

(2004) 04 KAR CK 0002

In the Karnataka High Court

Case No : Writ Petition No's. 24384, 43433 to 43436 of 2002 and 19699 of 2003

State of Karnataka and Another

APPELLANT

Vs

T. Chandrashekhar and Another

RESPONDENT

Date of Decision : 07-04-2004

Acts Referred:

Constitution of India, 1950 — Article 14, 16 (1)
Karnataka Civil Services Rules, 1958 — Rule 32, 53 (a)

Citation : (2004) 7 KarLJ 222 : (2004) 3 KCCR 223 SN

Hon'ble Judges : Ajit J. Gunjal, J;A.V. Srinivasa Reddy, J

Bench : Division Bench

Advocate : Rosa Perumal, High Court Government Pleader in W.P. No. 24384 and Additional Government in W.P. Nos. 43433 to 43436 of 2002 and M.S. Ananda Ramu, in W.P. No. 19699 of 2003, for the Appellant; Rosa Perumal, High Court Government Pleader and Additional Government Advocate in W.P. No. 19699 of 2003, M.S. Ananda Ramu, for Respondent-3 in W.P. Nos. 43433 to 43436 of 2002, B.P. Jayakar, B. Satish and B.P. Dhireschandra for Respondent-1 in W.P. No. 24384 of 2002, Rangnath S. Jois, for Respondents-1 to 4 in W.P. Nos. 43433 to 43436 of 2002, Thimmanna, for Respondent-7 in W.P. Nos. 43433 to 43436 of 2002 and K.S. Desai and Harsha Desai for Respondents-8 and 10 in W.P. Nos. 43433 to 43436 of 2002, for the Respondent

Judgement

A.V. Srinivasa Reddy, J.—As common questions of law and facts are involved, these writ petitions were heard together and are disposed off by this common order.

2. The applicants in O.A. Nos. 3180 to 3183 of 1997 who were working as F.D.As in the Directorate of India Systems of Medicine and Homeopathy moved the Karnataka Administrative Tribunal, Bangalore ("the Tribunal" for short), with a prayer to quash the inter se ranking in their cadre and further, praying for a direction to prepare a fresh seniority list after reviewing the promotion to the next higher cadre of Superintendent. The Tribunal allowed these applications in part. Being aggrieved the Department has filed W.P. Nos. 43433 to 43436 of 2002 and the applicant in O.A. No. 3182 of 1997 has filed W.P. No. 19699 of

2003.

The applicant in O.A. No. 1856 of 1996, Head Accountant in Sub-Treasury Office, Udupi, filed the application before the Tribunal with a prayer to prepare a fresh gradation list and place him above the third respondent. The said application was allowed by the Tribunal. Being aggrieved, the State and the Department have come up in W.P. No. 24384 of 2002.

3. For the sake of convenience the parties are referred to in the course of this order as "applicants" and the "department".

4. The applicants allege that they have been deprived by their promotion by the respective departments which promoted their juniors overlooking their seniority on the ground that on the date of consideration of their respective cases for promotion they had not cleared the departmental examination and therefore they were ineligible for promotion though being seniors to those who were actually promoted. The common feature in all these writ petitions is that all the respondents had appeared for the departmental examinations but the results of those examinations had not been published till such time the promotions were effected and on the results being announced the respondents who found that they had cleared the examinations, moved the department for promotion with due deference to their seniority and claimed that they must be placed over and above their juniors who were promoted earlier. The departments having declined their prayer they moved the Tribunal.

4-A. We have heard the learned Counsels for the applicants Mr. B.P. Jayakar and M.S. Anandaramu and Mr. Ranganath S. Jois and Ms. Rosa Perumal, learned Additional Government Advocate for the State.

5. The questions that arise for consideration in this batch of writ petitions are:

(i) Which is the relevant date for reckoning the passing of the departmental examination i.e., the date of examination or the date of announcement of the result?

(ii) Whether the promotion of the juniors overlooking the eligibility of the applicants constitutes an illegality vitiating their promotion and, therefore, liable to be struck down?

Additional Issue in W.P. Nos. 43433 to 43436 of 2002 and W.P. No. 19699 of 2003.

(i) Whether it was obligatory for the applicants to have passed the prescribed examinations for being entitled to the promotion?

6. Before we proceed to answer these points, it is relevant to refer to the dates on which the promotions have been made by the departments concerned. The petitioner in W.P. No. 24384 of 2002 had appeared for the departmental examination in December 1980, the result of which was announced on 4-8-1981. When vacancy arose in the cadre of Senior Clerk on 20-4-1981 the department

promoted the second respondent herein for the said post ignoring the petitioner. The petitioner was also shown in the review-cum-final gradation list published on 24-10-1994 as junior to the second respondent. The representation given by the petitioner for review of the seniority list was rejected by the department on the ground that the date of passing of the departmental examination was taken as the date of eligibility.

The applicants in O.A. Nos. 3180 to 3183 of 1997, F.D.As working in the Directorate of Indian Systems of Medicine and Homeopathy, moved the Tribunal for preparation of a fresh seniority list and to review their promotion vis-a-vis respondents 2 to 9 in the application. The respondents 2 to 4 before the Tribunal were promoted to the cadre of F.D.A. on 3-11-1982, and respondents 5, 6, 7 and 8 were promoted respectively on 1-9-1984, 2-11-1984, 22-9-1984 and 30-9-1984. The applicants came to be promoted to the cadre of F.D.A. respectively on 18-9-1984, 13-6-1983, 9-6-1985 and 12-9-1984. The bone of contention of these applicants is that their cases were not considered by the department for promotion on the dates when their juniors were promoted as the results of the petitioners' service examination had not been announced. They complained before the Tribunal that despite their passing in the departmental examination subsequently, the department failed to redo the seniority list and to effect changes in the dates of promotion. Therefore, they sought for redoing the seniority list and for consequential benefits. Not being satisfied with the orders passed by the Tribunal both the department and the applicants are before us in these writ petitions.

7. Additional Issue in W.P. Nos. 43433 to 43436 of 2002 and W.P. No. 19699 of 2003.--The Tribunal has dealt with this issue in paragraph 3 of the impugned order. The Tribunal has drawn attention to the fact that the Health Department had its own cadre and recruitment rules since 1960 for officials working in Indian Medicine Branch, which were called the Mysore Medical (Indian Medicine Branch) Recruitment Rules, 1960 and they were published on 8-7-1960. In the said Cadre and Recruitment Rules, 33 1/3% of the posts in the cadre of F.D.Cs were meant for promotion from the Second Division Assistants if they had passed the departmental examinations. The rules did not prescribe any "minimum service" in the cadre of S.D.C. for promotion to the cadre of F.D.C. The say of the applicant in W.P. No. 19699 of 2003 that the rules prescribed the passing of the departmental examination for the first time in the year 1982, therefore, is without substance. In the absence of any separate rules, they were governed by the 1960 Cadre and Recruitment Rules and, therefore, unless they passed the prescribed departmental examination, they were not eligible for promotion to the next higher cadre. The Tribunal also having recorded the very same finding, the same does not call for any interference.

8. Point No. 1.--The dictum that a Government servant passes the departmental examination on the date when he takes up the exam and not on the date when the result of the exam is announced stems from the fact that the person's

knowledge over a particular subject is tested on the date of the examination and not on the date of the announcement of the result. It would be a travesty to state otherwise and even where the results are announced after a long period of time, for one reason or the other, the date of passing of the examination is always construed and mentioned in the result sheet as the date of examination. We answer the issue accordingly.

9. Point No. 2.--On the basis that the Government servant clears the departmental examination which is mandatory for being promoted to the next higher cadre on the date when he took up the examination, obviously, he would become entitled for promotion as on the date of the examination and if not considered by the department for promotion then, he would be right, in law, in questioning the promotions made. But, there is at least one exception to this rule which, to a large part, is owed not to any rule of service but to the principle laid down by the Apex Court on the point in its several decisions. In *Dr. Umakant Saran Vs. State of Bihar and Others*, , the Supreme Court while considering the challenge to the promotion of doctors, who were juniors to the petitioner, as lecturers on the ground that as on the date of promotion the petitioner did not possess the requisite teaching experience, made the following pertinent observations:

"As between Dr. Saran and respondent 5 it is true that respondent 5 was his junior in service, but he had the requisite -minimum teaching experience which the petitioner did not have. It is not necessary for us to consider in this case whether the lecturer's posts which were in class I service were filled by promotion, as contended for the appellant, or by deputation, as contended on behalf of the State. Assuming that the lecturer's posts were filled by promotion, then it will have to be shown that the appellant, though he had the requisite qualification for his promotion, had been disregarded in favour of a junior. The answer made by the State Government is that they had taken the decision to fill the posts on March 31, 1965 and on that day the appellant had not even completed the minimum period of teaching experience while the other two had done so. In other words, the case is that the appellant was ineligible for appointment when the decision was taken. It is true that the appointment was actually notified on 19-8-1965 when the appellant had also completed his 3 years of experience. But, obviously that is irrelevant. Decisions have to be taken first before appointments are notified. The usual administrative process takes some time. The appellant sought to controvert the statement of the Government that the decision had been taken to make the appointment on March 31, 1965. But we do not think there is any substance in that contention. It would, thus, follow that while respondents 5 and 6 were eligible for appointment as lecturers on 31-3-1965 the appellant was not and, therefore, he cannot be regarded as aggrieved for the purpose of the relief claimed by him".

(emphasis supplied)

To similar effect is the pronouncement of the Apex Court in *Union of India v. A.R.*

Shinde, : [1987]2SCR339 :

"Exception, however, has been taken to the further extension of the appointment for the period expiring on March 3, 1987. The question of filling up the vacancy was taken up for consideration in advance as the initial appointment was due to expire on September 3, 1985. But even at that time no one was qualified for promotion. Under the circumstances the appointment of respondent 2 was extended upto March 3, 1987. The Tribunal has taken the view that "even if the proposal was initiated earlier the entire position as on 3-9-1985 when the post fell vacant ought to have been clearly presented to the appointments committee and considered". Both the respondents would have then qualified to have been considered for the post by the Departmental Promotion Committee. The Tribunal adds. In our opinion, this line of reasoning cannot be sustained. The appointment to such a sensitive post by the very nature of things had to be considered in advance and if when the proceedings were initiated respondent 2 had not yet qualified for being appointed to the post, his name could not have been considered. In any case failure to consider his name in anticipation that he would have qualified by the date on which the initial appointment came to an end does not constitute any illegality which vitiates the appointment. The Tribunal does not say that there were mala fides. And we think the Tribunal was right in not drawing such a sinister inference for there was nothing on record to suggest that the Appointing Authority had any animus against respondent 2. The mere fact that the original appointment of respondent 2 which was rightly made initially, even according to the Tribunal, was extended for a further period by reason of the fact that when the proposal was mooted for consideration nobody else was eligible for promotion, cannot vitiate the appointment of respondent 2 by transfer on deputation which was the approved mode for appointment as per the relevant rules. The very fact that extension was made only till March 3, 1987 shows that there was anxiety to fill up the vacancy ultimately by promotion which was the first preferential mode of appointment, if possible. If it was otherwise, the initial appointment itself could have been made without restricting the appointment by a time-limit. If therefore appears that there was anxiety to make the appointment by way of a stop-gap arrangement in order that the regular appointment could possibly be made by promotion which was the first preferential mode of appointment to the post. We do not think that merely by reason of the fact that it was brought to the notice of the appointments Committee that respondent 2 would qualify for being considered for promotion shortly would not justify characterising or quashing the appointment as illegal under the Rules. We are, therefore, unable to uphold the finding recorded by the Tribunal on this point".

(emphasis supplied)

This school of thought attaches importance to the filling up of a vacancy whenever it accrues, so that an important position in the Government is not left without any one to man it and operates on the principle that no one can question

a promotion who on the date of the reckoning for such promotion was not qualified to stake a claim for such promotion. In Shinde's case, the Apex Court has gone to the extent of observing that the appointment committee being put on notice that some one would qualify for promotion in a short time would not by itself justify characterising or quashing the appointment made as illegal. What is the relevant date for consideration of the case of an individual for promotion viz., whether it is the date of application or the date of selection has been answered by the Apex Court in *Smt. Rekha Chaturvedi v. University of Rajasthan* 1993 Su. (3) SCC 168 : 1993 SCC 951 : 1993 I LLJ 818 (SC), as follows.--

"10. The contention that the required qualifications of the candidates should be examined with reference to the date of selection and not with reference to the last date for making applications has only to be stated to be rejected. The date of selection is invariably uncertain. In the absence of knowledge of such date the candidates who apply for the posts would be unable to state whether they are qualified for the posts in question or not, if they are yet to acquire the qualifications. Unless the advertisement mentions a fixed date with reference to which the qualifications are to be judged, whether the said date is of selection or otherwise, it would not be possible for the candidates who do not possess the requisite qualifications in praesenti even to make applications for the posts. The uncertainty of the date may also lead to a contrary consequence, viz., even those candidates who do not have the qualifications in praesenti and are likely to acquire them at an uncertain future date, may apply for the posts thus swelling the number of applications. But a still worse consequence may follow, in that it may leave open a scope for malpractices. The date of selection may be so fixed or manipulated as to entertain some applicants and reject others, arbitrarily. Hence, in the absence of a fixed date indicated in the advertisement/notification inviting applications with reference to which the requisite qualifications should be judged, the only certain date for the scrutiny of the qualifications will be the last date for making the applications".

Keeping in view the principles laid down by the Apex Court in the decisions cited supra, it remains to be seen whether even on construing the date of passing of the examination by the petitioners herein as the date on which they appeared for the examination, the promotions made of their juniors could, still, be held to be proper in law.

10. In the cases on hand the rules leave nothing to doubt that passing of the service examination was a sine qua non for promotion. From the facts placed on record, it is also clear that the applicants had appeared for the respective service examination but results of the service examinations had not been announced at the time of reckoning for promotion. The facts obtaining in these cases are different from the facts that were involved in the cases referred to supra in that in those cases the Supreme Court was not called upon to determine the issue of eligibility and the persons who had moved the Courts had no eligibility. But herein the case of the applicants stands on a different footing. They claimed they

had the required eligibility and in our answer to issue No. 1 we have accepted their claim. The State while dealing with its officials as employer should not so conduct itself as even to give room for a charge that its action was such as to give room for heartburn amongst a section of the officials. The power to make promotions and thereby affect the conditions of service of its employees cannot be used to bring about discrimination in promotional chances of Government servants who belong to the same category. In W.P. No. 24384 of 2002, the case of the officials for promotion was considered on 20-4-1981. The applicant who was an aspirant for the promotional post had appeared in the December 1980 service examination the results of which for some unknown reasons could not be announced till 4-8-1981. The department would have certainly been aware of the fact that applicant had appeared in the said exam and the results were awaited. Even if on account of administrative exigencies the promotional post had to be filled up, in fairness to all concerned any promotion to be made to the said post ought to have been made on an ad hoc basis and subject to the result of the service examination of the applicant. Not only this is ex facie unreasonable but given the fact that the passing of the exam would relate back to the date of appearance in the exam, it also becomes illegal and, therefore, liable to be set aside.

The case of the applicants in W.P. Nos. 43433 to 43436 of 2002 is no different. The date of eligibility was taken from the date of announcement of the result and not from the date of passing of the examination. The action is sought to be justified by relying on a circular issued by the Chief Secretary to Government in No. GAD 155 SSR 66, Bangalore, dated 4th May, 1966. The said circular makes reference to Rule 53(a) and Rule 32 of the Karnataka Civil Services Rules, 1958 in the following terms:

"According to Note 3 below Rule 53(a) of the Karnataka Civil Services Rules, 1958 in cases where the passing of an examination or test confers on a Government servant the title to any right, benefit or concession, such title should be deemed to have accrued on the day following the last day of the examination or test which he passed.

Rule 32 of the same rules permits an appointment being made to be in independent charge of a higher post as a temporary measure instead of appointment a Government Servant to officiate in such higher posts".

(emphasis supplied)

Having noted the rules as aforesaid the circular gives the direction in total disregard of the rules. The direction which is totally contradictory to the Rules excerpted in the very circular, reads:

"It is hereby clarified that the date of publication of the results of departmental examination is the date for determining the eligibility for promotion and not any other previous date as an examination/test is deemed to have been passed only on the date the result is announced and not on any date prior to it".

We fail to understand how after quoting the rule the Government could issue directions which are totally opposed to the object and meaning of the rule and it is following this circular the departments have acted in the manner which is complained of now by the applicants. If the rules were adhered to in letter and spirit, this situation would not have arisen. The direction issued destroys the spirit and object behind the rule. In our considered opinion, the fixing of the eligibility and the subsequent promotion being violative of Article 16 of the Constitution, the question of delay is of no relevance at all and cannot be construed as a factor to either deny the applicants the benefit which is rightfully theirs or to validate the promotions that were illegally made. We may in this connection draw attention to the dictum of the Apex Court in *State of Kerala and Another Vs. N.M. Thomas and Others*, , which reads:

"... The guarantee of equality before the law or the equal opportunity in matters of employment is a guarantee of something more than what is required by formal equality.... But the language of Article 16(1) is in marked contrast with that of Article 14. Whereas, the accent in Article 14 is on the injunction that the State shall not deny to any person equality before the law or the equal protection of the laws, that is, on the negative character of the duty of the State, the emphasis in Article 16(1) is on the mandatory aspect, namely, that there shall be equality of opportunity for all citizens in matters relating to employment or appointment to any offices under the State implying thereby that affirmative action by Government would be consistent with the Article, if it is calculated to achieve it".

The entire approach of the departments appears to have been aimed at protecting and validating illegal appointments made through imperceptible extension of the theory of classification of its servants into two groups viz., eligible and ineligible which, in our considered opinion, is without basis and opposed to the relevant rule referred to us above. It is settled law that once statutory rules have been made, the executive power could be exercised only to fill in the gaps but the instructions cannot and should not supplant the rule itself. The circular referred to above instead of supplementing the rule, subverts the precious guarantee of equality and all actions by the executive in pursuance of such a circular which antagonizes the rule are, therefore, required to be interfered with.

11. In the result, we make the following.--

(i) W.P. No. 24384 of 2002 filed by the State is dismissed.

(ii) W.P. No. 19699 of 2003 is allowed.

W.P. Nos. 43433 to 43436 of 2002 filed by the State are dismissed. Original Application Nos. 3180 to 3183 of 1997 are allowed. The-final seniority list dated 31-5-1997 is quashed and the department is directed to prepare and publish a fresh seniority list and give all the consequential benefits to the applicants to which they would become entitled to consequent upon the publication of such

seniority list.