

(1969) 04 DEL CK 0007

In the Delhi High Court

Case No : Civil Writ Petition No. 1576 of 1967

S.C. Sharma

APPELLANT

Vs

Union of India

RESPONDENT

Date of Decision : 30-04-1969

Acts Referred:

Citation : AIR 1970 Delhi 1

Hon'ble Judges : V.S. Deshpande, J

Bench : Single Bench

Advocate : A.S.R. Chari, B.R.G.K. Achar and H.K. Puri, for the Appellant;
Narsaraju and S.S. Chandha, for the Respondent

Judgement

1. In this writ petition we are concerned with the true construction and the legality of certain provisions of the Central Health Services Rules, 1963 (hereinafter called "the Original Rules of 1963") as amended by the Central Health Services (Amendment) Rules, 1966 (hereinafter called "the Rules of 1966") and the Central Health Services (second Amendment) Rules, 1967 (hereinafter called "the Rules of 1967").

2. In exercise of the powers conferred by the proviso to Article 309 of the Constitution, the President promulgated the Central Health Services Rules, 1963 Constituting the Central Health Services by Rule 3 thereof. Under Rule 7 thereof, the Union Public Service Commission constituted a Selection Committee to determine the suitability of the departmental candidates for appointments to the different categories of the Central Health Service on its initial constitution, which are described in the first schedule thereto Accordingly, the petitioner was selected and appointed to a post in category E of the said service on the 1st January, 1965 under Rule 7 thereof. However, the Rules of 1966 added Rule 7A of the Original Rules of 1963, the relevant portion of which may be reproduced below, as it is the main provision, the true construction and validity of which is to be considered:

"7A, Appointment of departmental candidates: (1) As soon as may be after the commencement of the Central Health Service (Amendment) Rules 1966-

(a) every departmental candidates who was appointed immediately before such commencement to any post in Category A or Category B of the Service or in any equivalent post, shall be appointed to the corresponding Supertime Grade I or Supertime Grade Ii of the Service (b) every departmental candidate who was appointed, immediately before such commencement to any post in any category (other than Category A or Category B), or in any other post, shall be appointed to the appropriate category after selection made on the recommendation of a Selection Committee constituted in accordance with the provisions of Sub-Rule (1) of Rule 7, on the basis of his experience and the conditions of eligibility as specified below:-

conditions of Eligibility

XX XX XX

(2) Vacancies in each category shall be filled by the appointment of departmental candidates selected under Sub-rule (1) and in the event of the non-availability of suitable departmental candidates for filling a vacancy, such vacancy may be filled by direct recruitment through the Commission.

(3) Departmental candidates who are not absorbed under Sub-rule (1) shall continue to hold the posts to which they were regularly appointed, and for this purpose, such posts shall be deemed to have been excluded from the Service for so long as such departmental candidates continue to hold then.

(4) Notwithstanding anything contained to these rules, any person who has been appointed to the Service under Sub-rule (1) shall be entitled to draw salaries in the scales of any specified in Rule 4 and non-practicing allowance of the rates prescribed in Rule 15.

(A) if his appointment to the Service was made on or before the 1st day of July, 1965, from that date; or

(b) if his appointment to the Service was made after the 1st day of July 1965, from the date of such appointment, as if such scales of pay and rates of non-practicing allowance were in force, and the categories of posts were in existence, on the 1st day of July, 1965, or on the date of such appointment, as the case may be."

The Rules of 1967 substituted the following Sub-rule (3) of Rule 7A in place of the original Sub-rule 3:-

"(3) Every departmental candidates who is not absorbed under Sub-rule (1) shall-

(i) In the case of a candidate appointed to the Central Health Service before the commencement of the Central Health Services (Amendment) Rules, 1966, continue to be a member of the Service holding a post specified before such

commencement in Part A or Part B of the First Schedule, as the case may be, subject to the condition that for the purpose of pay and non-practicing allowance, he shall be governed by these rules as they stood before the commencement of the Central Health Service (Amendment) Rules, 1966:

(ii) in the case of a candidate referred to in Sub-rule (3) of Rule 7, who is not appointed to the Central Health Service before the commencement of the Central Health Service (Amendment) Rules, 1966, continues to hold the post to which he was regularly appointed; and the respective posts, for the time being held by every such departmental candidate, shall be deemed to have been excluded from the service for so long as such departmental candidate continues to hold it".

3. The Central Government construed Sub-rule (1) (b) Rule 7A to mean that a second Selection Committee was to be established to select candidates from among the departmental candidates, who had been appointed at the initial constitution of the Service to categories C, D and E of the original Rules of 1963 for appointment to appropriate categories established by the Rules of 1966. Briefly, the Rules of 1966 left intact categories A and B formed by the original Rules of 1963, but substituted the categories of the specialists and general duty grades I and II in place of the original categories C, D and E. Accordingly, there was a fresh selection by a second Selection Committee constituted under the Rules of 1966 as a result of which the petitioner among 44 departmental candidates, who had been initially appointed to the Service under the original Rules of 1963, were not selected for appointment to the new categories, which were formed by the Rules of 1966 in place of the categories C, and E of the original Rules, of 1963. It is this action of the Government, which is challenged in this writ petition on various grounds.

4. The learned counsel for the petitioner, however, restricted themselves only to the following two grounds of attack during the argument. Viz:

(1) The true construction of Rule 7-A (1) (b) of the Rules of 1966 is that all the departmental candidates, who had been initially appointed to categories C, D and E of the Service under the original Rules of 1963, have to be appointed to the new categories formed by the Rules of 1966 and, Therefore, none of them can remain outside these new categories; and

(2) If the true construction of the above mentioned rules authorised the Government not to select any of the departmental candidates, who became a part of the service at its initial formation under the original Rules of 1963 and even to keep them out of the categories formed by the Rules of 1966, then this rule read with Rule 7A (3) in its original form as also as amended by the Rules of 1967 as ultra vires and unconstitutional.

5. The writ petition was resisted by the Government on the ground that the true construction of Rule 7A (1) (b) authorised the Government to make a further selection from the departmental candidates initially appointed to the Service under the original Rules of 1963 and on making such selection, the petitioner

along with other 44 candidates was not selected for appointment to the new categories. The Rules enabling the Government to make such further selection and to keep out the petitioner and the other persons from appointment to the new categories were valid.

6. Let us first consider the meaning of Rule 7A(1). It has two parts (a) and (b). Part (a) deals with the departmental candidates, who were initially appointed to categories A and B of the Service. All of them are to be appointed to the corresponding supertime grade I and supertime grade Ii of the new categories formed by the Rules of 1966. Part (a). It says that every departmental candidate who was appointed to a category other than the categories A and B initially to the Service shall be appointed to the newly formed appropriate category "after selection". The learned counsel for the petitioner did not dispute the fact that a second Selection Committee had to be appointed under Rule 7A (1) (b) and that it had to make a selection from among the departmental candidates who had initially been appointed to categories C, D and E under the original Rules of 1963.

They, however, submitted that the selection was restricted only to the allocation of the departmental candidates to different posts in the newly formed categories. They supported this argument by pointing out that the selection had to be made "on the basis of experience and conditions of eligibility", which are specified at the end of Rule 7A (1) (b). They further pointed out that substantially the conditions of eligibility for the new categories were the same as those for categories C, and E under the original Rules of 1963.

The learned counsel for the respondent on the other hand, pointed out that the names of the new categories were different and the conditions of eligibility also had been revised. He went so far as to argue that the formation of the new categories in 1966 amounted to the formation of a new service. In my view it is not necessary to decide whether a new service was formed by the Rules of 1966. The name of the service remained the same, the incumbents of posts in categories A and B also remained intact and the departmental candidates other than the 44 of which the petitioner is one, were also taken into the new categories. Therefore, even it is assumed that the Rules of 1966 did not provide for the formation of the new service as such, it cannot be denied that a revision or reformation of the old service was made by the Rules of 1966. The conditions of eligibility were slightly revised. The designations were changed and the pay scales were also revised. What is important to bear in mind is that the Government had decided that there should be a selection from among the departmental candidates for appointment to these new categories.

It cannot be denied that the power to "select" implied the power not to select. The very concept or selection means that only some from all may be taken. If all were to be taken necessarily on the true meaning of Rule 7A (1) (b), then the use of the words "after selection" was not warranted. This is proved by the fact that in Rule 7A (1) (a) the words "after selection" were not used for the simple reason that all the candidates in categories A and B were to be taken in the new

categories. I am of the view, Therefore, that the selection on the recommendation of the Selection Committee necessarily implied that the Governmental candidates initially appointed to the Service in categories C, D and E. The power not to take some of these candidates in the new categories could not be denied to the Government on a plain reading of Rule 7A (1) (b).

7. The interpretation placed by me above on Rule 7A (1)(b) is confirmed by Sub-rules (2) and (3) of Rule 7A. Sub-rule (2) reiterates that vacancies in the new categories shall be filled in by appointment of departmental candidates selected under Sub-rule (1) and in event of non-availability of suitable departmental candidates for filling a vacancy, such vacancy may be filled by direct recruitment through the Commission. Sub-rule (2) apparently applies only to the selection made under Rule 7A (1) (b), inasmuch as Rule 7A (1) (a) does not talk of any selection. Sub-rule (3) is even more clear. It expressly contemplates that certain departmental candidates, who had been initially appointed to the Service under the original Rules of 1963 would not be absorbed in the new categories under Sub-rule (1), viz., Sub-rule (1) (b) of Rule 7A. If the construction suggested by the learned counsel for the petitioner for Sub-rule (1) (b) of Rule 7A had been correct, there would have been no need for Sub-rule (3) at all. The existence of Sub-rule (3) destroys the suggestion made by the learned counsel for the petitioner. The learned counsel for the petitioner emphasised that Sub-rule (3) used the word "absorbed ", which shows that all the departmental candidates had to be absorbed. I am unable to agree.

The use of the word "absorbed" only shows that those who are appointed to the new categories would be appropriately said to be absorbed, inasmuch as they were already in the Service under the original Rules of 1963. This is why they are absorbed in the new categories, Sub-Rule (3) on the other hand, expressly contemplates that some departmental candidates would not be absorbed in the new categories. They would, Therefore, stay outside the new category. I, Therefore, find that on a correct construction of Rule 7A of the Rules of 1966, it authorised the Government to make a second selection from among the departmental candidates of categories C, D and E appointed under the original Rules of 1963 and to select some of them and not to select the others for the appointment to or absorption in the new categories formed by the Rules of 1966.

8. The learned counsel for the petitioner could not point out any definite reason why Rule 7A was wither ultra virus or unconstitutional. A reference was made to the Supreme Court decision in S.G. Jaisinghani Vs. Union of India (UOI) and Others, , to support the argument that once departmental candidates were initially appointed to the Service under the original Rules of 1963, the Government was bound to take them in the new categories formed by the Rules of 1966. I do not see how the said decision supports the petitioner. In Jaisinghani's case the quota for the recruitment of the promotees was originally fixed by the Government by an administrative act at 25%. Later by another administrative act it was varied to 33.1/3%. This shows that the Government

was free to vary the conditions of service even administratively. If so, the Government could certainly change the conditions of service by making a statutory amendment to the original Rules of 1963 by making the Rules of 1966. The right of the Government to change the conditions of service even retrospectively has been upheld by the Supreme Court in *B.S. Vadera Vs. Union of India (UOI) and Others*, .

The decision of the Supreme Court in *Moti Ram Deka etc. Vs. General Manager, N.E.F. Railways, Maligaon, Pandu, etc.*, , was also referred to. The ratio of the said decision is that if a Government servant had a right to hold a post because he was a confirmed Government servant, then he cannot be removed from the said post except after following the procedure laid down under Article 311 of the Constitution and the disciplinary rules framed to carry out the purpose of Article 311. The original Sub-rule (3) of Rule 7A excluded from the Service the posts held by the departmental candidates who were not selected to the new categories formed by the Rules of 1966. But, there was no removal of the departmental candidates from those posts. Those candidates could continue to occupy those posts as long as they chose to do so subject to superannuation. This would show that Article 311 was not attracted at all. By the exclusion of the posts from the Service, however, the future prospects of these candidates for promotion, etc., were severely curtailed. This, however, did not amount either to removal or reduction in rank within the meaning of Article 311. In fact, the Government could have totally abolished those posts held by the Departmental candidates. In that event, the departmental candidates would have lost their jobs not because they were removed from service, but because the posts held by them ceased to exist. There is no fundamental right to any kind of right in the incumbents of posts under the Government that these posts must be continued by the Government for any amount of time. The Government has the discretion to create and abolish posts. The incumbents of the posts so abolished automatically go out of the service and I am not aware of any protection given by law or the Constitution to such incumbents against such abolition of posts.

9. The Rules of 1967 have, however, revised Sub-rule (3) in this respect and now these posts continue to be in the service, though for the purpose of pay and non-practicing allowance, the incumbents are to be governed by the original Rules of 1963 and not by the Rules of 1966. This cannot be challenged as discriminatory inasmuch as the departmental candidates, who were not selected to the new categories formed in 1966 form a class by themselves separate from the departmental candidates who were selected to the new categories. The different treatment to this different class is justified by the fact that the Selection Committee had found the petitioner and some others not good enough for being, appointed to the new categories.

10. The decision of the Government to form the new categories and to subject the departmental candidates already appointed to the Service under the original Rules of 1963 to a second Selection was also attacked as arbitrary. To me, it

seems, on the other hand, that the decision was a studied one. The Government was apparently not satisfied with the categories formed by the original Rules of 1963 and some of the appointments made to some of the posts in categories C, D and E thereof. As the Government steps of that view it could certainly take steps for the reselection of the candidates after the re-formation of the categories. This power of the Government has never been doubted and is firmly established by Article 310 and the proviso to Article 309 of the Constitution.

11. Some of the points regarding the study leave taken by the petitioner and whether he was entitled to pay during it or not were not germane to the decision of this petition. The learned counsel for the petitioner, Therefore, requested me to leave them open. They are, Therefore, left open.

12. For the above reasons, the writ petition is dismissed, but without any order as to costs.

13. Petition dismissed.