

State of Gujarat

Vs

C. G. Desai and Others

Civil Appeal No. 2170 of 1970

(V. R. Krishna Iyer, R. S. Sarkaria JJ)

13.11.1973

JUDGMENT

SARKARIA, J. –

1. This appeal by special leave by the State is directed against the judgment and order, dated November 24, 1970, of the High Court of Gujarat allowing a writ petition of (1) C. G. Desai; (2) B. L. Joshi, and (3) H. N. Shah filed under Art. 226 of the Constitution. The material facts are not in dispute and may now be stated.

2. Respondent No. 1 herein (original petitioner No. 1) was officiating as Deputy Engineer since May 16, 1955, in the P.W.D. Department of the then State of Bombay and he continued in service as such until on December 3, 1959, he was selected and appointed as a result of the competitive examination held by the Public Service Commission, to a post in B.S.R. Class II service. Under the Engineering Service Rules, 1960 (hereinafter called 1960 Rules), a direct recruit is required to undergo training for a period not exceeding one year and thereafter to work on probation as in-charge of a sub-division for a further period of one year. Since respondent No. 1 had already worked as officiating Deputy Engineer, the initial period of one year's training in his case was dispensed with and he was directly placed in-charge of a sub-division. On completion of his two years' probation he was confirmed as Deputy Engineer in Class II with effect from December 3, 1961. Sometime in June, 1961, a committee appointed by the State Government prepared a select-list of Deputy Engineers for promotion as officiating Executive Engineers, but the case of respondent No. 1 was not considered for the reason that he had not put in 7 years (reduced to 6 years in 1961) service requisite under Rule 7(ii) for such promotion (hereinafter, for short, called 'eligibility service'). The Government's stand was that in the case of Deputy Engineers directly recruited through a competitive examination held by the Public Service Commission, service, if any, rendered by them, as offsetting Deputy Engineers prior to their appointment to Class II (hereinafter called 'pre-selection service') could not be taken into account in computing their eligibility service. The case of respondent No. 1 herein was that this stand of the Government was wrong and, under the relevant Rules his pre-selection service (from 16-5-1955 to 2-12-1959) as officiating Deputy Engineer had to be tacked on to his post-selection service calculating the requisite period of his eligibility service. When the next select-list was prepared in the year 1963, respondent No. 1 was included in that list and in consequence, promoted as officiating Executive engineer. Since then he has been working as in the promoted rank.

3. Respondents Nos. 2 and 3 herein (original petitioners Nos. 2 and 3) were promoted as Deputy Engineers on July 8, 1957, September 28, 1957, respectively. They continued to work in that capacity till December 3, 1959, when they too like respondent No. 1, were directly recruited as

Engineers in Class II service as a of the competitive examination held the Public Service Commission. On of their probationary period of years, they were confirmed as Deputy Engineers on December 3, 1961. In their case also the Government did not count their pre-selection service from July 8, 1957 to December 3, 1959, for computing their eligibility service, for further promotion; and, in consequence, they were also not considered eligible for selection at the time of the preparation of the select-lists of 1961, 1963 and for the subsequent years upto 1966. The respondents (then petitioners) prayed for a writ of mandamus or any other appropriate writ or order directing the state Government to determine and settle their seniority in accordance with the provisions of Rule 8 (i) and (ii) of the Government Resolution dated April 29, 1960.

4. The main ground taken in the petition before the High Court was, that the action of the Government in excluding from computation the service rendered by the respondents as officiating Deputy Engineers prior to their selection as Deputy Engineers, Class II service, was violative of Art. 16 of the Constitution of India. The contention was that the rule of eligibility for promotion had not been uniformly applied to all Deputy Engineers inasmuch as in the case of persons who were recruited to Class II by promotion, their pre-selection service as officiating or temporary Deputy Engineers was computed towards their eligibility service but the same treatment was denied to Deputy Engineers directly recruited.

5. In the counter filed on behalf of the State, it was averred that this distinction between the direct recruits and promotees in computing their eligibility service for further promotion was observed as a matter of deliberate policy. It was added that at the time of the preparation of the select list of Deputy Engineers fit to be promoted as Executive Engineers in 1965, the claims of officiating Deputy Engineers appointed subsequent to 1-11-1956 were not considered; while the claims of directly recruited Deputy Engineer though appointed after November 1, 1956, were so considered because of the special provision for the latter category of Deputy Engineers as per Government resolution, dated 29th April, 1960. The Government therefore, felt that as the direct recruits were getting special treatment because of being direct recruits, they should not be allowed a further advantage of counting, for the purpose of further promotion, their pre-selection service towards the period of their eligibility service.

6. The High Court found that the differentiation in question made by the Government in the application of the Rules, had no reasonable nexus with the object of promotion; and the action of the Government was, therefore, clearly discriminatory and amounted to a denial of equal opportunity to directly recruited Deputy Engineers like petitioners Nos. 1 to 3. In the result, the High Court allowed the application of the present respondents 1 to 3 and issued a writ of mandamus directing that their cases "for promotion as officiating Executive Engineers shall be considered on the basis that the preselection service by them as officiating Deputy Engineers prior to their direct recruitment as Deputy Engineers was liable to be taken into account in counting the minimum period of seven years service requisite for promotion as officiating Executive Engineers."

7. In order to appreciate the controversy, it is necessary to notice briefly the history of these engineering services and relevant rules which are appendages to various Government resolutions passed from time to time. Originally, the Government of Bombay in the Public Works Department passed a resolution on March 22, 1937, in pursuance of which Bombay Engineering service Consisting of Class I and Class II was constituted. The posts of Chief Engineer, Superintending Engineer and Executive Engineer were placed in Class I and Class II. The recruitment to both Class I and Class II was partly by direct recruitment and party by promotion from the lower ranks. In 1939, further rules were framed under which recruitment to Class II service was to be made either :

(a) by nomination under Rule 11 under the guarantee given to the college of Engineering, Poona, or

(b) by promotion from the -

(i) Subordinate Engineering Service;

(ii) Permanent and Temporary Supervisors, and

(iii) Temporary Engineers appointed on annual sanction.

8. On the 27th May, 1947, the Government of Bombay withdrew its guarantee of certain appointments given to the students of the Engineering College, Poona : and thereafter appointed a Committee (known as Gurjar Committee) to examine the question of recruitment to the engineering service and allied matters. In the meantime, the Government of Bombay made direct recruitment to Class I and Class II service through competitive examination held by the Public Service Commission.

9. Though the Committee made its recommendations in 1951, yet this provisional arrangement appears to have continued upto April 29, 1960, on which date, the Government of Bombay in the Public Works Department passed a resolution delineating the principles of recruitment to the Bombay Service of Engineers. Class I and Class II. Shortly thereafter the Bombay State was bifurcated; but the 1960 Rules continue to be applicable to the engineering services of the new State of Gujarat, to which the respondents herein, were allotted.

10. By the resolution of 1960, the existing Class I and Class II services were continued. The appointments to both these services are to be by direct recruitment through competitive examination held by the Public Service Commission and also by promotion in the ratio of 75 : 25. As per Rule 2 the candidates appointed from either service have to be on probation for a period of two years : in the first instance as trainees for a period not exceeding one year, and then in a probationary capacity, in-charge of sub-division for one year more. On satisfactory completion of the period of probation, the candidates recruited from both the services are confirmed as Deputy Engineers in the cadre of Class II or as Assistant Engineers in Class I, as the case may be.

11. The provisions of 1960 Rules material for our purpose are to be found in Rules 6, 7 and 8, which read thus :

# "6. (i) \* \* \* \*##

(ii) For absorption into Class I, a Class II Officer must be in the permanent Bombay Service or Engineers Class II Cadre, should have at least 15 years service to his credit in Class II in temporary and permanent capacities, and should be holding an officiating divisional rank, at the time of such absorption. On such absorption, the Class II Officers shall be confirmed as Executive Engineers.

# (iii) \* \* \* \*##

7. (i) Since the percentage in the superior posts of direct Class I recruits and promotees from Class II is to be about 75 and 25, the number of promotions from Class II in any year would be about one third of the number of directly recruited

Assistant Engineers confirmed as Executive Engineers during that year. Recruitments in the past have, however been erratic and insufficient.... to Class I. In order to deal with such situation, the following rules shall be supplemental and exceptional to those in paragraph 6 above :

(ii) As far as possible promotion as officiating Executive Engineers shall be so made that the promotee under consideration from Class II has to his credit at least 6 years longer service than promotee under consideration from Class I, subject as far as practicable to the condition that a Class I Officer shall not hold a divisional rank at less than 4, a Class II Officer at less than 7 years' service.

Subject to availabilities, and the above criteria, an attempt should be made to maintain the percentages, stated in paragraph 6(i) above, between direct Class I and promoted Class II Officers in the total of permanent plus officiating superior posts.

# (iii) and (iv) \* \* \* \*##

8. (i) The Sub-Divisional posts in the Department are at present manned by direct recruits to Bombay Service of Engineers class II Cadre, Deputy Engineers confirmed from subordinate Service of Engineers, the temporary Deputy Engineer recruited by the Bombay Public Service Commission, Officiating Engineers and similar other categories. These various categories are being compiled into two lists only, (i) Bombay Service or Engineers Class II Cadre of permanent Deputy Engineers, and (ii) a list of officiating Deputy Engineers.....

(ii) All direct recruitment of temporary Deputy Engineers have been stopped, further officiating vacancies will be manned from the rank of the subordinate service of Engineers....."

12. The question that falls for decision is : Whether the action of the State Government in treating "difficulty" the promotees and direct recruits in Class II, for the purpose of computing the period of their eligibility service requisite for promotion as officiating Executive Engineers, violates the constitutional guarantee of equal treatment enshrined in Art. 16 of the Constitution ?

13. Mr. Bhandare, learned counsel for the appellant, has in the course of his elaborate arguments stressed the points :

(1) The two channels of promotion of direct recruits and promotees are separate and there would be no violation of Art. 16 if these two classes continue to be treated differently;

(2) It would be open to the Government to lay down and accept different conditions for these two classes in the matter of their further promotion to Class I service;

(3) Since all the direct recruits constitute one class, it is not permissible to the Government to treat the members of the same class differently and to make a distinction in the matter of their promotion by taking into account the pre-selection service of an officer when he was not a direct recruit in Class II. To do so would be to give an undue advantage to a direct recruit with pre-selection service over his colleagues who did not have such pre-selection to their credit.

14. Learned counsel further urged that there existed a rational basis for this classification and differential treatment of direct recruits and promotees in the matter of their promotion to Class I. Reliance has been placed on two decisions of this Court in Prabhakar Yashwant Joshi v. The State of Maharashtra and Others, and Ganga Ram and Others v. Union of India and Others. We shall presently examine the effect of those decisions.

15. Mr. Chitley, learned counsel for the respondents, maintained, in reply, that Rule (ii) does not permit discrimination between promotees and direct recruits in the matter of computing the seven years' service as Deputy Engineer requisite for further promotion as Officiating Executive Engineer. The point sought to be made out is that if this rule is correctly interpreted and uniformly applied then direct recruits cannot be denied the advantage of taking their 'pre-selection' service, if any, to their 'post-selection' service in Class II.

16. After hearing the learned counsel on both sides, we think that the contentions of Mr. Bhandara must prevail. It is manifest that direct recruits and promotees in Class II constitute two distinct groups or classes. This classification has a historical background and a rational basis. The promotees from the lower ranks have only one chance of getting into Class II service, as against three available to the direct recruits. Further, for a considerable time, recruitment by promotion from the ranks of temporary officiating Deputy Engineers etc., to Class II service remained frozen with consequent stagnation and loss of incentive in the service. Circumstances being what they are, promotees, at the time of their entry into Class II service, are, broadly speaking, far older than the direct recruits; and, many of the promotees may have less than 7 years to go before attaining the age of superannuation. If in the case of both these groups of promotees and direct recruits, with different background and dissimilar circumstances, the period of seven years eligibility service were to start from the date of their absorption in Class II, then, for most of the promotees there would be a rare change of ever getting promotion as Officiating Executive Engineer. The classification is thus based on intelligible differential.

17. If a person, like any of the respondents, to avoid the long tortuous wait leaves his position in the 'never ending' queue of temporary/officiating Deputy Engineers, etc., looking for promotion, and takes a short cut through the direct channel, to Class II service, he gives up once for all the advantages and disadvantages that go with the channel of promotion and accepts all the handicaps and benefits which attach to the group of direct recruits. He cannot, after his direct recruitment, claim the benefit of his pre-selection service and thus have the best of both the worlds. It is well-settled that so long as the classification is reasonable and the persons falling in the same class are treated alike, there can be no question of violation of the constitutional guarantee of equal treatment.

18. As pointed out by this Court in Ganga Ram's case (supra) in applying the wide language of Arts. 14 and 16 to concrete cases, doctrinaire approach should be avoided and the matter considered in a practical way. If the claim of the respondents to the counting of their preselection service is conceded, it will create serious complications in running the administration; it will result in inequality of treatment rather than in reasoning (sic) it. If the pre-selection service as officiating Deputy Engineers of direct recruits having such service is taken into account for the purpose of promotion, it would create two classes amongst the same group and result in discrimination against those direct recruits who had no such pre-selection service to their credit.

19. The select list is prepared on the basis of seniority-cum-merit, and the inter se seniority of the selected officers in the lower rank is ordinarily to be maintained in promoted rank. Acceptance of the respondents' contention will make the smooth working and uniform application of this principle

of "seniority-cum-merit" difficult. The inter se seniority of the selected officers will be seriously disturbed and the department will be faced with the anomalous situation of a junior officer, with pre-selection service, becoming eligible to be considered for promotion over the head of his seniors, in the same group, having no such fortuitous preselection service to their credit.

20. There is nothing in Rule 7(ii) which compels the interpretation that in the case of direct recruits also, their pre-selection service as officiating Deputy Engineers, if any, should be counted towards their 'eligibility service'. Rule 7(ii) is silent with regard to the method of computing the seven years period of eligibility service.

21. The interpretation of this condition of seven years' service in Rule 7(ii) is not res integral. It came up for consideration before this Court in Prabhakar Yashwant Joshi's case (supra). The petitioners therein were also direct recruits to the posts of Deputy Engineers in B.S.E. Class II. The respondents therein had entered Class II, service by promotion. The petitioners challenged the promotions of the respondents to the posts of officiating Executive Engineers as being contrary to the principles of natural justice and violative of Arts. 14 and 16 of the Constitution. It was inter alia contended that under the 1960 Rules in force, respondents 2 to 5 therein were only officiating Deputy Engineers and they had to put in, after confirmation as Deputy Engineers, seven years actual service before, being eligible for promotion as officiating Executive Engineers. Speaking for the Court, Jagannathan Reddy, J., negated this contention in these terms :

"Even this Rule 7(ii) does not indicate that the qualifying service of either of six years or of 7 years specified in the rule has to be permanent service. In cl. (ii) of r. 6 it is provided that 15 years of service in Class II for absorption (which means permanent absorption) as Executive Engineer can be in temporary or permanent capacities. There is nothing in Rule (ii) to militate against the interpretation that the service specified there can be the total service of any description whether provisional, temporary or permanent. If promotion from Class II as officiating Executive Engineer can only be made after 7 years of permanent service, then there would be no meaning in including the temporary service in Class II for the purpose of absorption as Executive Engineer. Even r. 6 upon which Shri Gupta has laid great emphasis in support of his contention does not, in our view, justify an interpretation that 7 years' service required to entitle persons in Class II for promotion as an officiating Executive Engineer should be permanent service in Class II ..... (with brackets ours)

As we have seen earlier, cl. (ii) of Rule 7 does not use the word 'belong' but requires only that the person under consideration for promotion should be from Class II service. To be in Class II service the Deputy Engineers promoted from subordinate service has to put in at least 3 years of service as officiating Deputy Engineers before being confirmed and thereafter he can when he is promoted to the next higher rank be confirmed as Executive Engineers if he has put in 15 years in Class II service in temporary or permanent capacities and is holding an officiating divisional rank namely, of an Executive Engineer. If temporary service can be taken into account for confirmation as an Executive Engineer, so can officiating service, and if officiating service, can be taken into consideration there is no impediment to a Deputy Engineer with 7 years' service, whether officiating, temporary or permanent to entitle him for promotion as an Executive Engineer...

We cannot, therefore, accept the contention of Shri Gupte that promotees officiating Deputy Engineer Class II is not entitled to be considered for promotion under r. 7 to the post of an officiating Executive Engineer unless he has put in 7 years of service from the date of confirmation."

22. What is quoted above, no doubt, pertains to the case of promotees, with which the Bench was mainly concerned. But the observations in the penultimate paragraphs of the judgment excerpted below incidentally cover the issue now before us :

"None of the petitioners, it is averred, was included in the select list of 1964 or 1965 because not only did any of them not have the requisite seven years' service as Deputy Engineer at the relevant time...

The petitioners, however, denied in their rejoinder that the lists were prepared keeping the criteria laid down by the rules, but in our view it is significant the they did not possess the required length of service in Class II for them to be entitled to promotion. When the respondents were included in the list and promoted as such they cannot challenge the appointments made as being in violation of Art. 14 or Art. 16."

23. In the light of the above discussion, we are of the opinion that the learned Judges of the High Court were in error in holding that the impugned action of the Government suffered from the vice of discrimination and as such was violative of Art. 16 of the Constitution. We, therefore, allow this appeal, set aside the judgment of the High Court and dismiss the writ petition, leaving the parties, in the circumstances, to their own costs.

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