

V. B. Badami and Others

Vs

State of Mysore and others

Civil Appeals Nos. 1359 of 1365 of 1973

(CJI A.N. Ray, K.K. Mathew, V.V. Chandrachud JJ)

17.09.1975

JUDGMENT

RAY, C. J. -

1. These appeals are by special leave against the judgment dated December 15, 1972 of the High Court of Mysore.
2. The appellants in the writ petition asked for quashing the gradation list of officers published by the State on January 13, 1972. The consequential prayer is for assigning correct ranks to the appellants.
3. The principal question is the relative seniority between direct recruits and promotees to the cadre of Assistant Commissioners of Mysore Administrative Service Class I (Junior Scale).
4. By a notification dated January 13, 1972 the Government published the gradation list which was prepared as on January 1, 1972. In the gradation list respondents Nos. 2 to 24 were placed at serial Nos. 214 to 236. The appellants are placed in the gradation list at serial Nos. 273 to 280. The appellants challenge the seniority of the respondents in the gradation list.
5. On December 2, 1957 the Mysore Administrative Service (Recruitment) Rules, 1957 (hereinafter referred to as the 1957 Recruitment Rules) framed under Article 309 of the Constitution came into force and the previous Rules were superseded. Under the 1957 Recruitment Rules Class I posts were divided into two categories. One was the senior scale post and the other was the junior scale post. The junior scale posts were to be filled up in the proportion of 66-2/3 per cent by promotion from Class II officers and 33-1/3 per cent by direct recruitment by competitive examination to be held by the Public Service Commission.
6. By notification dated January 23, 1958 issued under Article 309 of the Constitution the Governor constituted the Mysore Administrative Service (Cadre) Rules with effect from November 1, 1956 (hereinafter referred to as the Cadre Rules). The cadre consisted only of permanent posts comprising 12 senior scale posts and 135 junior scale posts. The cadre did not include temporary posts.
7. It may be stated here that the initial cadre strength of Assistant Commissioners Class I junior scale posts was filled by persons allotted to the new State of Mysore on November 1, 1956 when the new State of Mysore was formed. The allottees exceeding the strength of the cadre were gradually adjusted against substantive vacancies. Till December 2, 1957 the Government did not frame special rules of recruitment applicable to the Mysore Administrative Service. Consequently all the

vacancies arising until December 2, 1957 were filled by promotion.

8. On December 2, 1957 the 1957 Recruitment Rules came into existence for filling 66-2/3 per cent posts by promotion and 33-1/3 per cent posts by direct recruitment. In September, 1959 the Government issued the Mysore Recruitment of Gazetted Probationers Rules, 1959 (hereinafter referred to as the 1959 Probationers Rules) whereby the quota for direct recruitment to the Mysore Administrative Service was increased from one third to two thirds for a period of five years and the quota for promotion was reduced from two thirds to one third.

9. Pending finalisation of the inter-State seniority lists of officers allotted to the new State of Mysore on November 1, 1956 to the cadre of Assistant Commissioners the Government could not by reason of pending proceedings in courts in respect thereof confirm officers working as Assistant Commissioners for a long time. In order to meet the exigencies of service, officers in Class II service were promoted on officiating basis as Assistant Commissioners in Class I service (junior scale) from time to time. Under Rule 17(b) of the 1957 Recruitment Rules the Government could fill up posts temporarily by promotion in vacancies reserved for direct recruits but such promotes became liable to be reverted after appointment of officers by direct recruitment. The Government permitted many officers from Class II including the appellants to officiate as Assistant Commissioners in Class I Service subsequent to November 1, 1956. The earliest to be promoted on officiating basis among those promotees was Narsingharao Kallurkar on November 30, 1959 who is numbered 268 in the gradation list as on January 1, 1972.

10. In September, 1959 the Government initiated steps for the first time for appointment of officers by direct recruitment to fill up the vacancies within the quota prescribed for direct recruits. The advertisement referred to 20 vacancies for the posts of Assistant Commissioners Class I and two vacancies for Assistant Controllers in the State Accounts Service. These vacancies for direct recruits had arisen during the period immediately prior to the issue of the notification. These vacancies arose between December 2, 1957 when the 1957 Recruitment Rules came into existence and September 11, 1959 when the 1959 Probationers Rules came into force. The notification made it clear that the appointment of probationers by direct recruitment was subject to the 1957 Recruitment Rules, the Mysore Government Servants Probation Rules, 1957, and the 1959 Probationers Rules. The Public Service Commission conducted the competitive examination and selected 17 among respondents Nos. 2 to 24 for appointment as Assistant commissioners Class I (Junior Scale) on probation. It may be stated here that the other six respondents were allotted to the service as a result of judgment of this Court. There is no dispute that all the 23 persons being respondents Nos. 2 to 24 are treated as direct recruits.

11. Respondents Nos. 2 to 24 were appointed on probation by order dated October 26, 1962. They were required to undergo training and probation for a period of two years. During the said period their appointments were provisional and liable to termination on one month's notice, as was the case of recruitment of probationers. In order to cause minimum prejudice to the officiating promotees and in order to meet the audit objections by reason of lack of provision in the 1957 Recruitment Rules for training reserves the Government sanctioned 20 temporary posts to accommodate the probationers for the period of their training.

12. On completion of the period of probation the Government issued a declaration under Rule 5 of the Mysore Government Servants Probation Rules, 1957 that the respondents had satisfactorily completed the period of probation on October 24, 1964. Consequent upon such declaration each of the respondents became entitled under Rule 9 of the Government Servants Probation Rules, 1957 to

be confirmed as a full member of the service in the class or category for which he was selected at the earliest opportunity to any substantive vacancy which may exist or arise in the permanent cadre of such class or category. Respondents became entitled to be full members of the service and to confirmation in the permanent cadre against vacancies existing within their quota since the promulgation of the 1957 Recruitment Rules.

13. The government action declaring respondents to have satisfactorily completed the probation under Rule 5 of the Probation Rules resulted in the confirmation of the respondents in substantive vacancies with effect from October 26, 1964. The creation of temporary posts for the duration of the training of respondents Nos. 2 to 24 as probationers was not renewed in 1964. The actual confirmation was delayed because of the finalisation of inter-State seniority lists of the allottees.

14. The appellants contended first that the word "vacancies" occurring in the 1957 Recruitment Rules means not only vacancies in the permanent posts but also in temporary posts, and, therefore, the quota rule applies to vacancies in all posts whether permanent or temporary. On that construction it is said that upto September 10, 1959 there were 59 vacancies and though the quota was for 39 promotions and 20 for direct recruitment there were in fact 59 promotions and no direct recruitment with the result that 59 promotes filled up all the vacancies permanent or temporary.

15. The second contention of the appellants was that the respondents were directly recruited as Assist Commissioners on October 26, 1962 against temporary vacancies created with effect from October 26, 1962 are not entitled to claim seniority over the appellants who had been promoted earlier than them and whose promotion was within the quota of 59 vacancies.

16. The third contention was that the direct recruits were not entitled to count their seniority from a date anterior to the date of their recruitment by taking advantage of the fact that the vacancies required to be filled up by direct recruitment had not been actually filled up by direct recruitment, but had been filled up actually by promotion.

17. The fourth contention was that all the Assistant Commissioners who were directly recruited or promoted to the posts of Assistant Commissioners formed one class and their inter se seniority in the cadre of Assistant Commissioners has to be determined on the basis of length of service rendered by them in the category in order to have equality.

18. The fifth contention was that the respondents who were appointed on temporary basis and the appellants who were promoted on officiating basis were entitled to have their seniority determined in accordance with the provisions of Rule 2(c) of the Mysore Government Servants (Seniority) Rules, 1957. Rule 2(c) is as follows :

Seniority inter se of persons appointed on temporary basis will be determined by the dates of their continuous officiation in that grade and where the period of officiation is the same the seniority inter se in the lower grade shall prevail.

19. The sixth contention was that the respondents were appointed on temporary basis with effect from October 26, 1962 against temporary posts created for them and they could not claim seniority to appellants for these reasons. Under Rule 5 of the Mysore Government Servants Probation Rules, 1957 the probationers are deemed to have satisfactorily completed their probation on the issue of an order to that effect. The respondents who were confirmed in substantive vacancies could be confirmed only in vacancies which might exist or arise after October 26, 1964 and not earlier. The

respondents were confirmed against substantive vacancies which arose from September 12, 1960 onwards. Both the 1957 Recruitment Rules and the 1959 Probationers Rules contemplate observance of quota rule at the time of appointment and promotion. The question of enforcement of quota rules does not apply at the time of confirmation. The quota rule will only apply when the vacancies are filled up either by direct recruitment or promotion. The appellants are promoted prior to the direct recruitment of the respondents, and therefore, they are entitled to claim seniority.

20. One of the most important matters to be kept in the forefront is that the permanent cadre strength of the Mysore Administrative Service is 147 of which senior duty posts are 12 and the junior duty posts 135.

21. The substantive vacancies which arose between December 2, 1957 and September 10, 1959 were classified into vacancies which were required to be filled up by direct recruitment and by promotion, in the ratio of 1/3 and 2/3 respectively in accordance with the 1957 Recruitment Rules which came into force on December 2, 1957. The substantive vacancies which arose from September 11, 1959 to October 26, 1964, the date when the direct recruits were confirmed were classified as direct recruitment and promotional vacancies on two-thirds and one-third basis respectively in accordance with the 1959 Probationers Rules which came into existence on September 11, 1959. The substantive vacancies which arose between October 26, 1964 upto September 10, 1965 have been classified as direct recruitment and promotional vacancies on two-thirds and one-third basis respectively in accordance with the 1959 Probationers Rules which continued to be operative upto September 11, 1965. From September 11, 1965 to October 8, 1971 the quota for direct recruitment became one-third and for promotional vacancies it was two-third.

22. The contention of the appellants that the respondents were recruited to temporary vacancies is wrong for these principal reasons.

23. First, the cadre here consists only of permanent posts. The cadre does not consist of any temporary post. The total number of vacancies between December 2, 1957 and September 10, 1959 were 59. Under the quota 39 were promotional vacancies and 20 were direct recruitment vacancies. There were in fact 59 promotees. They were 20 in excess of their quota. There was however no direct recruitment during that period. Again between September 11, 1959 and September 10, 1965 the total number of vacancies were 208. Under the quota system 71 were promotional vacancies and 137 were direct recruitment vacancies. There were in fact 168 promotees during the period. Therefore 97 promotees were in excess of their quota. Out of the 137 direct recruitment quota only 20 were filled up during the period. In this background it appears that when in 1962 direct recruitment was made there were 20 direct recruitment vacancies in the quota which were not filled up. The promotees, however, being 20 in excess were not entitled to confirmation against the vacancies within the quota of the direct recruits. The promotees were promoted on officiating basis. Therefore, when the respondents were appointed by direct recruitment on probation under order dated October 26, 1962 they were required to undergo training and probation, for a period of two years. In order to meet the audit objections by reason of lack of provisions in the Recruitment Rules for training reserves the Government sanctioned 20 temporary posts to accommodate the probationers for the period of their probation. On the completion of the period of training there was no renewal of the temporary posts. Therefore, the temporary posts which were created for the direct recruits during their period of probation cannot be taken into account in working out that quota rule and for adjustment of seniority.

24. It may also be stated here that the promotees had not been deprived of their appointment and

they had not been subjected to any reversion. The implementation of the quota rule has resulted in the adjustment of seniority consistent with the quota. The confirmations had been issued in the case of promotees and direct recruits having regard to the permanent strength of the cadre and the quota.

25. Second, the advertisement of the Public Service Commission inviting direct recruits stated that the posts "are likely to be made permanent". The order of appointment of the respondents as gazetted probationers on selection by the Public Service Commission stated that the respondents were appointed as probationer Assistant Commissioners. The order of appointment refers obviously to the 1959 Probationers Rules.

26. Third, Rule 9 of the Mysore Government Servants Probation Rules states that a probationer who has been declared to have satisfactorily completed his probation has to be confirmed as a full member of the service at the earliest opportunity in any substantive vacancy which may exist or arise in the permanent cadre of the service in respect of which he has been recruited as a probationer. This rule excludes temporary posts from the cadre. It is, therefore, impossible to hold that the direct recruits were temporary employees outside the permanent cadre of the service.

27. Counsel on behalf of the appellants contended that the quota rule applies to vacancies in all posts, whether permanent or temporary and relied on the decisions of this Court in *Bishan Sarup Gupta v. Union of India* ((1973) 3 SCC 1 : 1973 SCC (L&S) 1), *G. R. Luthra, Additional District Judge, Delhi v. Lt. Governor, Delhi* ((1975) 3 SCC 258 : 1974 SCC (L&S) 541) and *A. K. Subraman v. Union of India* ((1975) 1 SCC 319 : 1975 SCC (L&S) 36). In all these cases the cadre comprised of both permanent and temporary posts. In *Bishan Sarup's* case (supra) the cadre consisted of permanent and temporary posts. In *Luthra's* case (supra) cadre post as defined in the Rules includes a temporary post. In *Subraman's* case (supra) it was said that a cadre might consist only of permanent posts or sometimes also of temporary posts. In the present case Rule 9 of the Probation Rules of 1957 provides for confirmation of a probationer as a full member of the service in any substantive vacancy in the permanent cadre of such class. This rule establishes the exclusion of temporary posts from the cadre.

28. In *E. P. Royappa v. State of Tamil Nadu* ((1974) 2 SCR 348 : (1974) 4 SCC 3 : 1974 SCC (L&S) 165) this Court said on the construction of Rule 4(2) of the relevant Cadre Rules in that case that the State Government might add for a period to the cadre one or more posts. But the posts so added could not become cadre posts. The temporary posts which are created due to exigencies of the service are posts which are outside the cadre.

29. In working out the quota rule, these principles are generally followed. First, where rules prescribe quota between direct recruits and promotees, confirmation or substantive appointment can only be in respect of clear vacancies in the permanent strength of the cadre. Second, confirmed persons are senior to those who are officiating. Third, as between persons appointed in officiating capacity, seniority is to be counted on the length of continuous service. Fourth, direct recruitment is possible only by competitive examination which is the prescribed procedure under the rules. In promotional vacancies, the promotion is either by selection or on the principle of seniority-cum-merit. A promotion could be made in respect of a temporary post or for a specified period but a direct recruitment has generally to be made only in respect of clear permanent vacancy either existing or anticipated to arise at or about the period of probation is expected to be completed. Fifth, if promotions are made to vacancies in excess of the promotional quota, the promotions may not be totally illegal but would be irregular. The promotees cannot claim any right to hold the promotional posts unless the vacancies fall within their quota. If the promotees occupy any vacancies which are

within the quota of direct recruits, when direct recruitment takes place, the direct recruits will occupy the vacancies within their quota. Promotees who were occupying the vacancies within the quota of direct recruits will either be reverted or they will be absorbed in the vacancies within their quota in the facts and circumstances of a case.

30. The quota between promotees and direct recruits is to be fixed with reference to the permanent strength of 135 junior duty posts. Persons who were allotted the junior duty posts under the States Reorganisation Act are to be accommodated within the permanent cadre strength of 135 posts. If they are in excess of the number then the excess will have to be accommodated in the promotional vacancies during the subsequent period commencing from December 2, 1957 to September 10, 1959.

31. Persons Nos. 1 to 164 in the gradation list consist of persons who were allotted under the States Reorganisation Act on November 1, 1956. The ranks of those 164 persons were determined in accordance with the final inter-State seniority list. Persons Nos. 165 to 184 are promotees who were allotted to substantive vacancies arising from November 1, 1956 to December 1, 1957 on the basis of their continuous service in the cadre. There was no quota rule for the period November 1, 1956 to December 1, 1957. Therefore, neither the promotions of those persons nor their relative seniority can be disturbed.

32. Persons Nos. 185 to 213 are promotees. Persons Nos. 214 to 236 are direct recruits. Persons Nos. 237 to 280 are also promotees. From December 2, 1957 when the 1957 Recruitment Rules came into existence till September 10, 1959 when the 1959 Probationers Rules came into force the State promoted many persons from Class II. Two-thirds of the total vacancies for the period December 2, 1957 to September 10, 1959 were promotional vacancies. Therefore, all persons promoted to those two-thirds vacancies cannot be disturbed. Those promotees who are in excess of the two-thirds vacancies will be pushed down to the vacancies in the subsequent period. The remaining one-third vacancies were for direct recruitment. Direct recruits equal in number to those one-third vacancies should be placed next after the promotees placed in the first two-thirds vacancies between December 2, 1957 and September 10, 1959. If direct recruits are in excess of the quota they will similarly be shifted to the subsequent period.

33. The next period is from September 11, 1959 to October 26, 1964. From September 11, 1959 the promotional vacancies became one-third and direct recruitment vacancies became two-thirds. The excess promotees during the previous period will be first absorbed in the promotional vacancies and thereafter promotees during the period will be absorbed. Again, if there would be excess promotions they will be shifted to the following period.

34. The important principle is that as long as the quota rule remains neither promotees can be allotted to any of the substantive vacancies of the quota of direct recruits nor direct recruits can be allotted to promotional vacancies. The result is that direct recruitment vacancies between September 11, 1959 and October 26, 1964 cannot be occupied by any promotees. The fact that direct recruits were confirmed on October 26, 1964 will not rob the direct recruits of their quota which remained unfilled from December 2, 1957.

35. The Government confirmed the direct recruits and the appellants by adjustment of vacancies within their respective quota and determined their seniority in accordance with Rule 2(b) of the Seniority Rules. Seniority is based on confirmation as full member of the service in the substantive vacancy.

36. In *S. G. Jaisinghani v. Union of India* ((1967) 2 SCR 703 : AIR 1967 SC 1427 : 65 ITR 34) it was said that when the quota was fixed for the two sources of recruitment the quota could not be altered according to exigencies of the situation. It was held there that the promotees who had been promoted in excess of the prescribed quota should be held to have been illegally promoted. In *Bishan Sarup's case* (supra) it was held that when it was ascertained that not more than 1/3 of the vacancies were to go to the promotees and the rest to the direct recruits, the ratio was not made dependent on whether any direct recruit was appointed in any particular year or not. The promotees were entitled to 1/3 of the vacancies in any particular year, whether or not there was direct recruitment by competitive examination in that year.

37. Two principles are established in the decisions referred to. One is that quotas which are fixed are unalterable according to exigencies of situation. Quotas which are fixed can only be altered by fresh determination of quotas under the relevant rule. The other is that one group cannot claim the quota fixed for the other group either on the ground that the quotas are not filled up or on the ground that because there has been a number in excess of quota the same should be absorbed depriving the other group of quota.

38. In *Bachan Singh v. Union of India* ((1972) 3 SCR 898 : (1972) 3 SCC 489) the two appellants were promoted in the years 1958 and 1959. The respondents were appointed by direct recruitment in 1962, 1963 and 1964. The respondents were confirmed in their posts before the appellants. The appellants contended that the respondents who were directly appointed after the appellants had been promoted were not to be confirmed in permanent posts before the appellants. It was held that the direct recruits were confirmed against permanent vacancies within their quota. The earlier confirmation of direct recruits though appointed later was upheld on the ground that they fell within their quota of permanent vacancies.

39. *Subraman's case* (supra) on which the appellants relied also held that each quota would have to be worked independently on its own force. In that case the Assistant Executive Engineers who were initially entitled to 3/4th and subsequently to 2/3rd of the vacancies while Assistant Engineers who were entitled initially to 1/4th and subsequently to 1/3rd of such vacancies were held to be entitled to their respective quotas independent of the fact whether any person from one class or the other was promoted or not. It was illustrated by saying that if there were three vacancies in a year, two would go to the Assistant Executive Engineers and one would go to the Assistant Engineers and even if there were not eligible Assistant Executive Engineers who could be promoted to fill in two vacancies belonging to their quota, one vacancy is to be filled up by promotion of an Assistant Engineer, if he was eligible. Similarly, if two vacancies belonging to the quota of Assistant Executive Engineers are to be filled by Assistant Engineers for want of availability of eligible Assistant Executive Engineers the appointment of Assistant Engineers to fill in those two vacancies would be irregular because they would have to be pushed down to later years when their appointment could be regularised as a result of absorption in their lawful quota for those years.

40. For the foregoing reasons, we hold that the respondents Nos. 2 to 24 were entitled to the vacancies within their quota which had not been filled up and they are senior to the appellants. We affirm the judgment of the High Court and dismiss the appeals. Parties will pay and bear their own costs in these appeals.

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