

(1984) 09 GUJ CK 0020
In the Gujarat High Court

R.Y. Vaidya and Others

APPELLANT

Vs

Union of India (UOI) and Another

RESPONDENT

Date of Decision : 18-09-1984

Acts Referred:

Constitution of India, 1950 — Article 16 , 309, 309

Citation : (1985) 1 GLR 344

Hon'ble Judges : P.S. Poti, C.J.;A.S. Qureshi, J

Bench : Division Bench

Judgement

P.S. Poti, C.J.—The question arising for decision in all these cases is the same. The petitioners in the Special Civil Applications are the appellants in these cases. Their applications which were evidently filed to challenge possible reversions from the post of Matric Clerks to that of Non-Matric Clerks have been dismissed by the judgment of the learned single Judge.

2. Normally promotions are made in regard to selection posts as a result of selection process being resorted to and the appointees are those who find their place in the select list. In the case of non-selection posts seniority is the main, if not sole, criterion for promotion and in such cases promotions have to be made based on the seniority list in force. But quite often it may not be possible for the administrative authorities to effect promotions in accordance with the entitlement of those in service for many reasons. In the case of selection posts it may be because the selection committee might not have met, the selection process is not gone through or it may be that there is impediment such as by way of court orders from selecting or from appointing pursuant to selection. In such cases appointments cannot be made regularly to a post. In the case of non-selection posts also it may be that regular appointments cannot be made. Such cases are where there is dispute as to seniority and the seniority list in the cadre from which promotion is to be effected is not finally settled. Quite often such instances arise where to a particular cadre persons from different services are drawn. Necessarily an acceptable rule has to be formulated to determine inter se

seniority between them. In such cases, even though promotions are to non-selection posts, in the absence of a final seniority list no regular promotion could be effected. But in order that interests of the administration may not suffer it may be necessary to find out incumbents for the various vacant offices and the only way to fill up such offices is to promote persons ad hoc. There may be a situation where it may be possible to promote persons regularly such as when there is a regular select list available for appointment to a selection post or a regular seniority list available for appointment to a promotion post, but even so the appointing authority is not able to make regular appointments for other reasons such as orders of stay from court preventing the implementation of the select list or the seniority list as the case may be. Such cases stand on a different footing, for while, in the cases, where the claimants for regular promotions are not finally ascertainable at the time of promotion such promotions have to be made on ad hoc basis, that is not the situation where the list from which appointments are to be made is final so far as the appointing authority is concerned, but there is objection to such appointment otherwise. In the latter case where persons are promoted from the select list or from the seniority list, as the case may be, the promotions are really of persons who, according to the rules in force, are entitled to be promoted. That is not so in the former set of cases, for who is liable to be promoted can be determined only on finalisation of the select list, or seniority list as the case may be, which has yet to be done. We are pointing out this essential distinction between ad hoc appointments where there is empanelment to selection posts and ad hoc appointments where there is no such empanelment and no selection process has been gone through. Both cannot be treated alike. Merely because a person has been promoted ad hoc and he is in office in the post promoted for a period of three or four years he would not get any title to that post and he could legitimately raise no claim against the person who is found to be the proper claimant to that office on the basis of seniority being settled or a proper selection being made. Every eligible person in service has a right to be considered for selection to a selection post and has a right to be considered for promotion on the basis of seniority to a non-selection post. If an ad hoc appointment is made without the determination of who is to be selected or without the determination of who is the senior, as the case may be, merely because by a fortuitous circumstance someone gets promoted should not enable him to claim title to that office as that would operate in defeasance of the rights of the legitimate claimant as and when the claim of such person is determined. We are prefacing our judgment with these observations because these have relevance to the case before us.

3. The petitioners in these cases are Non-Matric Clerks. They were originally Class IV employees. They were selected for the post of Non-Matric Clerks in the scale of Rs. 105-135 (A)/225-308(R) and promoted to that post on regular basis. The next higher post is that of Junior Clerk in the scale of Rs. 260-400(R). This post is filled up by direct recruitment as well as by promotion from the post of Non-Matric Clerk according to a quota which is 662/3% direct recruitment and 33

1/3% promotion from Non-Matric Clerk. The post of Junior Clerk is a selection post. It appears that for a fairly long time there has been no direct recruitment, as required by the rules, to the post of Junior Clerk. But in order to fill up those posts Non-Matric Clerks were pro-moted ad hoc. This was in addition to the regular promotion of Non-Matric Clerks as Junior Clerks in their quota of 33 1/3%. The petitioners were those who were so promoted ad hoc to the post of Junior Clerks. Naturally they have to surrender their places when the direct recruits come in for appointment or even earlier, for the ad hoc promotions are not made on the basis of recognition of any claims of the Non-Matric Clerks who were so promoted. It seems that realising the difficulty of getting direct recruits, the Railway Administration decided, as a one time measure, that in the quota for direct recruits instead of directly recruiting from the open market a recruitment may be made from among Class IV employees who had the specified qualifications. This selection enabled sufficient hands to be made available for the purpose of regular promotions to the post of Junior Clerks. But this resulted in the displacement of the petitioners who had been, in the meanwhile, promoted ad hoc. The petitioners complain that they should not be reverted in the circumstances for more reasons than one. Most of the petitioners have been in office by way of ad hoc arrangement for more than three years and it is their case that, under a circular issued by the Railway Board in 1965, if they officiate even ad hoc for a period of 18 months they ought not to be reverted and this rule should have been applied to them and their reversions avoided. Their further case is that Class IV employees are given an opportunity to seek selection to a post higher than the post of Non-Matric Clerks and since they, as Non-Matric Clerks, are not allowed the same opportunity to compete for selection the concerned rule is unfair to them. In other words, they claim that their juniors of one time, viz. Class IV employees, are given the benefit of seeking selection to the higher post of Junior Clerk while they, who have been promoted from Class IV employees, are not given the same right. This, it is said, is discriminatory. The third point urged by the petitioners in these cases is that the rule relating to one time recruitment is not a valid rule as it was not framed by a properly constituted authority and should not work to alter the existing rule of direct recruitment. It is not that the rule of direct recruitment would in any way help the petitioners, but according to them, if that rule had stood, without being amended there would have been no direct recruits from Class IV employees with the resultant possibility that they would have continued as ad hoc in the post of Junior Clerks.

4. The Railway Administration refutes the case of the petitioners that they would get title to the office of Junior Clerks merely by reason of officiating therein for a period of 18 months. They point out a Circular of 1966 which amends the earlier Circular of 1965. Under the amended Circular it would only be those who are working ad hoc as a result of promotion from an empanelled list that would be entitled to claim non-reversion on account of officiation for 18 months. The case of the Railway Administration in answer to the claim of the petitioners that they are denied the opportunity of competing for the selection is that though originally

Class IV employees alone were in contemplation for the selection, later, before the selection, this was amended and all those below the scale of junior Clerks including the Non-Matric Clerks were allowed to compete. The petitioners sought to compete, but all but one of them were not allowed to compete only because they did not have the minimum qualification of Matric. The one who possessed the educational qualification was above the age of 45 which was the prescribed age. In regard to the third contention the Railway Administration's answer is that the Circular of 1965 was a Circular by the Railway Board which was competent to make rules, that those rules would be valid under Article 309 of the Constitution of India and that the later Circular was also made by the Board and therefore it had the same validity as the earlier Circular. It substantially amended the earlier Circular.

5. Now we will consider the contentions in seriatum. In 1965 the Railway Board noticed that any person who is promoted continuing to officiate beyond 18 months cannot be reverted without following the procedure prescribed in the Discipline and Appeal Rules. No. doubt if the said rules are alive it will be open to the petitioners to claim that by virtue of the said rules they are not liable to be reverted except as a result of the procedure adopted in the Discipline and Appeal Rules once they are shown to have officiated for 18 months. Ext. F is a confidential letter dated 15-1-1966 of the Railway Board to the General Managers. This refers to the earlier letter of 9-6-1965 whereunder the petitioners claim the right to hold the office of Junior Clerk merely for reason of officiating for 18 months. In the Circular of 15-1-1966 the question answered is whether the safeguard applies to persons who are officiating on promotion as a stop-gap measure. The answer to this, as found in the Circular, is this:

A question has been raised whether this safeguard applies to persons who are officiating on promotion as a stop-gap measure and not after empanelment (in the case of selection posts) and after passing the suitability test (in the case of non-selection posts). It is clarified that the safeguard applies to only those employees who have acquired a prescriptive right to the officiating posts by virtue of their empanelment or have been declared suitable by the competent authorities. It does not apply to those officiating on promotion as a stop-gap measure and also to those cases where an employee, duly selected, has to be reverted after a lapse of 18 months because of cancellation of Selection Board's proceedings or due to a change in the Panel position consequent to rectification of mistakes in seniority etc.

6. We have at the beginning of this judgment pointed out the need for distinction between a case where a person is promoted to a place to which he is legitimately entitled to promotion as a result of empanelment in a selection list and a person promoted merely as an ad hoc measure without such empanelment. The Circular to which we have just now referred treats these two as different and limits the right to continue to officiate to those who are promoted based on empanelment and not merely by way of stop-gap arrangement.

7. Our attention has been drawn to a decision of the Orissa High Court which refers to the earlier order of 9-6-1965 and also the later order of 15-1-1966 and takes the view that clarification in the communication dated 15-1-1966 was with reference to cases of purely stop-gap appointments and where there is a clear vacancy the rule will not apply. It is said that the petitioner in that case had held the post for almost three years and the result was that the petitioner was found not liable to be reverted. With due respect to the learned Judges of the Orissa High Court we are unable to agree with that view. The purpose of the second circular is quite evident. It is to define that the case of promotion of a person, who would have been legitimately promoted, stands on a footing different from that of a person who has been promoted without any occasion to determine the legitimacy of his claim for promotion. To hold otherwise would be, as we have indicated, violative of Article 16 of the Constitution. Every one must have an opportunity to seek selection and any rule which would operate to confer an advantage on a person merely based upon the fortuitous circumstance of an ad hoc promotion would nullify such right of opportunity envisaged in Article 16 of the Constitution. We cannot read the rule, as the Orissa High Court has done as referring to a case where there is a clear vacancy. The question is not whether the vacancy is clear. The question is not how long a person had been officiating in the ad hoc post. The question is, was his promotion in recognition of his legitimate rights, but nevertheless made ad hoc for some reason or other. In many States, consequent upon the State Re-organisation, claims between different units had to be settled and it took long number of years for these to be settled. What exactly should be the principle of integration with regard to different services was a matter which called for deliberation and that took years, mainly because there were protracted litigations also. Promotions had necessarily to be made and promotions had to be made on the basis of selection of such promotees. Many of them have even retired. Such promotions would be regular for all purposes excepting that such promotions are liable to be disturbed in the event of the principle finally settled by court being different. At the time the promotions were made, if they were made as a result of selection and on the basis of the rules in force, such promotions would be proper, but subject to the result of the challenge in the courts to such selection. The decision of the Orissa High Court adverted to is reported in 1983 All ISLJ 14 28.

8. We notice that a different view has been taken by the Patna High Court in an unreported decision to which reference has been made in the Orissa decision. We therefore do not think that the petitioners in these cases can stand to benefit by reason of the Government Circular of 9-6-1965 in view of the subsequent amendment of the Circular in 1966. We now come to the question of the claim of the petitioners that they were not allowed to compete while Class IV employees were allowed to compete. We felt, when admitting those appeals, that we would like to have clarification in this matter and we directed the Railway Administration to answer this by filing an affidavit. Accordingly this has been answered in an affidavit filed by the Railway Administration. It has been pointed

out that it is not correct to say that Non-Matric Clerks were not allowed to compete. They also could seek selection. In the case of the petitioners they were not considered for selection because they were not found to be eligible. A detailed list has been filed alongwith the affidavit showing what exactly was the reason for ineligibility in the case of each one of the petitioners. That answers the case of the petitioners.

9. The last argument urged before us also cannot succeed. It was the Railway Board that directed the Western Railway Administration to hold a one time selection in the quota for direct recruits from among those who were in the scales lower than that of the Junior Clerks. This being direction by the Railway Board would operate as a rule in amendment of the existing rule and therefore there can be no reason for challenge to the selections made pursuant thereto. We therefore find no reason to interfere in these appeals. The appeals are dismissed. No costs. The appellants seek status quo for a period of six weeks. Status quo will be maintained for six weeks in order to enable the petitioners, if they are so advised, to take further proceedings in the matter. No orders on the Civil Applications.