(1976) 03 MAD CK 0028

In the Madras High Court

M.S. Narayanan, Etc., Etc. APPELLANT

Vs

Accountant-General I and Others RESPONDENT

Date of Decision : 24-03-1976

Acts Referred:
Constitution of India, 1950 — Article 148, 309

Citation : (1976) 1 LLJ 501

Hon'ble Judges : Ramanujam, J

Bench : Single Bench

Judgement

Ramanujam, J.—As these three writ petitions are connected, they are dealt with together,

2. The petitioners are auditors in the office of the Accountant-General, I, Tamilnadu, the first respondent in these petitions. One of their avenues of

promotion is post of Section Officer which is a selection post. For such a promotion one of the requirements is that one should have passed the

S.A.S. examination Parts I and II held by the third respondent which is conducted practically every year. The qualification for taking the S.A.S.

examination Part II are as follows :

(1) A pass in Part I of the S.A.S. examination.

(2) Three months training in Public Works Division.

3. The petitioners possess these qualifications and they applied for admission to the S.A.S. examination Part II scheduled to be held in November,

1074. But they were intimated that the departments has not accepted their candidature for the said S.A.S. Part II examination. As regards the

petitioner in W.P. No 3677 of 1974, it is said that the reason for not permitting him to write the examination is that disciplinary proceedings had been initiated against him for an alleged misconduct. As regards the petitioner in W.P. No. 3678 of 1974 it is said that the reason is that he is under

suspension with effect from 17-11-1973 pending a disciplinary action initiated against him. As regards the petitioner in W.P. No. 3679 of 1974, it

is said that the reason is the pendency of certain disciplinary proceedings against him. Aggrieved against the orders withholding the petitioners''

candidature for the said S.A.S, examination Part II. they have approached this Court seeking to quash the said orders.

4. The common case of the petitioners is that the pendency of the disciplinary action against them is not a ground for not allowing them to appear

for the examination, that in the event of their being exonerated ultimately in the said disciplinary proceedings they would have lost an opportunity to

qualify themselves for promotion, and that they will be rendered juniors to those who successfully write the examination, with the consequence of

their chances of promotion pending. According to the petitioners, under the Manual of Standing Orders of the Comptroller and Auditor General,

the seniority is accorded to candidate passing the S.A.S. examination depending upon the date of passing the same which is termed as "" batch

seniority "" and if the petitioners are not allowed to pass the S.A.S. Part II examination, they will definitely lose their seniority and their juniors will

have a march over them if they happen to pass the S.A.S. examination as the seniority for promotion to the post of Section Officer from the

Auditors is with reference to the date on which they pass the said examination. It is said that by preventing the petitioners from writing the

examination the respondents have in effect prevented them from acquiring qualification for the post of Section Officers, that inasmuch as the orders

of the respondents preventing the petitioners from writing the examination effects their right to seniority without any opportunity afforded to them,

the same is violative of the principles of natural justice and that in any event, the pendency of disciplinary action against the petitioners cannot be a

ground for preventing them from writing the examination. It is also stated on behalf of the petitioner; that the power of the third respondent being

confined only to regulate the scheme and syllabus for the S.A.S. examination, he has exceeded his jurisdiction in directing the deletion of the names

of the petitioners from the list of persons permitted to write the examination, That in any event having regard to the order, dated 31-8-1960 of the

Government of India, Ministry of Home Affairs directing that the suspension and pendency of disciplinary proceedings should not be a bar to

consideration for promotion, neither the suspension nor the pendency of disciplinary proceedings could be taken to be a bar to their right to sit for

the examination, that in pursuance of the said order of the Government of India, the Director General. Posts and Telegraphs has issued a directive

that Posts and Telegraphs employees should be permitted to sit for the departmental examination even during the pendency of suspension and

disciplinary proceedings and that a separate yardstick cannot be applied for the Accounts Department, another wing of the Government of India.

The petitioners also contend that once they had been permitted to write Part I examination, they cannot be prevented from writing Part II

examination.

5. In the counter-affidavits filed by the respondents the stand taken is that as the petitioners did not satisfy the essential conditions laid down in

Chapter V of the Comptroller and Auditor General''s Manual of Standing Orders (Administrative) Volume I (hereinafter referred to as M.S.O.)

where they were not given the necessary certificates authorising them to write the examination and that, therefore, the proceedings impugned in

these writ petitions are legal and valid. As regards the avenue of promotion for an auditor, it is said that there are two avenues, one promotion as a

selection grade auditor without his being required to pass any examination and (2) promotion as Section Officer in the Subordinate Accounts

Service if he passes the S.A.S. examination and is also otherwise suitable for the post. It is also stated that so far no rules had been framed under

Article 309 of the Constitution read with Article 148(5) regulating appointment to the above categories of posts and, therefore, the third

respondent had framed the necessary rules in exercise of the power conferred on him by the order of the Government of India, Finance

Department, dated 21-7-1919. Therefore, the third respondent had the requisite power to frame rules for examination of candidates to the S.A.S.

establishments in his office and all offices subordinate to him. including the power to prescribe conditions of eligibility and fitness for the

examination. The rules framed in this regard by the third respondent are contained in Chapter V of the M.S.O. according to which if a candidate satisfies the conditions relating to eligibility, he has no claim to appear for the examination unless the head of the office is personally satisfied as to

his fitness to sit for the examination with reference to the qualities mentioned in paragraph 207, namely, regularity in attendance, possession of good

moral character and business-like habits, possessing the aptitude for the work relating to the Subordinate Accounts Service and reasonable

prospect of passing the examination, etc. It is said that the petitioners lacked all these qualities and, therefore, they were not selected for writing the

examination in question. As regards the allegation of the petitioners that they have been prevented from writing the examination because of the

pendency of the disciplinary proceedings, it is said that the pendency of the disciplinary proceedings was not taken as a ground for not allowing the

petitioners to sit at the examination and that they had not been allowed because the head of the department was not satisfied to the fitness of each

of them to sit at the examination, with reference ,to the character roles, personal files and other confidence records. Thus the respondents'' stand is

that the decision not to permit the petitioner to write the examination was arrived at alter due consideration of the relevant materials set out in

paragraph 207 of the M.S.O. and on due application of mind to the facts of these cases and that they have no claim to sit for the examination as of

right.

6. As regards the petitioners'' reliance on the orders of the Government of India, Ministry of Home Affairs, dated 31-8-60 directing that

suspension or pendency of disciplinary proceedings will not stand in the way of concerned person being considered for promotion, the respondents

state that it has no relevance to the procedure to be followed for selecting candidates for appearance at the departmental examination, that it

related only to the procedure to be followed at the time of promotions, and that even if the Posts and Telegraphs Department has issued a directive

to follow the said procedure in the matter of admission to the departmental examination, that cannot be taken as a ground for permitting the

petitioners to sit for the S.A.S. Part II examination. Even the Government of India directive, dated 31-8-1960 will not automatically apply to the

employees of the Indian Audit and Accounts Department, for any administrative order issued by the Government of India can be made allocable to the audit employees only after consultation with the Comptroller and Auditor General of India, and there has been no such consultation. In the

counter-affidavit and the justification and purpose of providing a code of conduct and behaviour as the basis for allowing the auditors to sit for the

examination is said to be this.

The conduct of the S.A.S. examination is for the purpose of selecting suitable persons to man the post of Section Officers the incumbents of which

have to exercise supervisory functions.... Persons to be appointed to the post of Section Officer should in the opinion of the appointing authority

possess ability, character and experience and to discharge adequately and efficiently the duties required of an incumbent of the post of Section

Officer.

The head of the office has, therefore, to satisfy himself personally that the person selected to appear for the examination is fit in all respects and that

if he succeeds in the examination, he is likely to be efficient in all the duties of the post of Section Officer. It is said that the very principle of

selection would become meaningless if persons like the petitioners are allowed to sit for the examination and that there being no limit on the number

of chances for taking Part II examination, they can avail of the chances of writing the examination in coming years subject to their being found fit by

the competent authority.

7. Before consideration the above rival contentions on merits it is necessary to set out the relevant paragraphs on the M.S.O.

8. Chapter V of the Comptroller and Auditor General''s Manual of Standing Orders (M.S.O.) Volume I deals with the Subordinate Accounts

Service, Paragraph 178 provides the appointment to the Subordinate Accounts Service are made by the Accountant-General, etc., partly by

continuation of eligible apprentices S.A.S. Accountants on probation but mainly by promotion of eligible clerks in their office and the Divisional

Accountants under their control subject to the condition that the eligible persons are also qualified in the opinion of the appointing authority of

ability, character and experience to discharge adequately and efficiently the duties required of the incumbent of a post in the Subordinate Accounts

Service. Paragraph 180 says that no person who has not passed the departmental examination prescribed in Section II of the Chapter is eligible for appointment to the Subordinate Accounts Service. Paragraph 182 directs that no S.A.S. passed person should be allowed to officiate in the

Subordinate to Accounts Service till he has done his G months training in a Public Works Division, Paragraph 184(2) provides that a clerk or

Divisional Accountant who passed the S.A.S. Examination in an earlier examination will have precedence in appointment to the Subordinate

Accounts Service over a person who possess in a later examination as amongst persons who pass in the same examination, the one senior in the

clerical grade will have a prior claim for such appointment. Paragraphs 194 to 203 in Section II of Chapter V deals with regulations for

departmental examinations qualifying for appointment to the Subordinate Accounts Service which is contemplated in paragraph 180. Paragraph

195 states that departmental examination qualifying for appointment as S.A.S. is divided into two parts and an examination in both the parts is

normally held once a year in November for all Audit and Accounts Officers in all branches on dates notified by the Comptroller and Auditor-

General. Paragraph 197 provides that subject to the various instructions issued by the Comptroller and Auditor General from time to time and also

subject to his approval, the Accounts General or Heads of Offices may permit the candidates in their offices to appear for the appropriate branch

of the S.A.S. examination provided they are otherwise eligible to take the examination. The note under the said paragraph is as follows:

Candidate under suspension should not be allowed to sit for the examination.

Paragraph 190 provides that the primary responsibility of selecting candidates for the examination vests with the head or the office who may,

however, be aided by an Advisory Committee in the discharge of this responsibility and that with a view to determine the suitability or otherwise of

the candidate taking the examination for the first time, the head of the office should screen the prospective candidates by invariably holding a

preliminary that which should not be an elaborate one. Paragraph 199 then proceeds to say that the essential condition governing the selection of

candidates for the examination by the Accountant-General or other heads of offices is that the candidates selected shall, if qualified by examination,

is likely to be efficient in all the duties of the Subordinate Accounts Service. Paragraph 200 fixed a minimum number of three years service and a maximum age limit of 48 years for admission to the examination. Paragraph 207 stated that candidates satisfying the conditions set out in

paragraphs 197 to 201 though eligible, have no claim to appear for the examination and the heads of offices should satisfy themselves while

recommending candidates that they are regular in attendance, energetic, good moral character and business like habits are not likely to be

disqualified for appointment to the Subordinate Accounts Service as not possessing the aptitude for the work of a holder of a post in the

Subordinate Accounts Service and that they have & reasonable prospect of passing the examination. Paragraph 208 gives a right of appeal to the

candidates rejected by the head of the office on three occasions or permanently against such rejection to the Comptroller and Auditor-General

whose decisions shall be final. It is in the light of the above provisions of the M.S.O. the rival contentions of parties have to be dealt with.

9. There is no dispute that the petitioners have the requisite qualification for writing the S.A.S. examination Part II. The affidavits in support of the

writ petitions proceed on the basis that the petitioners have been prevented from writing the examination only because the disciplinary proceedings

are pending against them. But having regard to the stand taken in the "" counter-affidavit of the respondents that the pendency of the disciplinary

proceedings was not the ground for preventing them from writing Part II examination and that the reason for such prevention is that the petition in

W.P. 3677 of 1974 and 3679 of 1974 did not possess the requisite qualities set out in paragraph 207 and the petition in W.P. No. 3678 of 1974

is under suspension as also lacked the requisite qualities set out in paragraph 207. Therefore we have to see whether the orders of the respondents

preventing the petitioners from taking the examination on the ground that they did not satisfy the requirements contemplated by paragraph 207 is

tenable.

10. The learned Counsel for the petitioners contends that paragraph 207 is bad as it affects the right of the petitioners under paragraph 184(2)

which confers certain benefits on those who pass the S.A.S. examination earlier in point of time and that the note appended to paragraph 197

stating that candidates under suspension should not be allowed to sit for the examination is also equally bad for the reason that the pendency of an order of suspension has no real nexus with the right of the petitioner to acquire the requisite qualification by passing the S.A.S. examination and that

the said note is not also in consonance with the directive issued by the Government of India dated 31-8-1960 stating that the pendency of

disciplinary proceedings cannot stand in the way of the person concerned being considered for promotion. It is also pointed out that a pass in the

S.A.S. Part II examination is not only a must for getting promotion to the post of Section Officer, but also enables and entitles the concerned

person to get additional remuneration, that the orders of the respondents preventing the petitioners from writing the said examination thus virtually

deprives them of a right to get promotion or a higher salary and that as such the petitioners cannot be prevented from writing the examination on

the basis of the criteria laid down in paragraph 207 or on the ground that the suspension is in operation.

11. Reliance is placed by the learned Counsel for the petitioners on the decision of the Maharashtra High Court in Viswanath v. Comptroller &

Auditor General of India (1975) M.L.J. 876. In that case, the petitioner, an auditor was duly qualified to write the Revenue Audit examination but

he was not allowed to write the said examination in the year 1974. He, therefore, approached the Court for suitable relief. The defence to that writ

petition was that the petitioner having taken part in the one day''s strike he was not allowed to write examination as there was break in. service.

The Court, after referring to the provisions of the Central Services (Classification,. Control and Appeal) Rules, 1965 Central Civil Servants

Conduct Rules, 1964 and the Fundamental Rules expressed the view that having regard to the scheme under which the said examination was

conducted which is not one for promotion but one for providing efficiency and incentive in the matter of their work and duty the benefit of the same

cannot be withheld. The relevant observations of the learned Judges are those :

The scheme indicated by the circular produced at Annexure 2 undoubtedly is a scheme for providing intensified training and further providing for

departmental examination so as to better efficiency in the matters of audit under the Comptroller and Auditor General. This is the motivations

behind the scheme. However, it is absolutely clear that the substance of the scheme is that upper division clerks should be provided for training for a period of six weeks on the subject stated in the syllabus and that if they have to appear for examination as in case of success making them

entitled to get two advance increments in their pay and salary. To read, therefore, in the scheme certain basic conditions permitting advancement in

the matter of pay and salary as well bettering the efficiency in the discharge of duties attached in these posts. These are valuable adjuncts having

practical and material orientations. It is not a mere matter of chance or choice. Given opportunity of training leading unto success increments in

salary are assured. Everyone entitled under the scheme will have to be afforded equal opportunity in these regards. If there be any scope for

selection in such matter and use of discretion that cannot be arbitrary, capricious if un-guided. Withholding this facility in the garb of using discretion

may in a given case affect the very matters of equality of opportunity and may also prove punitive.... Even a person who may having adverse

remarks in the confidential record may not; be out of the test of this eligibility mentioned in paragraph 3 and paragraph 5, because obviously this is

not a scheme for promotion but providing for efficiency and incentive to the Government servants in the matter of their work and duty. Surely,

therefore, the remarks in the confidential record of given employee will not be a condition of eligibility with regard to these matters. Even such an

employee would be expected to be efficient and to know his job better and even be permitted, provided he undergoes the training and takes the

test to get better emoluments in the same post. That cannot be denied to him on any other extraneous consideration.

The learned Judges proceeded to say further:

The matter of training and the matter of examination being of consequence as it furthers the entitlement of the civil servant in getting two advance

increments, we feel, that same could not have been denied except by following the minimum principles of fairness in this regard in that the

petitioners were entitled to know on what ground they were being denied this opportunity...before withdrawing the permission or refusing it

minimum expected is that the person affected is communicated the grounds on which such action is proposed and his explanation sought and

further that an order indicating the reason eventually made by the competent authority.

The above decision proceeds on the basis that even a person having an adverse remark had a right to appear for the departmental examination if

be satisfies the conditions for eligibility, that the same being for general benefit and advantage, the opportunity there-under could not be denied to a

public servant satisfying the conditions for eligibility, and that any action depriving a public servant of such an advantage or opportunity which is

part of the matter of his employment, can be reviewed by the Court and the appropriate relief given. The learned Judges, however, seem to say

that if it is a scheme for promotion, different considerations have to be applied.

12. The learned Counsel for the petitioners also submits that though promotion to the post of Section Officers and selection posts cannot be

claimed as of right, the petitioners cannot be prevented from acquiring the requisite qualification for the purpose of promotion or for getting

additional remuneration in an arbitrary manner, that the refusal to permit the petitioners from writing the S.A.S. examination Part II on the ground

that they do not have the requisite ability, character and experience to discharge adequately and efficiently the duties required of the incumbent of

the post in S.A.S. as provided in paragraph 207 is arbitrary, and that the fitness of a candidate to sit for the examination is decided with reference

to (1) not having the aptitude for the work of the higher post, and (2) no reasonable prospect of passing the examination. The learned Counsel

further submits that the fight to acquire a qualification either for getting an additional remuneration or for getting a promotion to a higher post is a

right inherited in all the members of service and that right cannot be taken away in the case of some members alone on the ground that they are not

regular in attendance, energetic or of good moral character and of business like habits, that these factors are extraneous and have no nexus to the

eligibility for the examination. It is also said that the rejecting of candidate for entry into the examination on the ground that he did not possess

aptitude for the work-of a higher post or that he has no reasonable prospect of passing the examination is clearly illegal in that even at the state of

the acquisition of qualification for a post, his possible future conduct in the higher post if appointed as also the possibility of his not passing those

examinations are taken into account.

13. Mr. Parasaran, learned Counsel for the respondents, however, points out that

the petitioners cannot claim to appear for the S.A.S.

examination as a matter of right as has been clearly stated in paragraph 207, that they have only a right to be considered for admission to the

examination with reference to the criteria laid down in the said paragraph, that if the petitioners are found not to satisfy the said criteria, the

respondents are justified in withholding the necessary certificate contemplated in paragraph 197, that the refusal to permit the petitioners to sit for

the examination has no civil or penal consequences and, therefore, the petitioners cannot question the authority of the respondents not to allow

them to sit for the examination. It is stated that the files relating to the petitioners indicated indiscipline and, therefore, they were not considered fit

for writing the examination. However, the contention of Mr. Parasaran seems to overlook the note under paragraph 298(a), which entitled the

S.A.S. passed clerks to enhanced rates of increments instead of the normal rates from the date on which they are declared successful in the S.A.S.

examination. Part II. Therefore, the refusal to permit the petitioners from writing the S.A.S. examination Part II can be said to result in civil

consequences and that by such rejection the petitioners are deprived of an opportunity of earning an additional remuneration by passing the said

examination as a matter of right but the persons already in service are entitled to equal opportunity to acquire the requisite qualifications for the

purpose of promotion or for getting an additional remuneration or a special pay. If such a person is deprived of his right to acquire a qualification

which helps him to get a promotion or set, a higher salary that should be for a substantial and reasonable ground. The reasons for withholding the

requisite certificate contemplated under paragraph 197 set out in paragraph 207 such as regular in attendance, energetic, or good moral character

and business like habits are likely to be disqualified for promotion are all vague and are incapable of precise connotation and such vague and

indefinite factors will vary with each individual and, therefore, they cannot be reasonably be taken in the matter of deciding the fitness of candidates

to write the S.A.S. examination. Two other factors which are mentioned in paragraph 207 are also equally untenable as the fitness for writing the

examination is decided with reference to the future events such as the petitioner''s aptitude for the work in the superior post if selected, and the reasonable prospect of his passing the examination. It is not known how before a person''s entry into the examination can be prevented for the

reason that he is not likely to succeed in the examination. Only if he is allowed to write the examination one can judge his performance accurately

and if a person is to be prevented from writing the examination on the ground that his Head of the department thought that he is not likely to pass

the examination, then there is an arbitrary exercise of a power which depends only upon his subjective satisfaction. It is also pertinent that if the

petitioners pass the S.A.S. Part II examination, they acquire seniority over others with reference to the date of their passing the examination under

paragraph 184(2). By withholding the certificate of fitness the head of department virtually deprived the petitioners of such a valuable right which is

conferred under Rule 184(2) they cannot claim such a right without reference to the other paragraphs of the M.S.O. and that paragraph 184(2)

has to read subject to paragraphs 190 and 207. It is unnecessary to decide this controversy as to whether the petitioners can claim the benefit of

paragraph 184(2) at this stage without reference to the other provisions in the M.S.O. I am of the view that the petitioners are entitled to make a

grievance that their right to get additional emoluments on passing the S.A.S. Part II examination is sought to be taken away with reference to the

factors set out in paragraph 207 which are somewhat vague and not precise. The pendency of disciplinary proceedings against the petitioners or

the fact that their conduct is not such as to consider them fit for promotion; cannot stand in the way of their acquiring a qualification for getting

additional remuneration. Even if the respondent''s case is that in the matter of promotion the factors set out in paragraph 207 are relevant is

accepted those factors may not stand in the way of the petitioners acquiring a qualification for getting additional remuneration though not

promotion. I am inclined to agree, therefore, with the view expressed by the Division Bench of the Maharashtra High Court in Viswanath v.

Comptroller and Auditor General of India 1975 Mh.L.J. 876 . As pointed out in that case acquiring a qualification for getting a higher pay is a

valuable adjunct to the conditions of service, and it is not a mere matter of chance or choice and that all persons in a particular service should have

equal opportunity of either acquiring the necessary training or qualification for leading to successive increments in salary, and even if there is any scope for selection in such matters the discretion in the matter of selection cannot be arbitrary and un-guided. Withholding the facility of acquiring a

higher qualification in the garb of using a discretion may in some cases prove punitive. Once the conditions of eligibility are satisfied, withholding of

the facility on the basis of some subjective criteria set out in paragraph 207 which are vague and indefinite appear to be quite unreasonable. If

really the factors referred to in paragraph 207 are to be taken into account to prevent a person acquiring a qualification for his betterment in the

service, then the person concerned should have an opportunity to say that the factors referred to in the said paragraph do not exist in his case and,

therefore, he is entitled to be permitted for writing the examination for purpose of acquiring the qualification. There is considerable force in the

contention of the learned Counsel for the petitioners that if the pendency of disciplinary proceedings or the existence of the factors referred to in

paragraph 207 are taken into account to prevent an employee from acquiring a qualification, then in the event of his being exonerated in the

disciplinary proceedings or in the event of the person correcting himself and making himself fit for writing the examination, he would have been put

to considerable disadvantage in that his juniors who had been permitted to write the examination earlier and had thus acquired the qualification will

supersede him in the matter of promotion. I have to, therefore, hold that paragraph 207 which takes in certain vague and indecisive factors as a

condition precedent are allowing an employee to write the examination for qualifying himself to the superior cadre or to a higher salary has to be

struck down as unreasonable. This will be the position whether the provisions in the M.S.O. are statutory or not.

14. The learned Counsel for the respondents refers to a decision of the Patna High Court in C.W.J. Case No. 1725 of 1974 wherein the Court

has held that Auditors such as the petitioners cannot claim as of right that they should be permitted to sit for the S.A.S. examination and that

paragraph 207 enables the head of the department to select candidates for the S.A.S. examination with reference to the criteria laid down in that

paragraph. In the said case the validity of paragraph 207 has not been challenged as has been done in this case. There the learned Judges

proceeded on the basis that paragraph 207 is valid and enforceable and that, therefore, unless an employee satisfies the requirements set out in that paragraph, he has no right to claim to sit for the examination as of right.

15. On a due consideration of the matter I hold that though in the matter of promotion the subjective satisfaction of the head of the department with

reference to the criteria laid down in paragraph 207 could be sustained, the same cannot be sustained in the matter of acquisition of a qualification

for the higher post by persons in service in the lower category. That will prevent them from getting a chance of promotion of the benefits of higher

salary to which they will be entitled if they get that qualification, and such a prevention will be punitive in character. I have to, therefore, hold that

paragraph 207 is invalid as being unreasonable.

16. The writ petitions are, therefore allowed. There will, however, be no order as to costs.