Govind Dattatray Kelkar & Ors.

Vs

Chief Controller of Imports & Exports & Ors.

Writ Petition No. 40 of 1965

(R. S. Bachawat, M. Hidayatullah, S. M. Sikri JJ)

01.11.1966

JUDGMENT

SUBBA RAO, C.J. –

This writ petition raises the question of the constitutional validity of the appointment of respondents 4 to 74 by direct recruitment as Assistant Controllers of Imports and Exports.

The relevant facts may briefly be stated. The Imports and Exports organization came into existence during the Second World War. It was expected to be a temporary organization and, therefore, appointments to the various categories in the said organization were made on an ad hoc basis. In the year 1949 it comprised the following posts : Chief Controller, Joint Chief Controller, Deputy Chief Controller, Assistant Chief Controller of Imports and Exports, Executive Officers, Licensing Officers and Junior Licensing Officers. Of these the last 3 were Class II posts and the rest were Class I posts. Subsequently, the posts of Assistant Chief Controllers were redesignated as "Controllers" and the posts of Executive Officers, Licensing Officers and Junior Licensing Officers were converted into one category, namely, Assistant Controllers, Class II. In the year 1949 the appointment of the said officers and their promotions were governed by the principles enunciated in the Memorandum No. 30/44-48-Appts. dated June 22, 1949 issued by the Government of India (Ministry of Home Affairs). But, as no rules were prescribed and the appointments were made on ad hoc basis, the Union Public Service Commission rightly raised objections; and after protracted correspondence it was agreed in 1955 that the appointments made by the Ministry during 1947-1951 should be regularized on the basis of the record of work and that in regard to subsequent appointments there should be a ratio of 25% for the departmental promotees and 75% for direct recruits. Ultimately, on June 13, 1962, the said arrangement was embodied in the recruitment rules made by the Government of India under Art. 309 of the Constitution.

There are three main categories of employees in the said department, namely, (i) those appointed prior to January 1, 1952; (ii) those appointed between January 1, 1952 and November 30, 1955; and (iii) those appointed after November 30, 1955. We are now concerned in this petition with those appointed after November 30, 1955. Assistant Controllers, Class II, are appointed from two sources, namely, by promotion from the lower cadre and by direct recruitment. Nothing need be said in this case about the first category, for their appointments are not in question. In the second category there were 76 posts available for recruitment. On the agreed formula of 25% for the department and 75% for direct recruitment, 19 posts would go to the departmental candidates and 57 posts to the direct recruits.

In December, 1955, pursuant to an advertisement issued by the Union Public Service Commission,

57 Assistant Controllers were appointed by direct recruitment. After consulting the said Commission, the Government of India fixed the seniority of the Assistant Controllers and prepared a seniority list dated November 30, 1961.

At this stage it may be mentioned that 76 posts to which recruitment was made were temporarily manned by departmental promotees. The effect of the new recruitment was that their position of seniority was disturbed by reason of the application of the said ratio of 25% for the departmental candidates and 75% for the direct recruits and by reason of the fact that the direct recruits took precedence over some of them. On November 30, 1961, the Government of India prepared a new seniority list and the said seniority list is given as Annexure 'F' to the petition. The said list comprises three categories of officers : the first category of 47 officers were those that were appointed before January 1, 1952, and whose appointments had been regularized by the Union Public Service Commission; the second category of officers are 76 in number comprising of departmental promotees and the nominees of the Union Public Service Commission in the ratio of 25 : 75 respectively as laid down in the recruitment rules; and the third category are departmental promotees and the nominees of the Union Public Service Commission arranged on the principle of rotation in the ratio of 1 : 3. But, in the second category with which we are now concerned, it appears that the Departmental Promotion Committee considered the cases of Assistant Controllers who were working on an ad hoc basis and selected, on the basis of merit, 25 officers out of whom 19 were adjusted against the said quota of 25% and these 19 officers were placed above the direct recruits. Serial Nos. 48 to 66 in the list are promotees so selected by the Departmental Promotion Committee, and serial Nos. 68 to 123 in the said list are direct recruits.

The first petitioner joined the office of the 3rd respondent, the Joint Controller of Imports and Exports, Bombay, on April 29, 1946, as an Appraiser. He was promoted to the post of Assistant Controller with effect from March 31, 1956; that is to say, he has been holding the post for a period of about 9 years at the time he filed the petition.

The second petitioner joined the said office on March 5, 1941 and in due course he was promoted to the post of Assistant Controller with effect from April 1, 1956. He was also holding the said post for a period of about 9 years at the time of filing the petition.

The third petitioner joined the said office on May 8, 1945 as a B Grade Clerk and was promoted to the post of Assistant Controller with effect from September 4, 1956. He had been holding the said post for about 8 1/2 years at the time of filing the petition.

The 4th petitioner joined the said office on July 28, 1943 as a lower division clerk and in due course he was promoted as Assistant Controller with effect from November 1, 1961. But he was reverted to the post of Section Head on June 14, 1963.

The effect of the new seniority list prepared on November 30, 1961 is that, as the said ratio was applied and as the direct recruits were put above the petitioners and others similarly situated, the 1st petitioner, who should have been shown at No. 67 in the list but for the new recruitment, was shown at No. 124; the 2nd petitioner, who should have been shown at No. 69, was put at No. 132; the 3rd petitioner, who should have been above all direct recruits, was not shown in the seniority list at all; and the 4th petitioner, who should have been above all direct recruits appointed after November 1, 1961 and below the departmental promotees appointed prior to November 1, 1961, was not shown in the seniority list at all. The petitioners allege that the said order dated November 30, 1961 fixing the seniority violated Art. 16 of the Constitution and that they should have been placed above the

direct recruits.

Mr. Gokhale, learned counsel for the petitioners, raised before us the following points : (i) The rules of 1962 were not retrospective in operation and, therefore, the seniority list dated November 30, 1961 based on the decision of the 2nd respondent, Union of India, dated July 29, 1961, was without any authority of law and was violative of Arts. 14 and 16 of the Constitution; (ii) prior to November, 1955 there was only one source of recruitment to the cadre of Assistant Controllers and, therefore, the decision to relate back the seniority of the direct recruits to the period between January 1, 1952 and November 30, 1955 being based on reservations to those who were then not in existence amounted to carrying forward of vacancies which was held by this Court to be unconstitutional; (iii) the ratio of 75% : 25% between direct recruits and promotees was violative of Art. 14 of the Constitution and (iv) the appointment of the officers of the Ministry of Rehabilitation to the posts reserved for direct recruits through the Union Public Service Commission violated Art. 14 of the Constitution.

The relevant law on the subject is well settled and does not require further elucidation. Under Art. 16 of the Constitution, there shall be equality of opportunity for all citizens in matters relating to employment or appointment to any office under the State or to promotion from one office to a higher office thereunder. Art. 16 of the Constitution is only an incident of the application of the concept of equality enshrined in Art. 14 thereof. It gives effect to the doctrine of equality in the matter of appointment and promotion. It follows that there can be a reasonable classification of the employees for the purpose of appointment or promotion. The concept of equality in the matter of promotion can be predicated only when the promotees are drawn from the same source. If the preferential treatment of one source in relation to the other is based on the differences between the said two sources, and the said differences have a reasonable relation to the nature of the office or offices to which recruitment is made, the said recruitment can legitimately be sustained on the basis of a valid classification. There can be cases where the differences between the two groups of recruits may not be sufficient to give any preferential treatment to one against the other in the matter of promotions, and, in that event, a court may hold that there is no reasonable nexus between the differences and the recruitment. In short, whether there is a reasonable classification or not depends upon the facts of each case and the circumstances obtaining at the time the recruitment is made. Further, when a State makes a classification between two sources of recruitment, unless the classification is unjust on the face of it, the onus lies upon the party attacking the classification to show by placing the necessary material before the court that the said classification is unreasonable and violative of Art. 16 of the Constitution : see Banarsidas v. The State of Uttar Pradesh ([1956] S.C.R. 357). All India Station Masters' and Assistant Station Masters' Association v. General Manager, Central Railways ([1960] 2 S.C.R. 311); and The General Manager, Southern Railway v. Rangachari ([1962] 2 S.C.R. 586).

Let us apply the said principles to the facts of the case. The sheet-anchor of the contentions of the learned counsel for the petitioners was that the petitioners, along with others, were promoted before the new appointments were made as Assistant Controllers, subject to the condition that they were approved by the Union Public Service Commission and that, therefore, the direct recruits could not be placed over them either on the principle of aforesaid ratio or on the principle of rotation and that in doing so the Government violated the doctrine of equality. The placing of the direct recruits over the petitioners and others who had long experience as Assistant Controllers, the argument proceeded, was violative of the doctrine of equality. There would be much force in this argument had the premises been correct. But the documents filed demonstrate that it has no foundation. The promotion of two of the petitioners, Kelkar and Deshmukh, were made by the Government by Order

dated March 31, 1956; and the other two petitioners were also, it is not disputed, promoted under similar Orders dated September 4, 1956 and November 1, 1961. Paragraph 5 of Order dated March 31, 1956 reads :

> "I am to add that the appointments of the Officers mentioned above have been made on an ad interim basis pending selection of the officers by the Union Public Service Commission."

By that time in November, 1955, the Union Public Service Commission had advertised for the posts of Assistant Controllers. There was also admittedly correspondence between the Government and the Union Public Service Commission indicating that the Union Public Service Commission was questioning the regularity of the appointments made earlier without framing rules and without consulting them. With the said background if the said order is looked into, there cannot be any doubt that the order in terms as well as in intent made only ad hoc appointments pending the filling up of the posts through the Union Public Service Commission. The order says in terms that the appointment of the officers mentioned therein were made on an ad interim basis pending selection of the officers by the Union Public Service Commission. If the intention of the Government was that the officers mentioned therein were appointed subject to the approval of the Union Public Service Commission, the phraseology used would have been different. It would have run : "the appointments of the officers mentioned above have been made, subject to the approval by the Union Public Service Commission". On the other hand, the word "selection" indicates that the appointments were only pending selection of the officers to the posts. To state it differently, as the selection to the said posts was impending through the usual channel of the Union Public Service Commission from all the sources of recruitment, the said officers were promoted on an ad hoc basis. If that was the intention - we have no doubt that it was so - it follows that the petitioners and others similarly situated had no right to the posts of Assistant Controllers.

If that be so, the factual position was that there were 76 vacancies and that the petitioners and others who were temporarily in charge of some of the said posts were to be treated as occupying their substantive posts of inferior grade. The result was that there were two sources of recruitment to the 76 posts advertised, namely, (i) by promotion from non-gazetted posts in the department, and (ii) by direct recruitment. The qualifications for both are different. For direct recruitment as Assistant Controllers the following are the qualifications : (i) degree of a recognised university; and (ii) about 5 years experience in responsible supervisory capacity in Government service or business concerns. The qualification was relaxable at the discretion of the Union Public Service Commission; and experience of work connected with imports and exports was made desirable. For promotion, the qualification prescribed was that the candidate should be a Section Head with a minimum of three years service in that grade. It will, therefore, be seen that the recruitment was made from two sources with different qualifications, namely, (i) by promotion from the subordinate staff; and (ii) by direct recruitment. It follows that they belonged to two different categories.

It was then suggested that the ratio of 75% for direct recruits and 25% for promotion from departmental candidates was discriminatory. This point directly arose for consideration in Mervyn Coutinho v. The Collector of Customs, Bombay. ([1966] 3 S.C.R. 600). Therein, this Court accepted the validity of rotational system where the recruitment to a cadre was from two sources and held that such a system did not violate the principle of equal opportunity enshrined in Art. 16(1) of the Constitution.

But, it is said that if the system of rotation was necessary, the Government should have applied the

ratio of 50 : 50 and not 75 : 25. When the recruitment to certain posts is from different sources, what ratio would be adequate and equitable would depend upon the circumstances of each case and the requirements and needs of a particular post. Unless the ratio is so unreasonable as to amount to discrimination, it is not possible for this Court to strike it down or suggest a different ratio. Nothing has been placed before us to show that the ratio of 3 : 1 is so flagrant and unreasonable as to compel us to interfere with the order of the Government.

The next argument is that the Government, in effect and substance, accepted the principle of "carry forward" which was struck down by this Court in T. Devadasan v. The Union of India. ([1964] 4 S.C.R. 680). There certain reservations were made for recruitment to certain posts for the members of the Scheduled Caste and Scheduled Tribes; and if the vacancies reserved for the said Castes and Tribes were not filled up in a particular year, the Government Order provided for carrying forward the said vacancies to the subsequent year, and if in the subsequent year also the said vacancies were not filled up, they would be carried forward to the next year and so on. That rule was struck down by this Court on the ground that the guarantee given under Art. 16(1) was for each individual citizen and, therefore every citizen who was seeking employment or office under the State was entitled to be afforded an opportunity for seeking such employment or appointment which was intended to be filled up and that the principle of "carry forward" deprived him of such a right. This decision has no bearing on the question raised before us. When a similar argument was advanced in Mervyn Coutinho v. The Collector of Customs, Bombay ([1966] 3 S.C.R. 600), Wanchoo. J., observed thus :

"Nor do we think that this system (the system of rotation) is on a par with the carry-forward rule which was struck down by this Court in T. Devadasan v. The Union of India ([1964] 4 S.C.R. 680) and on which strong reliance is placed on behalf of the petitioners. In the case of the carryforward 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".

These observations directly apply to the present case. But it is said that there is a difference between that case and the present one. It is argued that the vacancies in the cadre of Assistant Controllers that arose between 1952-55 were filled up subsequently and, therefore, in effect and substance, those vacancies were carried forward to the subsequent year or years. This argument, if we may say so, is fallacious. The vacancies were not reserved to be filled up in any year nor were they carried forward to subsequent years. Certain vacancies arose and for certain reasons they were not permanently filled up, but some ad hoc appointments were made in regard thereto and they were subsequently filled up by permanent appointees. We, therefore, reject this contention.

In this view the other points raised by learned counsel for the petitioners need not be considered.

As regards costs, we do not think that this is a fit case for awarding costs to the State, for, as no rules under Art. 309 of the Constitution were made in time and as appointments were made on an ad hoc basis without consulting the Union Public Service Commission, a lot of confusion was introduced in the administrative set up, with the result that persons who acted as Assistant Controllers for a number of years had to be superseded by direct recruits. Whether another formula could have been more equitably evolved is not for us to say, but the fact remains that the petitioners

cannot be blamed for coming to court for getting their rights settled one way or other. The petition is, therefore, dismissed without costs.

Petition dismissed.

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