

B. S. Vadera

Vs

Union of India & Others

Writ Petitions Nos. 96 and 165 of 1967

(CJI M. Hidayatullah, R. S. Bachawat, C. A. Vaidialingam, A. N. Grover, K. S. Hegde JJ)

27.03.1968

JUDGMENT

VAIDIALINGAM, J.-

In both these writ petitions, under Art. 32 of the Constitution, the petitioners seek to have quashed, certain orders passed by the 2nd respondent and, in particular, the order dated June 16, 1967, reverting them, as Upper Division Clerks, with effect from June 9, 1967. The Union of India, through the Chairman, Railway Board, and the Secretary, Railway Board, are respondents 1 and 2, respectively, in these proceedings. The other respondents are officers, working under the 2nd respondent, who, according to the petitioners, have been given preferential treatment, by way of promotion, under the orders, impugned, in these proceeding.

At the outset, it may be stated, that the various orders, passed by the 2nd respondent, referred to, by both the petitioners, are one and the same, and therefore, we shall refer to those proceedings, in accordance with the annexure number, given to them, in Writ Petition No. 96 of 1967. Wherever necessary, we shall advert to any separate order, that has been referred to, by the petitioner, in Writ Petition No. 165 of 1967.

According to the petitioner in Writ Petition No. 96 of 1967, he joined service, on July 16, 1955, as Lower Division Clerk, was promoted, with effect from February 2, 1957, as Upper Division Clerk and further promoted, as Assistant, on February 3, 1958. His grievance is that while he was holding the post of such Assistant, from 1958, he has been illegally, and without any justification, reverted, as Upper Division Clerk, with effect from June 9, 1967, as per the impugned order, dated June 16, 1967 (Annexure 16). Similarly, according to the petitioner, in Writ Petition No. 165 of 1967, he joined as a Lower Division Clerk, on September 14, 1954, was promoted as Upper Division Clerk, with effect from February 2, 1957 and was further promoted, as Assistant, on February 3, 1958. His grievance is that while he was so holding the post of Assistant, from 1958, he has been illegally, and without any justification, reverted as Upper Division Clerk, with effect from June 9, 1967, as per Annexure 16.

According to the Railway Board, these promotions, made of the petitioners, either as Upper Division Clerk, in the first instance, or, later, as Assistant, were purely on a temporary and ad hoc basis, pending the framing of the Railway Board's Secretariat Clerical Service (Re-organization) Scheme, which was in contemplation, at the material time. The Scheme (Annexure 4), was actually framed on February 5, 1957, and the Railway Board's Secretariat Clerical Service was to be organized in the manner, set out therein. Under this Scheme, there were to be two grades of service - (i) Grade I - Upper Division Clerk; and (ii) Grade II - Lower Division Clerk. The authorised

permanent strength of the Service, in Grade I, was fixed at 45, and of Grade II, at 82. The initial constitution of the service, was to be with effect from December 1, 1954.

On March 30, 1963, some of the provisions, contained in Annexure 4, were modified, by Annexure 7. One of the modifications, effected under Annexure 7, related to the manner of filling up of permanent vacancies and temporary vacancies, in Grade I of the Service, and this modification was also to have effect, from the date of the date of the initial constitution of the service, via., December 1, 1954.

In 1965, a final panel was drawn up, strictly on the basis of the Scheme, for promotion to the Grade of Upper Division Clerks, in which the names of all the Lower Division Clerks were arranged, strictly in accordance with their seniority positions, in that Grade. Accordingly, the names of the petitioners, who had been promoted as Officiating Upper Division Clerks, in 1957, were entered, in that panel, in accordance with their inter se seniority as Lower Division Clerks. As the posts of Upper Division Clerks were non-selection posts, so far as promotion quota was concerned, they had to be filled in, on the basis of seniority-cum-suitability and hence particular officer's seniority, as Lower Division Clerk, was duly reflected, in his seniority as Upper Division Clerk. Similarly, Upper Division Clerks, who were promoted as officiating Assistants, were also promoted, on the basis of their seniority, in the Upper Division Clerks' Grade and, therefore, their seniority, in the Lower Division Clerks' Grade, was thus reflected in the Assistants' Grade. The petitioners were required to be reverted, for such Upper Division Clerks, who were senior to them, being posted in the Grade of Assistants. Effort, however, was made, to avoid hardship to person, like the petitioners, who were functioning as Assistants, by deciding to make available, vacancies in the Assistants' Grade, by promotion and by curtailing the quota, reserved for direct recruits; but the petitioners could not be continued as Assistants, for an indefinite period, as difficulty arose, when there was contraction, in the Cadres, by some of the Section Officers, being reverted, as Assistants, in June 1967. This, in consequence, resulted in the reversion of certain Assistants, including the petitioners, to the posts of Upper Division Clerks. The reversions themselves were made, strictly in the reverse order of seniority. According to the Railway Board, the petitioner, in Writ Petition 96 of 1967 is still a temporary Lower Division Clerk, and he has not been even confirmed in that Grade, because he has not passed the requisite typing test. It is further stated that the petitioner, in Writ Petition 165 of 1967 is even now not a permanent Upper Division Clerk, and that he was confirmed, as Lower Division Clerk, in 1966, with effect from September 14, 1957. Therefore, according to the Railway Board, the impugned orders were all valid and legal and did not contravene any provisions of the Constitution, nor did they infringe any of the rights of the petitioners.

In order to appreciate the arguments, addressed before us, on behalf of the petitioners, and respondents 1 and 2, it is necessary to give, in chronological order, the events, leading up to the filing of these writ petitions. On August 22, 1956, the second respondent issued a Circular, Annexure 1, about having decided to hold a test, for drawing up a panel of staff considered suitable for promotion, to the Grade of Assistants. The categories of staff, eligible to appear for the test, as well as the subjects for the written tests, were mentioned, therein. There is no controversy legal and did not contravene any provisions of the Constitution, examination, and they also successfully got through the interview. The second respondent simultaneously took a decision that posts of Upper Division Clerks, which were introduced at about that time, may also be filled up, on the basis of the results of the test, which was, no doubt, primarily held for the purpose of filling the posts of Assistants. The criterion for promoting Lower Division Clerks, to the posts of Upper Division Clerks and Assistants, was, that persons, who obtained 50% or more of the marks, were to be promoted, as Officiating Assistants, and those who obtained between 40 and 49%, were to be

promoted, as Officiating Upper Division clerks. Their inter se seniority, as Lower Division Clerks. As both the petitioners had passed the test, they were promoted, as Officiating Upper Division Clerks, with effect from February 2, 1957. The order, appointing the petitioners, as Officiating Upper Division Clerks, is Annexure 3, dated February 1, 1957. It is the claim of the petitioners that they were promoted, on a regular basis, as Upper Division Clerks, and that a panel of Assistants and Upper Division Clerks, was formed, by the 2nd respondent.

Meanwhile, the framing of a scheme for the Railway Board Secretariat Clerical Service, was in the offing, and such a scheme, was ultimately issued, under Annexure 4, on February 5, 1957. The 2nd respondent has filed a statement, regarding the circumstances, under which the scheme was framed, in consultation with the Union public Service Commission, and the Ministry of Home Affairs. The scheme was for filling the posts of Lower Division Clerks, Upper Division Clerks and such of the Upper Division Clerks who can be promoted as Assistants. Paragraph 14, subparas (1) and (3), dealt with the filling up of posts of Grade I, Upper Division Clerks, of the Clerical Services. That provided for the different manner in which the permanent vacancies, and temporary vacancies, were to be filled up, in the authorized strength of Grade I of the Service. Under paragraph 14, sub-para 1(b), promotion to the cadre of Upper Division Clerks, can only be made of permanent Lower Division Clerks, for permanent vacancies, and, under paragraph 14, sub-para (3), only permanent Lower Division Clerks and temporary Lower Division Clerks, with more than three years' standing, and graduate Lower Division Clerks, could be promoted to Temporary vacancies in the Cadre. But, in view of the non-availability of permanent Lower Division Clerks, the Scheme could not be implemented to fill permanent vacancies, immediately.

Similarly, under para 16 of the Scheme, permanent Upper Division Clerks, with three years' service in the grade, or in a higher grade, were eligible for promotion, as Assistants. But, here again, no permanent Upper Division Clerks were available, at that time. As certain vacancies existed, in the posts of Assistants, and required to be filled up, as a purely short-term measure, it was decided, by the 2nd respondent, that some of the posts of Assistants, may be temporarily filled up, by promotion from Upper Division Clerks. In view of this decision, the petitioners were promoted, as Assistants, on an ad hoc basis with effect from February 3, 1958, under Annexure 5, dated February 1, 1958. That order clearly shows that the petitioners including others, who were officiating as Upper Division Clerks, were promoted to officiate, as Assistants, on a purely short-term arrangement. It was further stated, in paragraph 5, of this Annexure, that the promotion is a purely short-term arrangement, till qualified Assistants become available, and that the promotion, under that order, will not confer, on the promotees, any claim for retention, as Assistants, as a long-term measure.

It may also be stated, at this stage, that it is the claim, of both the petitioners, that they have been promoted, on a regular basis, as Assistants, under this Order, and that, in consequence, the order of reversion, passed on June 16, 1967, is illegal. That contention is clearly belied, by the express terms of the Order, Annexure 5, promoting these petitioners.

Later on, in or about 1959, as there were vacancies in the grade of Upper Division Clerks, a panel was drawn, by the 2nd respondent, called 'Interim Provision Panel', to fill in temporary vacancies, and certain Lower Division Clerks were considered suitable, for promotion as Upper Division Clerks, again, on a purely short-term arrangement. That is Exhibit 6, dated June 24, 1959.

On March 30, 1963, the original Service Scheme, Annexure 4, was amended in certain material particulars, by Annexure 7. Paragraph 14, of the original Scheme, was modified, by providing a different method of promotion, to Grade I (Upper Division Clerks). Under this modified scheme,

the distinction between the manner of recruitment, in respect of permanent vacancies, and temporary vacancies, which existed in the original scheme, was done away with. The modified scheme provided a uniform method of promotion, to both permanent vacancies, in the authorized strength of Grade I Service, as well as temporary vacancies. Broadly, the method of appointment, to this Grade, was : (a) 80%, by promotion of permanent Lower Division Clerks and temporary Lower Division Clerks, with more than three years of service in the Grade, on the basis of seniority, subject to rejection of the unfit; (b) 20%, on the basis of competitive examination, limited to the Lower Division Clerks.

In 1965, a final panel was drawn up, according to the Railway Board, on the basis of the Scheme, Annexure 4, as modified by Annexure 7. That panel consisted of Lower Division Clerks, fit for promotion to the grade of Upper Division Clerks. The Lower Division Clerks were arranged, strictly in accordance with their seniority position, in that Grade. The final panel is Annexure 14, dated March 30, 1965; and, according to the petitioner in Writ Petition No. 96 of 1967, he has lost 148 places, and, according to the petitioner, in the connected writ petition, he has lost 110 places, in seniority. Both the petitioners are aggrieved about the ranking, given to them, in this list.

On June 9, 1967, under Annexure 18, the Railway Board had reverted, to the grade of Assistants, with immediate effect, the Officiating Section Officers, shown therein. In consequence, under Annexure 16, dated June 16, 1967, which is one of the orders, under attack, in both these petitions, the Railway Board reverted, as Upper Division Clerks, several officiating Assistants, including the two petitioners, herein, with effect from June 9, 1967. As mentioned earlier, the main grievance of the petitioners is, that they having been promoted, as Assistants, as early as February 3, 1958, and which posts they had been holding till 1967, their reversion, as Upper Division Clerks, under Annexure 16, is illegal and void.

We have referred to the relevant orders, promoting these two petitioners, in the first instance, as Upper Division Clerks and, later, as Assistants. The order promoting the petitioners, as Assistants, Annexure 5, dated February 1, 1958, has been referred to, already, and that order clearly shows that the promotion was only a short-term, temporary arrangement, on an officiating basis, and that no claim could be based upon that promotion. No doubt, the order, Annexure 3, dated February 1, 1957, promoting the petitioners, as Upper Division Clerks, may, on a superficial reading of that order, give the impression that the promotion, is on a permanent basis, and from which further promotion is to be made, to the Grade of Assistants, but, in view of what is stated, on behalf of the Railway Board, the promotion, under Annexure 3, is again, a temporary promotion, because the Scheme, Annexure 4, was to come into force, within a very short time, and that the promotions were made, only on a provisional basis. The regular promotions, or appointments, to Upper Division Grade, which is styled as Grade I, were to be made, as envisaged under the Scheme, Annexure 4, dated February 5, 1957. Both the petitioners have, categorically, averred in their petitions, that Annexure 4, as modified by Annexure 7, has retrospective effect, from December 1, 1954.

The second respondent has also given various particulars, regarding as to how the framing of the Scheme originated, as well as the different stages, it had to pass through. In fact, it is also seen, from the documents filed, on behalf of the respondent, that there was a suggestion, by either the Home Ministry, or the Union Public Service Commission, that the Scheme was to come into effect, on the date it was promulgated; but that was met, by the Board, by replying that an assurance had been given to the staff, to whom the Scheme had been circulated, that the crucial date, for initial constitution of the Scheme, was to be fixed as December 1, 1954. In fact, a reading of Annexure 4 and 7, also clearly shows that the initial constitution of the Service, is to be from December 1, 1954,

and it is, on that basis, that appointments, or promotions, are to be made. Once it is held that the initial constitution of the Service, is from the date, mentioned above, on the basis of Annexure 4, read with Annexure 7, it follows that the promotion of the petitioners, as Upper Division Clerks, under Annexure 3, was not under the Scheme, but really on a provisional, or temporary basis. Notwithstanding the fact that the grievance of both the petitioners is that ranking has not been given to them properly, in Exhibit 16, we are satisfied that it is in accordance with the principles, under the Scheme Annexure 4, as modified by Annexure 7. Therefore, we are not inclined to accept the contention of the petitioners that there has been a promotion, on a permanent basis, in the first instance, as Upper Division Clerks and, later, as Assistants, which cannot be disturbed, by any orders that may be passed, by the 2nd respondent. We have already indicated that the regular promotions and appointments have to be made, under the Scheme, with effect from December 1, 1954.

In particular, a contention has been raised, on behalf of the petitioner in Writ Petition No. 165 of 1967, that he stands on a different footing, in that he is a permanent Lower Division Clerk and, therefore, his promotion, as an Assistant, must, again, have been, on a permanent basis. There is no substance, in this contention, in view of the statement, made by the 2nd respondent, that this petitioner was confirmed, as a Lower Division Clerk, in 1966, with effect from September 14, 1957, in which case it follows that he will not be eligible, for promotion, as an Upper Division Clerk, under the Scheme. The petitioner, in Writ Petition No. 96 of 1967, as pointed out, by the 2nd respondent, continues, even now, as a temporary Lower Division Clerk, and he has not been made permanent, and, therefore, he cannot certainly be considered eligible, for promotion, under the Scheme.

A further contention has been taken, on behalf of the petitioner in Writ Petition No. 165 of 1967, that the Scheme, as well as various orders, passed by the 2nd respondent, violate the provisions of Arts. 14 and 16, of the Constitution, inasmuch as he has been deprived of the benefits of Chapters II and III, of the Indian Railway Establishment Manual. Once it is held that the said petitioner does not satisfy the requirement of the Scheme, there is no question of any discrimination, under Art. 14, or violation of Art. 16, arising for consideration at all. Therefore, both the petitioners, will have to fail, on merits.

A more serious contention has, however, been taken, by the petitioners, that the second respondent has no power, in law, to frame, either the Scheme, Annexure 4, or the modified Scheme, Annexure 7, so as to have retrospective effect, from December 1, 1954. Though both the petitioners have raised this contention in the writ petitions, Mr. Chatterjee, learned counsel for the petitioner in Writ Petition No. 165 of 1967, was not prepared to take up that extreme position, because, his attempt, was to show that his client satisfies the requirement of the qualifications, laid down for promotion, in Annexure 4, read with Annexure 7. We have already negated that contention; but this legal contention has been persisted, before us, by Mr. K. L. Mehta, counsel appearing for the petitioner, in Writ Petition No. 96 of 1967.

Mr. Mehta, by reference to the provisions of the Indian Railway Board Act, 1905 (Act IV of 1905), and to the decision of this Court in *State v. Padmanabhacharya* [[1966] 1 S.C.R. 994.], urged that the 2nd respondent had no power to frame a rule, having retrospective effect. In our opinion, this contention cannot be accepted. Act IV of 1905 is an Act to provide for investing the Railway Board with certain powers of functions, under the Indian Railway Act, 1890. The preamble to that Act shows that a Railway Board has been constituted, for controlling the administration of Railways in India. Section 2 provides that the Central Government, may, by notification, in the Official Gazette,

invest the Railway Board, either absolutely, or subject to conditions, with powers, or functions, stated therein. That statute, does not, in any way, advance the petitioners' contention. As we shall presently show, the decision of this Court, referred to above, does not also support the petitioners.

There is no controversy that the Indian Railway Establishment Code has been issued, by the President, in exercise of the powers, vested in him, by the proviso to Art. 309, of the Constitution. Only two rules require to be noted, and they are rr. 157 and 158, occurring in Chapter I, under the sub-heading 'Power to frame rules'. They are as follows :

"157. The Railway Board have full powers to make rules of a general application to non-gazetted railway servants under their control.

158. The General Managers of Indian Railways have full powers to make rules with regard to non-gazetted railway servants under their control, provided they are not inconsistent with any rules made by the President or the Railway Board."

We are not concerned, really in this matter, with r. 158, because the Scheme, Annexures 4 and 7, in particular, and the various orders, have been passed by the 2nd respondent, the Railway Board. The Railway Board, as will be seen from r. 157, have full powers to make rules of general application, to non-gazetted railway servants under their control. The question is whether the 2nd respondent, has, while acting under r. 157, power to make a rule (in this case, the Scheme), having effect from an anterior date.

The matter must be considered, in the light of the provisions of Art. 309, of the Constitution. That Article provides :

"309. Subject to the provisions of this Constitution, Acts of the appropriate Legislature may regulate the recruitment, and conditions of service of person appointed, to public services and posts in connection with affairs of the Union or of any State :

Provided that it shall be competent for the President or such person as he may direct in the case of services and posts in connection with the affairs of the Union, and for the Governor of a State or such person as he may direct in the case of services and posts in connection with the affairs of the State, to make rules regulating the recruitment, and the conditions of service of persons appointed, to such services and posts until provision in that behalf is made by or under an Act of the appropriate Legislature under this article, and any rules so made shall have effect subject to the provisions of any such Act."

We may emphasize the words 'and any rules so made shall have effect subject to the provisions of any such Act', which must receive their due weight. To that aspect, we shall come, presently.

We have already pointed out, that Annexure 4 was issued on February 5, 1957, and Annexure 7, on March 30, 1963, and that the initial constitution of the Service was to be from December 1, 1954, and it is, on that basis, that the promotions, or appointments, to the Service, are to be made. In this case, there is no Act of the appropriate Legislature, regulating the recruitment and conditions of service, under the 2nd respondent and, therefore, the main part of Art. 309 is not attracted. But, under the Proviso therein, the President has got full power to make rules, regulating the recruitment, and conditions of service, of person, under the 2nd respondent. Further, under the Proviso, such

person, as may be directed by the President, can also make rules, regulating the recruitment and conditions of service, of persons, under the 2nd respondent. The rules so made, either by the President, or such person, as he may direct, will have currency, until provision, in that behalf, is made by or under an Act, of the appropriate Legislature, under Art. 309.

It is also significant to note the proviso to Art. 309, clearly lays down that 'any rules so made shall have effect, subject to the provisions of any such Act'. The clear and unambiguous expressions, used in the Constitution, must given their full and unrestricted meaning, unless hedged-in, by any limitations. The rules, which have to be 'subject to the provisions of the Constitution', shall have effect, 'subject to the provisions of any such Act'. That is, if the appropriate Legislature has passed an Act, under Art. 309, the rules, framed under the Proviso, will have effect, subject to that Act; but, in the absence of any Act, of the appropriate Legislature, on the matter, in our opinion, the rules, made by the President, or by such person as he may direct, are to have full effect, both prospectively and, retrospectively. Apart from the limitations, pointed out above, there is none other, imposed by the proviso to Art. 309, regarding the ambit of the operation of such rules. In other words, the rules, unless they can be impeached on grounds such as breach of Part III, or any other Constitutional provision, must be enforced, if made by the appropriate authority.

In the case before us, the Indian Railway Establishment Code has been issued, by the President, in the exercise of his powers, under the proviso to Art. 309. Under Rule 157, the President has directed the Railway Board, to make rules, of general application to non-gazetted railway servants, under their control. The rules, which are embodied in the Schemes, framed by the Board, under Annexures 4 and 7, are within the powers, conferred under r. 157; and, in the absence of any Act, having been passed by the 'appropriate' Legislature, on the said matter, the rules, framed by the Railway Board, will have full effect and, if so indicated, retrospectively also. Such indication, about retrospective effect, as has already been pointed out by us, is clearly there, in the impugned provisions.

The decision of this Court in *State v. Padmanabhacharya* [[1966] 1 S.C.R. 994.], does not assist the petitioners. The rule, that came up, for consideration, has been referred to, at p. 999, of the Reports, in the judgment of Wanchoo, J., (as he then was); and the Court specifically says that the rule, referred to by it, cannot be made, under the proviso to Art. 309, of the Constitution. It is further stated that the notification, referred to, cannot be said to be a rule, regulating the recruitment and conditions of service of persons appointed to the services and posts, in connection with the affairs of the State. This Court further observes that the effect of the notification, or the rule, that it had to consider, was to select certain Government servants, who had been illegally required to retire, and to say that even if the retirement had been illegal, that retirement should be deemed to have been properly and lawfully made. Finally, the Court said, that such a declaration, made by the Governor, cannot, in any sense, be regarded as a rule, made under the proviso to Art. 309. Having held that the rule, which was before it, was not one made under the proviso to Art. 309, the Court further observed, in that case, that it was not necessary to decide, whether a rule, governing conditions of service, of persons appointed in connection with affairs of the State, can be made retrospectively, under the proviso to Art. 309. This decision, in our opinion, can be distinguished, on two grounds : (i) that the rule, in question, construed by the Court, was held to be one, not coming within the purview of the proviso to Art. 309; and (ii) the question, as to whether a rule, under the proviso to Art. 309, can be framed, to have retrospective effect, has been left open.

In this connection, we may refer to two decisions, of the Mysore High Court, and one of the Allahabad High Court. The Mysore High Court, in the decisions, *Govindaraju v. State of Mysore* [A.I.R. 1963 Mys. 265.] and *Govindappa v. I.G. of Registration* [A.I.R. 1965 Mys. 25.], has taken

the view that it is not open to the Governor, under the proviso to Art. 309, to frame a rule, having retrospective effect. We may state that the decision in Govindaraju's Case [A.I.R. 1963 Mys. 265.] came up, before this Court, on appeal, in Nagarajan v. Mysore [[1966] 3 S.C.R. 682.]. But this Court, in Nagarajan's Case [[1966] 3 S.C.R. 682.], had no occasion to express any opinion on the question as to whether the Governor, under the proviso to Art. 309, could frame a rule, having retrospective operation, as it took the view that the relevant rules had not been made under Art. 309.

A Full Bench of the Allahabad High Court, on the other hand, in Ram Autar v. State of U.P. [A.I.R. 1962 All. 328, F.B.] has taken a view, contrary to the one, expressed by the Mysore High Court. We are of opinion that the latter, represents the correct view. But, even the Allahabad High Court has not given due importance to the mandatory words, used in the concluding part of the proviso to Art. 309, that the rules made, by the authority mentioned therein, 'shall have effect, subject to the provisions of any such Act'. This aspect has been emphasized by us, in the earlier part of this judgment.

To conclude, on this aspect, we are satisfied that Scheme, Annexure 4, as modified by Annexure 7, framed by the 2d respondent, Railway Board, such as it is, must have effect, as it does not suffer from any defect in its making and does not offend against the Constitution.

In the result, both the writ petitions are dismissed; but, in the circumstances, parties will bear their own costs.

Petitions dismissed.##

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