

Mervyn Coutindo & Ors.

Vs

Collector of Customs, Bombay & Ors.

Writ Petition No. 97 of 1964

(CJI P. B. Gajendragadkar, K. N. Wanchoo, J. C. Shah, S. M. Sikri, V. Ramaswami-I JJ)

14.02.1966

JUDGMENT

WANCHOO, J. -

This petition under Art. 32 of the Constitution by certain Appraisers in the Customs Department of the Government of India is directed against the seniority list prepared in 1963 under the order of the Central Board of Revenue (hereinafter referred to as the Board). The petitioners contend that the list in question denies them equality of opportunity in matters relating to employment under the State enshrined in Art. 16(1) of the Constitution. The system that prevails for recruitment to the post of Appraisers is that 50 per cent is reserved for direct recruits while the remaining 50 per cent is filled up by promotion from subordinates in the Customs Department. It further appears that seniority is determined in the cadre by the system of rotation, i.e., the list is arranged in such a way that there is one person from the direct recruits and one from the promotees alternately. The contention of the petitioners is that this system has resulted in discriminatory treatment against them with the consequence that promotees of much longer service in the cadre of Appraisers are put in the seniority list below direct recruits with much shorter service. This, according to the petitioners, offends against equality of opportunity guaranteed under Art; 16(1) of the Constitution. That is one grievance of the petitioners. The other grievance of the petitioners is that in the cadre of Principal Appraisers who are all promoted from Appraisers, there is again discrimination and violation of equality of opportunity inasmuch as the same method is followed in the matter of fixation of seniority of Principal Appraisers, though in this case there is only one source of recruitment i.e., by promotion from the cadre of Appraisers. The petitioners therefore pray that the seniority list prepared in 1963 should be struck down as violative of Art. 16(1) and directions be issued to prepare a fresh seniority list for the cadre of Appraisers. They further pray that in the matter of appointment of Principal Appraisers, the system at present being followed in the matter of seniority should be struck down.

The petition has been opposed on behalf of the Union. It is contended that in a service where recruitment is partly by promotion and partly by direct recruitment, the system of fixing seniority by rotation is followed and that this is being done in a number of services under the Union. It is urged that there is nothing discriminatory in such a system and there is no denial of equality of opportunity by following the rotational system for determining seniority in such circumstances. As to the Principal Appraisers, the case of the Union is that these posts are selection posts and selection is made from the cadre of Appraisers. For this purpose Appraisers with a minimum service of five years are eligible for promotion and there is a probation of two years before they are confirmed. The Union further contends that by the system of rotation which is being followed in the cadre of Principal Appraisers also what happens is that the seniority of a direct recruit in the cadre of

Appraisers is restored as on account of five years qualification. A direct recruit cannot be promoted to the post of Principal Appraiser while his junior promotee in the post of Appraiser gets such promotion. According to the Union, therefore, this system which is given effect to in the cadre of Principal Appraisers merely restores the seniority which a direct recruit had in the cadre of Appraisers. This is the only justification for the system in the matter of seniority in the cadre of Principal Appraisers.

We shall first consider the question of Appraisers. As far back as 1936, an order was passed by the Board which laid down that recruitment to the Customs Appraisers' Service would be from two sources, i.e. 50 per cent by promotion, 25 per cent directly from experts and 25 per cent by means of a competitive examination or selection by the Public Service Commission. It was also said in the said order that those percentages would be the maximum and the Collectors of Customs would not be bound to recruit upto the maximum particularly in the case of recruitment by promotion. In actual practice however this order has been acted upon as if it provides 50 per cent for promotees and 50 per cent for direct recruits, whether they are experts or come by competitive examination or selection by the Public Service Commission. In 1940, the Government of India issued a circular for the determination of relative seniority of candidates appointed by direct recruitment and by promotion. In that circular it was stated that "where in a department two permanent or quasi permanent vacancies occur, even simultaneously, and the first vacancy is in accordance with the rotation meant for a direct recruit, the direct recruit will rank in seniority above the promotee even though he joined his post after the promotee had been promoted and confirmed". Reliance has been placed on behalf of the Union on this circular in the matter of fixation of seniority between direct recruits and promotees in a cadre in which rotational system prevails. The petitioners however rely in reply on a circular issued in June 1949. That circular dealt with the seniority of displaced government servants who had been absorbed temporarily in service under the Central Government. The occasion for that circular was the division of India, and the creation of Pakistan resulting in displacement of a large number of public servants from the area which went to Pakistan. That circular provided for a change in the system due to displaced government servants having in most cases lost all their property and having to migrate in difficult circumstances. It was therefore thought fit to give some weightage in the matter of seniority to such persons on compassionate grounds. It was therefore decided that the seniority of persons appointed on permanent or quasi permanent basis before January 1, 1944 should not be disturbed, but thereafter displaced persons should be given consideration and their seniority counted on the basis of length of service in the particular grade as well as service in an equivalent grade. "Service in an equivalent grade" was defined as service on a rate of pay higher than the minimum of the time scale of the grade concerned. The principle of this circular was also applied to ex-Government servants of Burma appointed under the central Government and employees of the former Part B States taken over by the Centre as a result of federal financial integration. Naturally as this change could not be applied only to displaced persons etc., it was applied to the existing government servants of the Government of India also from January 1, 1944. But there is nothing in the circular to show that the seniority of the existing government servants inter se was to be disturbed on the basis of this circular. The real purpose of this circular appears to be to fix seniority for displaced persons etc., in accordance with it and for that purpose it applied the same principle to the existing central government servants from January 1, 1944.

It appears that by 1959, the circular of 1949 for absorption of displaced government servants etc., had worked itself out. Therefore, on December 12, 1959, the Government of India issued another circular containing general principles for determining seniority of various categories of persons employed in central services. By this circular, the circular of 1949 and certain other circulars issued

to deal with special types of recruitment like war service candidates were cancelled, and thereafter seniority was to be determined by the circular of 1959, which states that instructions contained in the said circulars had achieved their object and there was no longer any reason to apply those instructions in preference to the normal principles for determining seniority in future. For the future certain general principles were laid down for fixing the seniority in the circular of 1959. These principles were not to apply retrospectively but were given effect to from the date of their issue, subject to certain reservations with which we are not concerned.

One of the principles in this circular of 1959 is with respect to relative seniority of direct recruits and promotees. It provides that relative seniority of direct recruits and promotees shall be determined according to the rotation of vacancies between direct recruits and promotees which shall be based on the quota of reservation for direct recruitment and promotion respectively in the recruitment rules. It was further explained that a roster should be maintained based on the reservation for direct recruitment and promotion in the recruitment rules. Where, for example, the reservation for each method is 50 per cent, the roster will run as follows - (1) promotion, (2) direct recruitment, (3) promotion, (4) direct recruitment, and so on. Appointments should be made in accordance with this roster and seniority determined accordingly. A question has been raised whether the circular of 1940 to which we have already referred survived after this circular of 1959; but in our opinion it is unnecessary to decide that question, for the circular of 1959 itself lays down that seniority shall be determined accordingly, i.e. in accordance with the rotational system, depending upon the quota reserved for direct recruitment and promotion respectively. It is this circular which according to the respondent has been followed in determining the seniority of Appraisers in 1963.

Before we come to what has been done in 1963 in the matter of fixing seniority of Appraisers, we may refer to two other circulars. The first is a circular of the Board issued in 1953. That circular in our opinion has nothing to do with the question of fixing of seniority as between direct recruits and promotees. Its main value is that it emphasises that the proportion fixed for direct recruits and promotees should be rigidly maintained. It also directs that promotion to higher grades should be made on the basis of a combined seniority list of both direct recruits and promotees. Then there is another circular of 1955. That circular again emphasises the rotational system and says that it has been decided that "inter se seniority of direct recruits and promotees in the grade of Appraisers should be determined in the order in which the vacancy in that grade is filled by a direct recruit or by a promotee according to the quota fixed for such appointments". Stress has been laid on behalf of the petitioners on the words "is filled" in the circular, and it is urged that this means that until the direct recruit is actually recruited and fills the vacancy meant for a direct recruit he cannot get seniority from before the date he fills the vacancy merely on the ground of rotational system of fixing seniority. We do not think that this is the meaning of the words "is filled" used in this circular. We have already said that this circular also emphasises the rotational system in the matter of fixing of seniority and all that it means is that vacancies should be filled either by direct recruits or by promotees according to the quota fixed for such appointments.

This brings us back to the circular of 1959, and the main question in that connection is the meaning to be assigned to the words "seniority determined accordingly", in the explanation to principle 6 relating to relative seniority of direct recruits and promotees. As we read these words, their plain meaning is that seniority as between direct recruits and promotees should be determined in accordance with the roster, which has also been specified, namely, one promotee followed by one direct recruit and so on. Where therefore recruitment to a cadre is from two sources, namely, direct recruits and promotees and rotational system is in force, seniority has to be fixed as provided in the

explanation by alternately fixing a promotee and a direct recruit in the seniority list. We do not see any violation of the principle of equality of opportunity enshrined in Art. 16(1) by following the rotational system of fixing seniority in a cadre half of which consists of direct recruits and the other half of promotees, and the rotational system by itself working in this way cannot be said to deny equality of opportunity in government service. The anomalies which have been referred to in the petition arise not on account of there being anything opposed to equality of opportunity in government service by the use of the rotational system; they arise out of the fortuitous circumstance that in this particular service of Appraisers, for one reason or another, direct recruitment has fallen short of the quota fixed for it. It is merely because of this fortuitous circumstance that anomalies to which reference has been made in the petition have arisen. There is no doubt that if direct recruitment had kept pace with the quota fixed therefor there would have been no anomalies in fixing the seniority list. The question therefore narrows down to this : Can it be said that there is denial of equality of opportunity which arises out of this fortuitous circumstance and which is not a vice inherent in the rotational system? We are not prepared to say that the rotational system of fixing seniority itself offends equality of opportunity in government service. Any anomalies which may have resulted on account of insufficient recruitment of direct recruits in the past cannot in our opinion be a ground for striking down the rotational system, which, as we have said, does not itself amount to denial of equality of opportunity in the matter of employment in government service. It is regrettable that some anomalies have appeared because of insufficient recruitment of direct recruits in the past in this particular service. But that in our opinion can be no reason for striking down the seniority list prepared in 1963 which is undoubtedly in strict accordance with the rotational system based on the fixed quotas for recruitment of direct recruits and promotees. The order of the Board of 1963 on the basis of which the impugned seniority list of Appraisers has been prepared clearly lays down that "the principle of determination of seniority of the direct recruits and the promotees inter se in the prescribed ratio of 1 : 1 should be worked out". This order is in accordance with the circular of 1959 and as we have said already, there is no inherent vice in the principle of fixing seniority by rotation in a case where a service is composed in fixed proportion of direct recruits and promotees. Nor do we think that this system is on a par with the carry-forward rule which was struck down by this Court in *T. Devadasan v. Union of India and others* ((1964) 4 S.C.R. 680) and on which strong reliance is placed on behalf of the petitioners. In the case of the carry-forward rule certain quota is fixed annually for a certain class of persons and it is carried forward from year to year. This is very different from a case where a service is divided into two parts and there are two sources of recruitment, one of promotion and the other by direct recruitment. In such a case, the whole cadre of a particular service is divided into two parts and there is no question of carrying anything forward from year to year in the matter of annual intake. The basis on which the carry-forward rule was struck down by this Court does not therefore apply to a case where the whole cadre of a service is divided in certain fixed proportions between promotees and direct recruits. The petitioners therefore can get no assistance from *Devdasan's* case. The petition must therefore fail so far as seniority of Appraisers is concerned.

This brings us to the question of Principal Appraisers. We are of opinion that the petitioners have a legitimate grievance in this respect. The source of recruitment of Principal Appraisers is one, namely, from the grade of Appraisers. There is therefore no question of any quota being reserved from two sources in their cases. The rotational system cannot therefore apply when there is only one source of recruitment and not two sources of recruitment. In a case therefore where there is only one source of recruitment, the normal rule will apply, namely, that a person promoted to a higher grade gets his seniority in that grade according to the date of promotion subject always to his being found fit and being confirmed in the higher grade after the period of probation is over. In such a case it is

continuous appointment in the higher grade which determines seniority for a source of recruitment is one. There is no question in such a case of reflecting in the higher grade the seniority of the grade from which promotion is made to the higher grade. In so far therefore as the respondent is doing what it calls restoration of seniority of direct recruits in Appraisers' grade when they are promoted to the Principal Appraisers' grade, it is clearly denying equality of opportunity to Appraisers which is the only source of recruitment to the Principal Appraisers' grade. There is only one source from which the Principal Appraisers are drawn, namely, Appraisers, the promotion being by selection and five years' experience as Appraiser is the minimum qualification. Subject to the above all Appraisers selected for the post of Principal Appraisers must be treated equally. That means they will rank in seniority from the date of their continuous acting in the Principal Appraisers' grade subject of course to the right of government to revert any of them who have not been found fit during the period of probation. But if they are found fit after the period of probation they rank in seniority from the date they have acted continuously as Principal Appraisers whether they are promotees or direct recruits. The present method by which the respondent puts a direct recruit from the grade of Appraiser, though he is promoted later, above a promotee who is promoted to the grade of Principal Appraiser on an earlier date clearly denies equality of opportunity where the grade of Principal Appraiser has only one source of recruitment, namely, from the grade of Appraisers. In such a case the seniority in the grade of Principal Appraisers must be determined according to the date of continuous appointment in that grade irrespective of whether the person promoted to that grade from the Appraisers' grade is a direct recruit or a promotee. This will as we have already said be subject to the government's right to revert any one promoted as a Principal Appraiser if he is not found fit for the post during the period of probation. The petition therefore will have to be allowed with respect to the method by which seniority is fixed in the grade of Principal Appraisers. That method denies equality of opportunity of employment to the Appraisers who are the only source of recruitment to the grade of Principal Appraisers. What the impugned method seeks to do is to introduce a kind of reservation in respect of the two categories of Appraisers from which the promotions are made, and that cannot be done when the source of promotion is one.

We therefore dismiss the petition so far as the seniority of Appraisers is concerned but allow it so far as the seniority of Principal Appraisers is concerned and the method used by the respondent in that connection must be struck down, and we further direct the determination of their seniority in the manner we have stated above. In the circumstances we pass no order as to costs.

Petition allowed in part.

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