

(1981) 08 KAR CK 0042
In the Karnataka High Court
Case No : WP 5040/78

Munireddy, M.

APPELLANT

Vs

State of Karnataka and Others

RESPONDENT

Date of Decision : 17-08-1981

Acts Referred:

Karnataka Civil Services Rules, 1958 — Rule 43

Citation : (1981) 2 KarLJ 417

Hon'ble Judges : M. Rama Jois, J

Judgement

1. In this writ petition the following question of law arises for consideration:

When a post in any of the services of this State is upgraded, whether the person, who held the post before such upgradation, should be deemed to have been appointed to the upgraded post and consequently entitled to the higher pay scale fixed for the upgraded post?

2. The facts of the case, in brief, are as follows:

(1) The petitioner was manager on the establishment of the Government Law College, Bangalore. The post was a Class III post. It carried the pay scale of Rs. 150-8-190-10-270 in accordance with the Mysore Civil Services (Revised Pay) Rules, 1961. The pay scales applicable to all the civil servants of this State were revised by the Karnataka Civil Services (Revised Pay) Rules, 1970. These rules came into force with effect from 1st January, 1970. By virtue of Rule 4 of the said Rules the civil servants were entitled to the revised pay as specified against the concerned post in the schedule to the said rules. The relevant portion of the schedule to the rules applicable to the Law College reads as follows:

"Schedule to the Mysore Civil Services (Revised Pay) Rules, 1970 Vide Page No. 52 (2) The above particulars indicate that a revised pay scale of Rs. 275-550 was accorded to the post of the Manager subject to the upgradation of the post to Class-II. The remarks implied that the proposal to upgrade the post to Class-II was under consideration of the Government and therefore no revised pay scale

applicable to the post as a Class-III post, was indicated in the schedule. Shortly, after the promulgation of the Revised pay rules, the Government issued an order dated 30th July 1971 (Exhibit-C). It reads:

Sl.No. Designation Existing Scale of Pay Revised Scale of Pay Remarks

1. Professor/ Principal 1000-75-1225 1300-60-1600-50-1800
2. Professor 400-30-700-40-900 500-30-650-40-850-EB-50-1000
3. Manager 150-8-190-10-270 275 20-375-EB 25-550 If upgraded to Class-11"

"Proceedings of the Government of Mysore

Subject: Government Law College-Upgrading the Post of the Manager, Government Law College from Class-III to Class II.

Order No. ED. 190 DGO 70 Bangalore Dt. the 30th July 1971.

With reference to the correspondence ending with the Principal, Government Law College, Bangalore letter No. GLC/ML/268/70-71 dated 1-2-1971 on the subject mentioned above, sanction is accorded to upgrade the post of Manager, Government Law College, Bangalore from Class III to Class-II in the pay scale of Rs. 275-20-375-EB-25-550.

By Order and in the name of the President of India Sd/- G.B. Deshapande

Deputy Secretary to Government Education and Youth Services Dept."

(3) By the above order the only post of the Manager which existed in the office of the Law College and which was held by the petitioner was upgraded to Class II, with the pay-scale of Rs. 275-20-375-EB-25-550. This order read with the provisions of the Revised Pay Rules of 1970 indubitably indicated that the petitioner was entitled to the revised pay scale of Rs. 275-550.

(4) Even after the above order was made, the pay-scale of Rs. 275-550 was not extended to the petitioner. This was on the ground that an order promoting the petitioner from the post of Manager Grade II, which was a Class-III Post, to the upgraded post of Manager (Class-II) was necessary and without such an order, the petitioner was not entitled to get the pay scale of Rs. 275 550, fixed for the upgraded post. Therefore an order dated 30th June 1973 (Exhibit D) was issued promoting the petitioner to the Class II Manager's post. Thereafter the petitioner was given the pay scale of Rs. 275-550 with effect from 30th June 1973. The petitioner was, however, insisting that he was entitled to the pay scale of Rs. 275-550 with effect from the date of upgradation, that is, 30th July 1971. His request was turned down. The resultant position was, during the period commencing from 30-7-1971 upto 30-6-1973 the petitioner was denied the pay-scale for the Class II post which existed and was given the pay of a Class III post which did not exist. In order to remove this anomaly, the Government thought that the date of the upgradation of the post itself should be modified and postponed to 30th June 1973 i.e., the date on which the petitioner was sought to

be promoted. Thus the attempt was, to make the upgradation of the post and the promotion of the petitioner to take effect from the same date. This is evidenced by the Government letter dated 28th January 1975. This was followed by the Government Order dated 28th January 1976 (Exhibit "U"). It reads:

"Proceedings of the Government of Karnataka

Subject: Government Law College-up-grading the post of Manager Class III to Class II-Modified orders regarding.

Order No. ED. 9 DGO. 74, Bangalore dated 28th January 1976.

Read:

1. Govt. Order No. ED 190 DGO 70 dated 30-7-71.
2. Govt. Notification No. ED 45 DGO 71 dated 30-6-75.
3. Letter No. GAD IV EI 586-88 dated 3-8-74.
4. Letter No. 710/74-75 dated 30-11-74 from the principal, Government Law College.

Preamble:

In Government Order dated 30-7-71 at (1) above sanction was accorded to upgrade the post of Manager, Government Law College, Bangalore from Class III to Class II in the pay scale of Rs. 275-20-375-EB-25-550.

In Government Notification dated 30-6-75, Sri M. Munireddy, Manager (Grade II) Government Law College, Bangalore was promoted to officiate as Manager, Class II against the upgraded post subject to review of promotion after framing C & R Rules for the post. The Accountant General in his letter dated 3-8-74 has expressed certain difficulties regarding fixation of his lien after 30-7-71. The Principal, Law College has in his letter dated 30-11-74 cited at (4) above has suggested certain alternatives.

ORDER

After careful examination of all aspects of the case and in partial modification of the orders issued in Government Order No. ED 190 DGO 70 dated 30-7-71, sanction is accorded to upgrade the post of Manager, Government Law College, Bangalore from Class III to Class II in the scale of Rs. 275-20-375-EB-25-550 with effect from 30-6-73 instead of 30-7-71.

This order is issued with the concurrence of the Finance Department, vide their U.O. Note No. FD 4553/S. III/75 dated 23-12-75.

By Order and in the name of the Government of Karnataka

Sd/- R.K. Deshapande,

I/C Under Secretary to Government Education & Youth Services Dept".

In view of this order the post which had already been upgraded with effect from 30th July 1971 was sought to be upgraded with effect from a subsequent date i.e., 30th June 1973. In other words the purpose sought to be achieved by the said order was to annul the upgradation of the post for the period commencing from 30th July 1971 upto 30th June 1973.

3. Aggrieved by these orders the petitioner has presented this petition praying for setting aside the Government Order dated 28th January 1976 and also praying for the issue of a writ of Mandamus directing the respondents 1 and 3 to extend to him the pay scale of Rs. 275-550 with effect from 30th July 1971 and to give him all consequential benefits. Respondent 2, the Registrar, Bangalore University is also made a party to the petition as the Law College was handed over to the Bangalore University by the Government in or about the year 1976.

4. In the statement of objections filed on behalf of respondent-1, State Government, it is specifically asserted that after the post was upgraded by the order dated 30th July 1971 unless an order promoting the petitioner from the post of Manager-Grade II to Manager Class II was issued by the State Government, he acquired no right to the pay scale of Rs. 275-550.

5. Sri Radhakrishna, learned Counsel for the University submitted that the University took over the Law College only in the year 1976 and they have been giving the pay to the petitioner as fixed earlier by the Government. He also adopted the stand taken on behalf of the Government.

6. Sri Abdul Khadar, learned Counsel for the State Government and the Accountant General, relied on the judgment of this Court in the case of Pooswamy v. Union of India, (1978) 1 Kar. L.J. 188 and submitted that the said decision fully supports the case of the State Government, that in the absence of an order promoting the petitioner, he was not entitled to the pay scale of Rs. 275-550 on the mere upgradation of the post. In particular he relied on paragraph 8 of the said judgment. It reads;

"Upgradation of a post in any Government Office or establishment presupposes that there is a particular lower grade post and that the same is sought to be converted into a higher grade post in the exigencies of public service. It does not appear from any of the rules or from the scheme of "upgradation" of a post that a person holding the lower post which is upgraded or converted into a higher post automatically fits into the upgraded post and acquires an indefeasible right to continue in the upgraded post. As to how the upgraded post has to be filled is a matter that can be regulated by the Recruitment Rules and in its absence by executive orders. With the upgradation of the post, the person holding the lower post does not ipso facto become the holder of the upgraded post with a right to continue in the said post. In my view, to concede that with the upgradation of the post the incumbent in the lower post becomes entitled to continue in the upgraded post and that if he is sought to be disturbed, it would amount to reduction in rank, in the absence of express provisions to the contrary, may bring

about startling results. With the upgradation of the post and the temporary fitment of the petitioner in the post, for various reasons, with which I am not concerned, the petitioner did not acquire an indefeasible right to continue in that post."

7. In the above paragraph it is specifically held that unless a person who was holding a lower post which was upgraded is promoted to the upgraded post, the concerned person acquires no right to hold the higher post and to get the consequential benefits. But as can be seen from the above paragraph itself, it was said, that there was no rule applicable to a Railway servant who was the petitioner in that case, which provided that when a post was upgraded a person holding the lower post automatically fitted into the upgraded post. Therefore, the ratio of the said decision would have been applicable to this case provided in this case also there was no rule governing the particular situation. But in the Karnataka Civil Services Rules, there is Rule 43 which reads:

"The holder of a post the pay of which is changed shall be treated, as if he were transferred to a new post on the new pay, provided that he may at his option retain his old pay until the date on which he has earned his next or any subsequent increment on the old scale, or until he vacates his post or ceases to draw pay on that time-scale. The option once exercised is final.

Note 1: x x x

Note 2: The above rule applies also in cases where a revision of pay is accompanied by change in the status of the posts. In such cases the posts virtually continue as before. Where, however, a revision of pay is concurrent with a specific change in the duties and responsibilities attached to the post, the old post will be deemed to have been substituted by a different post. In such cases the individual will be treated as having been appointed to a higher or lower post, as the case may be, and pay will be fixed under the relevant rules, and not under this rule."

The wording of the rule is unambiguous and clear. According to the said rule when the pay of a particular post is changed, the person holding the post before such change should be deemed to have been transferred to such new post. Even if there was any doubt as to whether the said provision was applicable even when a post was upgraded, it has been removed by Note-2 which provides that the said rule applies also to a case even when the change in pay is accompanied by the change in the status of the post. This Note was introduced as early as on 22nd June 1966.

8. In the present case, it is not in dispute that there was only one post of Manager in the pay scale of Rs. 150-270. That was a Class III post. That one post was converted into a Class II post under Government Order dated 30th July 1971 (Exhibit-"C"). There was no change in the duties and responsibilities of the post also. Therefore the underlined portion of the rule and the note was applicable to the petitioner. As a result, on and with effect from 30th July 1971,

by the force of rule 43, the petitioner must be deemed to have been transferred to the post of Manager (Class II). Consequently, the petitioner not only came to occupy the post but also became entitled to the pay scale of Rs. 275-550 with effect from 30-7-1971. (See: B.K. Saroja Bai v State of Karnataka, WP 4573/70 dt. 19-11-73). The right of the petitioner to the pay scale of Rs. 275-550 also flows from the provisions of the Karnataka Civil Services (Revised Pay) Rules, the relevant extract of which is given earlier, according to which the post was to be in the pay scale of Rs. 275-550, the moment it was upgraded to Class II.

9. In view of this legal position, it was not necessary for the Government to have issued the notification dated 30th June 1973 in order to enable the petitioner to have his pay fixed in the scale of Rs. 275-550; though it might have been necessary for other purposes such as the procedure for the drawing of pay, applicability of leave rules etc., In passing the order dated 30th June 1973 and the order dated 28th January 1976, and in denying the pay scale of Rs. 275-550 to the petitioner from the date of the upgradation of the post, the existence of rule 43 in the Civil Service Rules was completely lost sight of by all the persons concerned. There is no reference to it either in the petition or statement of objections. However, the fact remains that the claim of the petitioner is covered by rule 43 of the Civil Services Rule as also the Revised Pay Rules.

10. Apart from the clear position, emerging from the effect of rule 43 of the Civil Services Rules, it should be observed that the acceptance of the stand taken by the State Government leads to following absurd results.

(i) There can be no doubt that the real effect of the upgradation would be the abolition of Manager Grade II (Class III) post and the creation of a Class II post of Manager or in other words substitution of the former post by the latter. If the stand, that the petitioner who was holding the Grade II post could not occupy the upgraded Class II post unless and until he is promoted is correct, the resultant position would be that there would be no Class III post which the petitioner could hold and there would only be a Class II post which the petitioner could not hold until he was promoted. The legal effect of it would be that the petitioner would stand removed from the Class III post with effect from the date of upgradation of the post for want of post. This is clearly impermissible as it was not the effect or the intention of upgradation.

(ii) The stand taken by the Government would also have the effect of removing the lien of the petitioner from the post of Manager Grade II without creating a lien in the Class II post. This would contravene clause (g) of rule 20 of the Civil Service Rules which prohibits the removing of the lien of a Government servant even with his consent.

(iii) There is no provision pointed out on behalf of the Government which provided for the promotion of an official holding the abolished post to the newly created post.

In fact it is in order to avoid such absurdities, rule 43 is incorporated in the

Karnataka Civil Services Rules. After reading rule 43 and Note (2) below it, learned counsel for the Government could furnish no effective answer to the claim of the petitioner. The purpose and effect of rule 43 is that in all cases where the only post held by an individual is upgraded, or all the posts, which are actually held by the civil servants, are upgraded, the consequence would be that such persons are by the force of the rule itself deemed to have been transferred and appointed to the upgraded post, it should however be pointed out that it is only in cases where a few unoccupied posts belonging to a cadre are upgraded and the recruitment rules indicate that all such upgraded posts belong to a higher cadre and are required to be filled up by direct recruitment or promotion, no person would be entitled to occupy such higher post unless by a specific order made by a competent authority he is appointed to such higher post. This is obviously so, because when a cadre consists of a large number of posts, and some of them only are upgraded no one can say that he was holding the upgraded post. That is not the position in this case. This is a case in which the only Class III post of Manager held by the petitioner was upgraded to Class II. Therefore the provisions of rule 43 read with Note 2 of K.C.S.Rs. were clearly attracted. Hence, I answer the question of law set out first in the affirmative.

11. Learned Government Pleader, however, contended that as the order dated 30th July 1971 has been modified by the order dated 28th January 1976 (Exh. U) postponing the date of upgradation from 30th July 1971 to 30th June 1973 the petitioner is not entitled to get the revised pay scale with effect from 30th July 1971.

12. In the writ petition, the petitioner has also questioned the legality of the Government Order dated 28th January 1976 which purports to postpone the date of upgradation of the post from 30th July 1971 to 30th June 1973. It is contended for the petitioner that this order deprives the petitioner of the rights which has already accrued to him by virtue of the upgradation of the post with effect from 30th July 1971 and that it was not competent for the State Government to issue the order in view of Rule 43 K.C.S.R. read with the provisions of the Revised Pay Rules, 1970.

13. As held by me earlier the combined effect of the Government Order dated 30th July 1971 upgrading the post, the provisions of the Karnataka Civil Services (Revised Pay) Rules, 1970 and rule 43 read with Note 2 of the Karnataka Civil Services Rules, is that the petitioner acquired a right to the pay scale of Rs. 275-550 with effect from 30th July 1971. Therefore, firstly, as the right had been conferred on the petitioner not only by means of an executive order dated 30th July 1971 but also by virtue of the rules framed by the Governor under the proviso to Art. 309 of the Constitution of India, it was not competent for the Government to issue an executive order dated 28th January 1976, which is inconsistent with the provisions of the rules. Further, even on the basis that the right was conferred on the petitioner by Government Order dated 30th July 1971 which was made in exercise of its executive power, it was incompetent for the

Government to deprive such right with retrospective effect by means of another executive order. (See: Ex. Major N.C. Singhal v. Director General, Armed Forces Medical Services, AIR 1972 S.C. 628 and also G.V.B. Naidu v. State of Mysore, (1970) 2 Mys. L.J. 296.

13. Therefore, the order of the State Government dated 28th January 1976 has to be declared illegal and invalid.

14. In the result, I make the following Order:

(1) The impugned order of the State Government dated 28th January 1976 (Ex. U) is set aside, (2) A writ of mandamus shall issue to respondents 1 and 3 to accord to the petitioner the pay scale of Rs. 275-550 with effect from 30th July 1971. He shall also be entitled to all the consequential benefits flowing from the said directions.

(3) Respondents 1 and 3 are directed to comply with this direction before 31st December 1981 and give all consequential benefits upto the date when the college was taken over by the Bangalore University.

(4) Respondents 2 and 4 are directed to re-fix the pay of the petitioner thereafter on the basis of the pay of the petitioner fixed as on the date of taking over of the College by the University and to give him all consequential benefits.

Petitioner shall be entitled to the costs from respondent.

Advocate's fee Rs. 250.