and Superintendent, the first respondent had not raised any objections. The Tribunal ought not to have observed that the Senior Assistant post is a non-selection post and that since the first respondent is senior to the petitioner in service and since the actual promotion was effected only on 26.9.1990 on which date the first respondent was fully qualified and eligible and promoting the petitioner is against the rules. The Tribunal has not followed the Rule 4(ii) of the Andhra Pradesh State and Subordinate Services Rules, 1962. As per the said Rule, the panels are relevant for the purpose of promotions. The observation of the Tribunal that the eligibility of the candidate has to be taken into consideration as on the date of filling up the vacancy, cannot be sustained as the petitioner was qualified to promote in the panel period from 1-11-1989 to 30-04-1990 and also panel period from 1-5-1990 to 31-08-1990, but however, due to administrative delay on the part of the official respondents, he was promoted on 26.9.1990. In view of the above facts and circumstances, particularly, on the ground of limitation, the impugned order is liable to be set aside. Hence, we are of the opinion that the impugned order suffers from legal infirmities and is liable to be set-aside.

24. The writ petition is allowed and the impugned order, dated 09-01-2003 in O.A. No. 6899 of 2001 passed by the Tribunal, is set-aside. No order as to costs.