

(1983) 02 BOM CK 0026
In the Bombay High Court
Case No : Writ petition No. 79 of 1979

K.B. Varade and Others

APPELLANT

Vs

Superintending Engineer and Others

RESPONDENT

Date of Decision : 18-02-1983

Acts Referred:

Constitution of India, 1950 — Article 226

Citation : (1983) 2 BomCR 176

Hon'ble Judges : R.A. Jahagirdar, J;M.P. Kanade, J

Bench : Division Bench

Advocate : L.V. Talaulikar, for the Appellant; D.P. Hedge and N.H. Gursahani, for the Respondent

Judgement

Jahagirdar, J.—The petitioners in this petition under Article 226 of the Constitution are employees of the Maharashtra State Electricity Board, hereinafter referred to as "the Board", and at the time when the petition was filed they were working in the category of Lower Division Clerks. The first respondent is the Superintending Engineer of the Sangli Circle Office of the Board while the Board itself has been joined as the second respondent in this petition. The other respondents are holding the posts of Upper Division Clerks and the orders appointing them as Upper Division Clerks are the subject-matter of challenge in this petition. The petitioners are seeking appointment as Upper Division Clerks and if some of them have already been appointed as Upper Division Clerks, they are seeking higher seniority in the cadre of Upper Division Clerks above the seniority enjoined by the respondent.

2. In order to appreciate the grievance made by the petitioners, it would be necessary to notice the channels of promotion in the establishment of the Board and in particular of the first respondent and also the Rules governing the recruitment, seniority and promotion of the employees of the Board. At the lowest rung of the ladder is the cadre of Lower Division Clerks. Above this cadre is the cadre of the Upper Division Clerks. Thereafter there is the cadre of

Assistant Accountants. Above it is the cadre of Divisional Accountants. From the cadre of the Divisional Accountants, a person will move, if he is promoted, to the cadre of Accounts Officer from where his portion is to the post of Joint Chief Accounts Officer. It may be mentioned that apart from promotion, a person may be directly recruited to the relevant cadre subject to certain terms and conditions mentioned in the rules. In this petition, however, we are concerned with the question of moving to the higher cadre by way of promotion and we will confine ourselves to that question.

3. Annexed to this petition are several orders passed between 5th of May, 1976 and 8th of August, 1978. Many of these orders are mutually inconsistent or mutually destructive of each other, but ultimately a state of affairs has come into existence with which the petitioners are aggrieved. It is the grievance of the petitioners that they have passed the qualifying examination earlier than many of the respondents and as a result they are entitled to be promoted in preference to the respondents from the posts of Lower Division Clerks to the posts of Upper Division Clerks. The second grievance of the petitioners is that some of them having been promoted earlier than most of the respondent or at any rate many of the respondents, they are entitled to be declared senior in the promoted cadre irrespective of their seniority in the lower cadre. The petitioners have also contended that they had been earlier promoted as Upper Division Clerks in vacancies which were in existence and had worked there continuously for two years or more. They were, therefore, entitled to be confirmed in those posts of Upper Division Clerks and they could not have been reverted to the posts of the Lower Division Clerks in order to make room for some of the respondents. This reversion amounts to reduction in the rank and is hit by Article 311, of the Constitution. These are mainly the grievance of the petitioners and they will have to be examined in the light of the relevant provisions governing the appointment, seniority and promotions of the employees of the Board.

4. Governing the field are the Maharashtra State Electricity Board Employees' Seniority Regulations, 1961 and the Maharashtra State Electricity Board Classification and Recruitment Regulations, 1961. The former will be referred to as "the Seniority Regulations" and the latter will be referred to as "the Recruitment Regulations." Regulation No. 3 of the Seniority Regulations mentions that seniority shall be based on the length of continuous service in the particular category. Regulation No. 4 provides that for purposes of fixing seniority, length of service shall be counted from the date of the order of appointment or of promotion and not the date of joining the post. At this stage it may be mentioned that some arguments have been advanced that the date of the order of appointment means the date of the order of appointment as such irrespective of whether the appointment was in officiating capacity or in what is called a regular capacity. Regulation No. 5 provides for the seniority among the candidates selected for appointment to posts at the same time in one batch of vacancies. It says that if a certain percentage of posts are reserved for direct recruitment and other for departmental promotions, the department appointees"

seniority shall be listed first in their order of seniority in the lower cadre inter se upto the extent of the percentage so reserved and they shall be followed in seniority by the direct recruits in the order of merit. In other words, if certain persons are promoted to a higher cadre simultaneously, they will carry with them the seniority which they enjoyed the lower cadre. Regulation No. 7 is of importance and it is in the following terms:

"Persons promoted earlier shall rank higher in the new category than those promoted later irrespective of their comparative seniority in the lower post before promotion".

This makes it clear that if two persons are in a lower category and if as a result of the rules governing the promotion one who is junior is promoted to a higher category, then he will have higher seniority than the other one who is promoted later though the latter one was senior in the lower cadre. But this is subject to one qualification and that is provided in Regulation No. 8 as follows:

"Where passing of a qualifying test within a given period is condition prescribed for continuance in a post, the date of passing the test at any time within the prescribed period shall not affect the inter se seniority in the category."

5. The provisions of Regulation No. 14 should also be mentioned. Regulation No. 14 says that when the date of the order of promotion is the same respect of any two or more employees of the same category who are promoted, the seniority of such employees shall be decided according to their seniority in the lower cadre at the time such promotion. The competent Selection Authority, however, has been given power to fix the seniority in the order of merits where the posts are filled by selection. One provision known as General Order No. 7 of the Personnel Department of the Board which has been annexed as Exhibit "A" to this petition, is also of importance. It deals with promotions to different categories of posts in the Accounts Department in the Head Office and in the Field offices. Paragraph 2.1 of the said General Order No. 7 mentions that candidates for posts of Lower Division Clerks in the Accounts as well as in non -Accounts Department will be required to submit to a written test which will be a common written examination in addition to their having to present themselves for interview before they are selected for appointment. Paragraph 3.1 of the said order provides as follows:

"All existing Lower Division Clerks as well as future entrants will be required to pass the Lower Accounts Examination for becoming eligible for promotion as Upper Division Clerk in the Accounts Department. In future no Lower Division Clerk will be promoted as Upper Division Clerk (Accounts) unless he passes the Lower Accounts Examination."

This makes it clear that promotion to the post of Upper Division Clerks is dependant entirely upon the person holding the post of Lower Division Clerk passing the Lower Accounts Examination. If he does not pass the said examination he will not be promoted to the post of the Upper Division Clerk. The examination is held twice in a year in the Head Office, in the Circle Office and in

the Divisional Offices and the examination is held in April and October. That is what is mentioned in paragraph 3.5 of this General Order. Paragraph 3.6 of the General Order must be reproduced :-

"No employee shall have more than 3 chances to appear for the Lower Accounts Examination."

A necessary corollary of the same paragraph is contained in paragraph 4.5 which mentions that no employee shall have more than 3 chances to appear for any or all papers.

6. Much debate has taken place earlier in this Court and also before us on the meaning of paragraph 3.6 and 4.5 of General Order No. 7. Probably this debate had taken place earlier also in the office of the Board and certain doubts had arisen. As a result, the Board issued a circular dated 13th of July, 1964, which is annexed to this petition as Exhibit "B". This circular mentions that as per the provisions of G.S.O. 110 dated 23/25-1-1962 and G.O. 7 dated 3-8-1962, employees both on Accounts and non Accounts side are given three consecutive chances to pass Lower/Higher Departmental Examination and qualify themselves for departmental promotions. The circular mentions that this had been interpreted by some employees to mean that once these three chances are exhausted, an employee is debarred from appearing for these examinations. The circular then , makes it clear that this was not the intention and it is clarified for the information of all concerned that unlimited chances can be taken for appearing for these examinations. Proceeding further, the circular says as follow:

"The only limitation is that the seniority will not be disturbed till three consecutive chances are exhausted and till then the employee junior to him is not promoted. No chance would be treated as "chance not lost" i.e. every chance not availed of for whatsoever reason, force majeure or otherwise, will be considered as lost."

7. One Regulation in the Recruitment Regulation should be briefly noted and that is Regulation No. 35(i) which provides that all appointments and promotion shall in the first instance be on probation for one year or for such longer period as may be prescribed by the competent authority even if the appointment is made in a clear vacancy. The period of probation may be extended by the competent authority. Continuance in the post or in the service as the case may be is dependant on the satisfactory completion of the probation period by the candidate.

8. Though the provisions which we have summarised above are fairly simple in nature, they have been the subject-matter of some controversy and decisions of all least four judgements by the Court. One particular provision which has given rise to litigation is the provision contained in General Order No. 7, paragraph 3.6 read with paragraph 4.5. Despite the clarification which was issued by the circular dated 13th July, 1964, some doubts relating to the correct meaning of the said provisions did remain. Fortunately we are relieved of covering the

ground again because some of the judgment which have preceded this one have already examined the above said provisions along with all other relevant provisions. We are left only the task of correctly understanding, interpreting and laying down the proposition which have emerged from the earlier judgments.

9. The first judgment to which we would make reference was delivered in Special Civil Application No. 3071 of 1973 decided on 18-11-1978 *Ramchandra Vyankatesh Joshi v. M.A. Subramanyam and another*, in that case, the petitioners had appeared and passed the departmental examination known as Lower Accounts Examination in November 1965. He had been observed as a Lower Division Clerks on 1st of April, 1963. He was promoted to the post Upper Division Clerk in an officiating capacity on 30th of April, 1965. It is after being promoted in an officiating capacity as an Upper Division Clerk that he has passed the Lower Accounts Examination, which is a qualifying examination. However, he was subsequently confirmed as Upper Division Clerk on 17th of January, 1966. At this stage it may be mentioned that according to the facts mentioned in that judgment and according to the statement made at the bar before us, the promotion from the post of the Upper Division Clerk to the post of Assistant Accountant is on the basis of seniority and no qualifying examination need be passed for being so promoted. However, if a person has not passed the Lower Accounts Examination then naturally he would not hold the substantive post in the category of the Upper Division Clerk and, therefore, he would not naturally be promoted to the category of Assistant Accountant. In *Ramchandra Vyankatesh Joshi's* case, he had been confirmed as Upper Division Clerk after he had passed the Lower Accounts Examination. Subsequently he was promoted as officiating Assistant Accountant on 18th of May, 1968 and after he had passed the Higher Accounts Examination, which was the qualifying examination for being promoted to the post of the Divisional Accountant's post, he was promoted to the post on 25th of July, 1972. However, that promotion was in the capacity of an officiating Divisional Accountant. Subsequently on 13th of November, 1973, he was reverted to the post of the Assistant Accountant. That order of reversion was challenged on the ground that some of the respondent who had been promoted to the post of the Divisional Accountants had passed the qualifying examination, namely the Higher Accounts Examination, much later than the petitioner in that case.

10. It may be stated that neither the petitioner in that case nor any of the respondents had passed the qualifying examination within the three consecutive attempts which were permitted by paragraph 3.5 of the General Order No. 7. *Dharmadhikari, J.*, (along with *Kurdukar, J.*), delivering the judgment held that General Order No. 7 read with the clarification did not debar a person from being promoted if at any stage he had passed the qualifying examination. However, if he does not pass the qualifying examination within the three consecutive attempts permitted, then his seniority would necessarily be affected. Therefore, a person who is senior but who has not passed the qualifying examination in the three consecutive attempts would lose his seniority to a person who, though

junior to him, has passed the qualifying examination in the three consecutive attempts. However, among those who have not passed the qualifying examination in the three consecutive attempts, only that person who passes the examination first will be entitled to promotion prior to a person who passes the qualifying examination later. The judgment proceeded to mention that "though it is true that neither the petitioner nor respondents Nos. 3 to 7 had passed the examination in three chances, it cannot be forgotten that the petitioner had passed the examination earlier and respondent Nos. 3 to 7 did not belong to the category of senior person who had passed the qualifying examination within permissible three chances". Interpreting the circular dated 17th of February, 1965, on which the reliance in fact was placed by the Board itself, the Division Bench held that the intention of the Board was that a junior employee who is promoted on his having passed the departmental examination should continue to officiate only so long as the person senior to him, who has also passed the examination within his three chances is not available. This meant that those person who passed the qualifying examination within the three chances available carry the seniority to the higher cadre, but a person failing to pass the requisite examination within the three chances will lose the seniority in the promotion post qua a person who is already promoted after passing the requisite examination.

11. Subsequently, the rules come again for interpretation before a Division Bench consisting of Deshpande. C.J. and Mrs. Sujata Manohar, J. in (Writ Petition No. 2947 of 1979, which was decided on 21st March, 1981). As a result of the judgment of this Court in Ramchandra Vyankatesh Joshi's case, the petitioner in the Writ Petition No. 2947 of 1979 were affected in the list of seniority which was prepared. The petitioner in the Writ Petition No. 2947 of 1979 had not been made parties to the petition where Ramchandra Vyankatesh Joshi was a petitioner. The order passed in the Ramchandra Vyankatesh Joshi's case affected the seniority of the petitioner in the Writ Petition No. 2947 of 1979 herein referred to as (N.S. Pathak's case) it was noticed by Deshpande, C.J., who delivered the judgment, that the petitioner before the Court had passed the qualifying examination earlier than the respondents. They had also been promoted earlier than the respondents, though in an officiating capacity. It was held that irrespective of the position as to whether a person is promoted in an officiating capacity or in a regular capacity he would be entitled to retain his seniority in the promoted post if he had passed the qualifying examination earlier than the others in the same cadre. The proposition laid down in Ramchandra Vyankatesh Joshi's case that a person passing the qualifying examination earlier, though he may not have passed in the three consecutive chances, is entitled to be promoted in preference to the one who passes the qualifying examination later was affirmed by the Division Bench in N.S. Pathak's case. It was also laid down that it does not make any difference as to whether the person so promoted holds the post in an officiating or regular capacity. The vagaries of confirmation could not be allowed to affect the position of the person who has attained the said position by virtue of his passing a qualifying examination earlier than the

others. The Division Bench noticed that when any vacancy arises in the cadre of a Divisional Accountant, the senior most Assistant Accountant would get promotion to that post only if he has passed the qualifying examination. If not, the vacancy is liable to be filled in by his so qualified junior. Proceeding further, it was held that his senior or seniors could be able to claim promotion in that vacancy on passing the examination thereafter if he or any one of such seniors has not by that time availed of three consecutive chances and any of such chances is still surviving. The senior most Assistant Accountant was liable to lose his seniority as against his junior who had passed by that time and the opportunity of promotion based thereon, if the senior most had by that time too fail to the three chances. However, it was opened to the senior person to claim the next vacancy if he passes the examination by that time. This position was held to be the true interpretation of the words "the only limitation is that the seniority will not be disturbed till three consecutive chances are exhausted and till then the employee junior to him is not promoted".

12. Summarising, therefore, it can be said that in N.S. Pathak's case it was held, as it had been earlier held in Ramchandra Vyankatesh Joshi's case, that if a person has not passed the qualifying examination in the three consecutive chances then he would be thrown into the common pool. From the common pool if any junior person passes the qualifying examination earlier, then that junior will be entitled to promotion in preference to the senior who had not passed the qualifying examination. However, the senior person is not bereft of all hopes because at any other later time he can still pass the higher cadre. However, in view of the fact that he has failed to pass the qualifying examination in the first three chances and also that he had failed to pass the qualifying examination before his junior has passed the same, he would be losing in the higher cadre which he possessed in the lower cadre.

13. The second proposition which was laid down in N.S. Pathak's case was that the starting point for counting the seniority in a cadre is not the date on which a person who holds the post in a confirmed capacity or what is called a regular capacity, but the date on which he is promoted after he has passed the qualifying examination. This was held to be the direct result of Regulation No. 3 of the Seniority Regulation which mentions that seniority shall be based on the length of continuous service in a particular category and also of Regulation No. 4 which mentions that for purposes of fixing seniority, length of service shall be counted from the date of order of appointment or of promotion and not the date of joining the post.

14. In N.S. Pathak's case, an earlier judgment of another Division Bench of this Court in Special Civil Application No. 1111 of 1973 V.G. Kulkarni v. Maharashtra State Electricity Board, decided on 22nd of November, 1974 by Deshmukh and Lentin, JJ., was noticed. It was also held that the said judgment did not in any way affect the proposition laid down by the Division Bench in Ramchandra Vyankatesh Joshi's case. In fact it was pointed out that the Seniority Regulation

did not admit of any conception of "regular" promotion. On the contrary, it was held that continuous officiation in any post alone is determinative of seniority under Clause 3, 7 and 11 of the Seniority Regulations. The Division Bench also took note of a decision given by another Division Bench consisting of Ginwala and Palshikar, JJ., on 29th October, 1980 (In Special Civil Application No. 2758 of 1976)4.

15. We have thus seen all the four judgments delivered earlier by this Court on the interpretation of the rules governing the service conditions of the employees of the Board in particular those conditions touching upon the seniority and the promotion from the lower cadre to the higher cadre. We respectfully agree with what has been laid down in all these decision and the propositions which have emerged from this decision will be summarised by us shortly. In our opinion, the proposition which have emerged from these decisions lay down the correct interpretations of the Rules. The propositions laid down in the different judgments are not only not mutually in consistent with each other but they are wholly consistent with each other. In our opinion, the following would be the proposition which can be laid down by way of interpretation of the various circulars to which we have already made reference above :

(1) No promotion from a lower cadre to a higher cadre can be given to a person without his passing the qualifying examination. (Paragraph 2.1 and 3.1 of General Order No. 7) :

(2) All persons who pass the qualifying examination within three consecutive chances will carry with them to the higher cadre the seniority which they had held in the lower cadre. This means that the persons who have passed the qualifying examination in any of the three consecutive chances will be promoted and their inter se seniority will not be distributed;

(3) Almost those employees who have failed to pass the qualifying examination in the three consecutive chances, those persons who pass the qualifying examination earlier will be entitled to be promoted prior to those who pass the qualifying examination later. Since seniority is not a qualification for promotion, those who are thus promoted having passed the qualifying examination (though not within three consecutive chances) will not be disturbed in their seniority by persons who are promoted later and who were senior in the lower cadre;

(4) A person who is already promoted to the higher cadre after having passed the qualifying examination will retain his position in the higher cadre, whether it is in an officiating capacity or regular capacity, and will not yield the same to another person who joins the higher cadre after passing the qualifying examination later and who might have been otherwise senior in the lower cadre;

(5). If at any particular time a person has passed the qualifying examination a vacancy is not immediately available, he will be promoted whenever vacancy is available and his such chance of promotion is not jeopardised by the fact that a person who is senior to him in the lower cadre has in the mean time passed the

qualifying examination. In other words, this is only a reaffirmation of the principle contained in proposition No. 4 above.

16. In this petition several facts have been alleged. The affidavit in reply has also been filed, but we do not intend to examine the case of each and every employee. We have laid down the propositions above after carefully examining all the provisions and the different judgment which have been already delivered on this subject. The authorities concerned will now proceed to pass appropriate orders of promotion and fixation of seniority on the basis of the above propositions.

17. To this extent the petition succeeds. Respondents Nos. 1 and 2 are hereby directed to pass appropriate orders of promotion and fixation of seniority in accordance with the proposition laid down above. In the process some persons may have to be reverted and other persons may have to be promoted. They will be justified in doing it so long as all such orders conform to the propositions laid down above.

There will be no order as to costs in this petition.