

(2001) 07 AP CK 0142

In the Andhra Pradesh High Court

Case No : Writ Appeal No. 19492 of 1999

The Regional Director, ESI Corpnn.

APPELLANT

Vs

Mohd. Yousuf and Others

RESPONDENT

Date of Decision : 19-07-2001

Acts Referred:

Constitution of India, 1950 — Article 14, 16, 309

Employees State Insurance Act, 1948 — Section 17(2), 97

Citation : (2003) 3 ALT 215

Hon'ble Judges : S.B. Sinha, C.J.;V.V.S. Rao, J

Bench : Division Bench

Judgement

S.B. Sinha, C.J.—This Writ Petition is directed against a Judgment dated 31.3.1999 passed by the Central Administrative Tribunal, Hyderabad Bench in O.A.No.1560 of 1997 whereby and whereunder the Original Application filed by the respondents 1 to 4 herein was disposed of with certain directions.

2. Respondents 1 to 4 herein who are working as Stenographer in Employees" State Insurance Corporation (ESI), Hyderabad filed the aforementioned Original Application before the Tribunal to set aside the notification No.A-12(11)-2/94 Estt.I(A) dated 1.3.1997 published in the Gazette of India on 22.3.1997 notifying the Employees" State Insurance Corporation (Head Clerk/Assistant) Recruitment Regulations, 1997, regulating the method of recruitment to the post of Head Clerk/Assistant, so far as it has not included the category of Stenographers as feeder category for the purpose of promotion thereto and for a further direction to include the category of Stenographers also as one of the feeder categories for promotion to the category of Head Clerks/Assistants with consequential reliefs.

3. The relevant facts necessary for the disposal of the Writ Petition are as follows:

Respondents 1 to 4 herein are working as Stenographers in ESI. Corporation, Hyderabad, w.e.f 24.2.1984, 3.5.1985, 28.2.1991 and 1.1.1992 respectively. The category of Stenographers was one of the feeder categories for the purpose of promotion to the category of Head Clerks/Assistants as per the Employees State

Insurance Corporation (Recruitment) Regulations, 1965, apart from the categories of UDCs/UDC Incharge/UDC Cashier/Care Taker etc. As per the said Regulations, Stenographers are eligible for promotion on merit basis but the promotion was not being in direct line. However, as per Note-3 appended to Schedule-II to the said regulations, it was stated that they may be posted to work as UDC for two years before they are considered for promotion to the higher grade, in which event, their promotion to higher category will be in direct line. By reason of amendment issued to the said Regulations by Notification dated 28.6.1974, Note-3 was deleted, as a result whereof, the stenographers were made eligible for promotion to the post of Head Clerk/Assistants/Managers Gr.III only as against 50% merit quota. Therefore, there is no dispute that the category of Stenographers is one of the feeder categories for promotion to the category of Head Clerks/Assistants.

4. By reason of the 1965 Regulations, Stenographers have also a channel of promotion to the category of Personal Assistant, which is equivalent to the Grade of Head Clerk to the extent of 50% and the remaining 50% are to be filled by direct recruitment. It appears that by reason of Notification dated 19.4.1994, separate regulations were issued regarding the recruitment for the posts of Stenographers/Personal Assistant/Sr. Personal Assistants in the ESI Corporation., called the ESIC (Stenographers) Recruitment Regulations, 1994. In terms of the said regulations, the method of recruitment to the category of Personal Assistants is 50% by the method of promotion from amongst the Stenographers on the basis of seniority subject to rejection of the unfit and the remaining 50% by promotion from amongst the Stenographers having rendered one year regular service on the basis of departmental competitive test in Stenography of the same standard as prescribed for direct recruitment, failing which by direct recruitment. However, so far as the post of Senior Personal Assistant is concerned, it was classified as Grade "C" Ministerial in the pay scale of Rs.1640-60-2600-EB-75-2900. The method of recruitment was by promotion from the category of Personal Assistants with 3 years regular service on the basis of seniority subject to rejection of the unfit.

5. While things stood thus, the Administrative Officer, of ESI Corporation, New Delhi issued letter dated 30.6.1995 calling the Stenographers who have completed the probation to exercise one time option to join the UDC cadre which reads thus:

Pursuant to the restructuring of the cadre of Stenographers and publication of separate Recruitment Rules for this stream of officials vide notification published in part III, Section IV of the Gazette of India dated 21.5.1994, the Director General has permitted the existing incumbents of the post of Stenographers who have completed the period of probation on or before 21.5.1994 to exercise one time option to join the UDC cadre. Such stenographers will continue to work as stenographers till they are absorbed against a regular vacancy in UDC cadre.]

6. The seniority of such stenographers on their absorption in the cadre of UDC

will be fixed keeping in view their length of regular service rendered in the grade of Stenographers/UDC.

7. The option once exercised will be treated as final. The R.,Ds are requested to bring this letter to the notice of all existing stenographers and request them to make their unambiguous option latest by 31st July, 1995.

8. Aggrieved by the same, some of the UDCs from Andhra Region filed O.A.No.1059 of 1995 before the Central Administrative Tribunal, Hyderabad Bench impleading the unofficial respondents herein contending that Stenographers are not entitled for conversion as UDCs as they have separate channel of promotion to the post of Personal Assistant and Sr. Personal Assistant. The Tribunal by order dated 11.12.1996 came to the conclusion that the notification dated 19.4.1994 does not prohibit the stenographers for being considered for promotion to the post of Head Clerk/Asst and thus they have two channels of promotion, one to the post of Personal Assistant and the other to the post of Head Clerk/Asst. In view of the regulations, the stenographers cannot be posted to the cadre of UDC before being considered for promotion to the post of Head Clerk/Asst and the one time option is uncalled for and the executive instructions cannot override the recruitment regulations. Paragraphs 12, 13 and 14 of the order of the Tribunal which are relevant for our purpose read as follows:

After hearing all the parties concerned, we come to the conclusion that the prayer in this O.A. is justified. However, it is to be emphasized that the Stenographers should also be considered for Head Clerk/Asst. without bringing them to the cadre of UDC, along with the eligible candidates in the UDCs to the higher post in accordance with the rules for selection.

9. It is also noted in this connection that the stenographers are also entitled for promotion to the higher grades of Personal Asst./Sr. P.A. in accordance with the recruitment rules following selection procedure to that category.

10. In the result, the following direction is given:

The letter dated 30.6.95 whereby the Stenographers are to be posted as UDCs as one time exception and posting of four stenographers as UDCs by letter dated 30.8.1995 are set aside. The promotions of UDCs and Stenographers are to be regulated as observed above.

11. Thereafter statutory regulations known as Employees State Insurance Corporations (Head Clerk/Assistant) Recruitment Regulations, 1997 were issued on or about 1.3.1997 by the competent authority in exercise of the power conferred by sub-section (1) of Section (1) of Section 97 read with Clause (xxi) of sub-section (2) and sub-section (2) of Section 17 of the Employees State Insurance Act, 1948 in supersession of the Employees State Insurance Corporation (Recruitment) Regulations, 1965 in so far as they relate to the post of Head Clerk/Assistant/Managers Grade-III/Cashier in Head Clerk's scale, as amended from time to time, except in respect of the things done, or omitted to

be done before such supersession. As per the said regulations, 75% of the posts are to be filled by promotion on the basis of seniority and 25% on merit on the basis of Departmental Competitive Examination with three years of regular service and these promotions were confined only to UDCs/UDC Cashiers.

12. By reason of the aforementioned regulations, therefore, now only the post of U.D.C. was made as feeder category for the purpose of promotion to the category of Head Clerk/Assistant and the category of stenographers were completely excluded as feeder category.

13. The Tribunal by the order impugned herein directed as under:

The applicants herein are eligible for progressing in both the channels viz., either UDC/Head Clerk/Assistants or in the post of Personal Assistant/Sr. Personal Assistant. If they were earlier prohibited to appear for Head Clerk/Assistants posts their cases should be reviewed in view of this judgment and on that basis of review necessary consequential action should be taken in accordance with law.

14. Time for compliance of the above order is four months from the date of receipt of a copy of this order.

15. The sole question, which arises for consideration, is as to whether by reason of the aforementioned notification, the right of the unofficial respondents had been infringed.

16. The learned counsel appearing for the petitioner, inter alia, would submit that having regard to the fact that the earlier Original Application being No.1059 of 1995 was allowed because the options called for from the UD Stenographers was not sustainable, impugned Judgment cannot be upheld as it would amount to partial modification of the Regulations, 1997. He would further urge that the directions issued by the Tribunal declaring that the unofficial respondents as eligible for progressing in both the channels is contrary to law.

17. Mr. Sudheer, learned counsel appearing on behalf of the unofficial respondents, on the other hand, would submit that having regard to the history of the matter, there cannot be any doubt that in terms of Regulations 1965, the unofficial respondents were entitled to be considered for promotion to the category of Personal Assistants as also to the category of Head Clerks/Assistants. According to the learned counsel, the chances for higher promotion are more in the category of Head Clerks/Assistants. In this situation, the learned counsel would urge that issuance of separate regulations for the Head Clerk/Assistant particularly having regard to the observations of the Tribunal in earlier O.A. that the Stenographers should be considered for promotion to the category of Head Clerks/Assistants along with the eligible UDC candidates in accordance with the regulations, must be held to be bad in law.

18. The learned counsel would contend that having regard to the fact that 1965 Regulations still existed, irrespective of the decision of the Tribunal, they were considered for promotion to the post of Head Clerk/Assistant and it is only for

that purpose, one-time options had been called for. It was submitted that the unofficial respondents herein had opted for the ministerial service. It was further contended that except in the State of Andhra Pradesh, in other parts of the country, no case was filed and as such the options so exercised by the UD stenographers for conversion to the UDC cadre were accepted. The learned counsel would contend that the learned Tribunal, therefore, rightly allowed the application filled by the unofficial respondents as the Regulations, 1997 did not have the sanctity of law nor they were necessary to be issued keeping in view the fact that the 1965 regulations still existed.

19. The learned counsel would urge that by reason of the impugned regulations, the right of the respondents for promotion to higher category has been infringed. In support of the said contention, strong reliance has been placed on the decision of the Supreme Court in RAGHUNATH PRASAD SINGH v. SECRETARY, HOME (POLICE) DEPARTMENT¹ and COUNCIL OF SCIENTIFIC & INDUSTRIAL RESEARCH v. K.G.S. BHATT². Mr. Sudheer would contend that the said regulations had been issued mala fide and in an arbitrary manner, as a result whereof, the unofficial respondents would face great hardship. The learned counsel would contend that the Regulations, 1997 having been issued nullifying the Judgment of the Tribunal, the same must be held to be invalid in law. Reliance in this connection has been placed on the decisions of the Apex Court in T.R. KAPUR v. STATE OF HARYANA³ and STATE OF MAHARASHTRA v. J.A. KARANDIKAR⁴.

20. It has not been disputed that the Regulations, 1997 impugned before the learned Tribunal are statutory in nature. It is trite that question of statutory regulations being tainted with malice cannot be allowed to be agitated. Judicial review of legislation is permissible only on limited grounds. Hardship being faced by certain group of persons by reason of such legislation cannot again be a subject matter of judicial review. In VIJAYALAKSHMAMMA v. B.T. SHANKAR⁵, the Apex Court while considering the provisions of Hindu Adoption and Maintenance Act, 1956 vis-à-vis the Old Hindu Law, clearly held that Courts may not add to or alter provisions of statutes by reading into them what was never intended by the legislature or may have been deliberately avoided by it. The Apex Court further observed that the extent to which aspects of law would require modernization, modification and alteration are matters of legislative policy and courts may not add to or alter the language, structure or contents of a provision by reading into it that which was not intended by the Legislature.

21. Yet again in GURUDEVDATTA VKSSS MARYADIT v STATE OF MAHARASHTRA⁶, the Apex Court dealing with legislative malice has categorically held that existence of malice in the legislation making process cannot be gone into by the Courts while considering the validity of a statute.

22. The submission of Mr. Sudheer to the effect that by reason of 1965 regulations, the right of the petitioners to be considered for promotion to the post of Head Clerk/Assistant survives, in our considered opinion, is wholly misplaced. The old regulations having been amended by reason of 1997

regulations, the latter shall prevail. 1997 Regulations had to be enacted having regard to the fact that the policy decision adopted for giving one time option to the Stenographers to opt for UD cadre was held to be contrary to the statutory regulations and was struck down by the Tribunal. By making the Regulations, 1997 the authority cannot be said to have acted either illegally or without jurisdiction. The authority, which has the power to make regulations in terms of the Employees' State Insurance Act, has also the power to amend the same. Since the policy decision adopted by the petitioner to call for one time option was held to be contrary to the regulations, now, the procedural defect has been remedied by issuing the 1997 regulations.

23. We do not find any force in the contention of Mr. Sudheer to the effect that that the UD Stenographers have an indefeasible right to be considered for promotion to the post of Head Clerk/Assistant. Keeping in view the exigencies of the situation, the channel of promotion may be revised and no exception thereto can be taken.

24. It is one thing to say that absence of promotional prospects in public service should be deprecated, but it is another thing to say that a promotion policy is laid down so as to curve out different channels of promotion.

25. In RAGUNATH PRASAD SINGH'S CASE (supra), on which strong reliance has been placed by Mr. Sudheer, in the fact situation obtaining therein, it was held that the option in terms of the instructions dated 1st of October, 1974 was available to those who came within the ambit of the earlier judgment. The case on hand stands absolutely on a different footing. It is not the case of the unofficial respondents that by reason of the regulations, their chances of promotion to higher category had been stopped forever. Similarly, in COUNCIL OF SCIENTIFIC & INDUSTRIAL RESEARCH case, the Apex Court, dealing with a situation where there had been no chances of promotion in a department, observed thus:

26. He was, however, left without opportunity for promotion for about twenty years. This is indeed, adroitly, an organization public or private does not "hire a hand" but engages or employs a whole man. The person is recruited by an organization not just for a job, but for a whole career. One must, therefore, be given an opportunity to advance. This is the oldest and most important feature of the free enterprise system. The opportunity for advancement is a requirement for progress of any organization. It is an incentive for personnel development as well.

27. In our view, the above decision has also no application to the facts of the present case.

28. In T.R. Kapur's case, the Supreme Court was dealing with a case wherein by reason of the amended rules; the qualifications were laid down with retrospective effect, which was held to be ultra vires the provisions of Articles 14 and 16 of the Constitution of India. In that case itself, however, the Apex Court observed:

It is well settled that the power to frame rules to regulate the conditions of service under the proviso to Art. 309 of the Constitution carries with it the power to amend or alter the rules with a retrospective effect : B.S. Vadera Vs. Union of India (UOI) and Others, , Raj Kumar Vs. Union of India (UOI) and Others, , K. Nagaraj and Others Vs. State of Andhra Pradesh and Another, and The State of Jammu and Kashmir Vs. Shri Triloki Nath Khosa and Others, . It is equally well settled that any rule which affects the right of a person to be considered for promotion is a condition of service although mere chances of promotion may not be. It may further be stated that an authority competent to lay down qualifications for promotion, is also competent to change the qualifications. The rules defining qualifications and suitability for promotion are conditions of service and they can be changed retrospectively. This rule is however subject to a well recognised principle that the benefits acquired under the existing rules cannot be taken away by an amendment with retrospective effect, that is to say, there is no power to make such a rule under the proviso to Art. 309 which affects or impairs vested rights. Therefore, unless it is specifically provided in the rules, the employees who are already promoted before the amendment of the rules cannot be reverted and their promotions cannot be recalled.

29. From the above, it is clear that the rules relating to conditions of service can be amended subject to the condition that the benefits accrued to the employees under the existing rules are not affected by reason of the amendment of the rules. The respondents herein had only mere chance of promotion or at best they had a right to be considered for promotion as and when the appointing authority decides to promote the employees. They had no vested right of promotion in terms of Article 16 of the Constitution of India. Thus, it cannot be said that the statutory authority did not have the right to amend or alter the rules. The rules have not been altered with retrospective effect far less thereby the vested right of the respondents 1 to 4 had been taken away.

30. In State of Maharashtra v J.A. Karnadikar (supra), the Apex Court observed:

We do not have to reflect upon the rules of interpretation since they are well settled. They are now like the habits of driving which have become ingrained. They come to our assistance by instinct. We are to use the different rules meticulously to give effect to the scheme as we use the clutch, brake and accelerator for smooth driving. These rules are to be harmoniously construed. We should not concentrate too much on one rule and pay too little attention on the other. That would lead us astray and result in hardships. We must avoid such construction. Rule 2 of the 1962 Rules no doubt states that a candidate who does not pass the examination at the end of nine years' service will lose his seniority. But this rule cannot be read in isolation as the High Court did. It has to be read along with the other rules since it is a part of the scheme provided for promotion. Rule 5 requires the Government to hold the examination every year. This rule is the basis of the entire scheme and the effect of other rules depends upon holding the examination. If examination is not held in any year, the rule 2 cannot operate

to the prejudice of a person who has not exhausted all his chances. The person who has not exhausted the available chances to appear in the examination cannot be denied his seniority. It would be unjust, unreasonable and arbitrary to penalise a person for the default of the Government to hold the examination every year. That does not also appear to be the intent or purpose of the 1962 Rules.

31. As regards the discretion of the Government to relax the period for passing the test in individual cases, it was observed:

This takes us to the question whether the Government was justified in individual cases to relax the period for passing the examination. It is said that the number of persons falling into this category is not more than five. In the rejoinder filed on behalf of the Government, it is stated that the Government made some orders extending the period for individuals to pass the examination on administrative grounds or on some genuine hardships. It is also stated that such orders were made upon recommendations by the respective departments and those persons passed the examination within the period extended. There is no reason to doubt the correctness of these statements made in the rejoinder. The power to relax the conditions of the rules to avoid undue hardship in any case or class of cases cannot now be gainsaid. It would be, therefore, futile for the respondents to make any grievance.

32. The above decision, in the facts and circumstances of this case, do not advance the contentions of the unofficial respondents.

33. We are, therefore, of the opinion that the impugned judgment of the Tribunal cannot be sustained, which is set aside accordingly. However, we may observe that having regard to the fact there exists power of relaxation under the Regulations, 1997 and as it is stated before us that throughout the country only four persons i.e. the respondents 1 to 4 herein were left out for consideration for promotion to the category of Head Clerks/Assistants, the Central Government may consider the desirability of relaxing the Regulations, 1997 in their favour and pass appropriate orders.

34. The Writ Petition is disposed of accordingly. No costs.