

S. Ramaswamy

Vs

Union of India and Others

Civil Appeal No. 381 of 1976

(Y.V. Chandrachud, P.K. Goswami, A.C. Gupta JJ)

17.08.1976

JUDGMENT

CHANDRACHUD, J. -

1. On February 7, 1959 the appellant, S. Ramaswamy, was appointed as an Assistant Development Officer in the Directorate General of Technical Development in the Ministry of Industry and Civil Supplies, Government of India. In 1964 he was appointed as a Development Officer on an ad hoc basis and that appointment was regularized in May 1966. On December 1, 1966 the post of Officer on Special Duty was created in the Directorate in order to deal effectively with the development of agro-based good processing industries. The Director General (Technical Development) recommended the appellant for appointment to the post and in course of time the appointment was duly made.

2. In 1974 a question arose regarding promotion to the selection post of Industrial Adviser in the Directorate. Respondents 6 to 11 and some others who were working as Development Officers filed Writ Petition 612 of 1974 in the Delhi High Court asking that the High Court asking that the Government of India be restrained from promoting the appellant to the post of Industrial Adviser and that their claims to the post be considered in preference to the appellant's claim. That petition was dismissed on September 17, 1975.

3. During the pendency of the writ petition filed by respondents 6 to 11, the appellant had made a representation to the Departmental Promotion Committee for considering his preferential claim to the post of Industrial Adviser. That committee met on August 7, 1975 for proposing a panel of officers for being considered for appointment to the post of Industrial Adviser, but the appellant's representation was not placed before the committee. The appellant made a further representation to the Government on August 18, 1975 complaining that though he was eligible for being appointed to the post of Industrial Adviser, his name was not included in the list of eligible officers which was forwarded to the Departmental to the post.

4. The committee, in its meeting of August 7, 1975 decided to recommend respondents 6 and 7 for appointment as Industrial Advisers. On October 31, 1975 the appellant filed Writ Petition 1077 of 1975 in the Delhi High Court to restrain the Government from implementing the recommendation and to restrain respondents 6 and 7 from taking charge of the posts of Industrial Advisers. That petition was dismissed in limine by a Division Bench of the High Court on October 31, 1975. This appeal by special leave is directed against the speaking order which was passed by the High Court while dismissing the writ petition summarily.

5. Recruitment to the post of Industrial Adviser (Chemicals) was governed originally by the Directorate General of Technical Development (Class I posts) Recruitment Rules, 1963. Item 6 of the schedule annexed to those Rules related to appointment to the post of Technical Adviser (Chemicals), a Class I selection post, then generally in the scale of Rs. 1300-100-2000. One of the methods of recruitment to the post, as specified in column 9 of schedule, was by promotion. Column 10 which regulated appointments by promotion read thus :

Promotion. - Development Officer having a minimum experience of 10 years in the grade provided however, that in the scale of Rs. 1300-60-1600-100-1800, the minimum experience shall be five years in that grade.

6. In exercise of the powers conferred by Article 309 of the Constitution the President on January 30, 1974 made the Directorate General of Technical Development (Class I posts) Recruitment (Amendment) Rules, 1974. Rule 2 of these Rules amended column 10 of the schedule to the Rules of 1963 by substituting the following entry for the one extracted above :

Promotion :

(i) Officer on Special Duty (Food Processing Industries) with 5 years' regular service in the grade; failing which with 10 years' regular service in the grade of Development Officer and Officer on Special Duty (Food Processing Industries) combined together of which 4 years should be as Officer on Special Duty (Food Processing Industries).

(ii) Development Officers having at least 10 years' regular service in the grade, provided that in respect of Development Officers, who are in the grade of Rs. 1300-1800 not less than five years regular service shall be required.

7. That the appellant is qualified and eligible for appointment as an Technical Adviser is beyond dispute and has at no stage been questioned. But it has to be stated that for the purpose of computing the completion of 5 years' service as an Office on Special Duty, the period during which the appellant was working in that post on an ad hoc basis has to be excluded from consideration. The appellant was appointed as an Officer on Special Duty on an ad hoc basis in 1966 but the appointment was regularized on January 23, 1970 after the President made the Recruitment Rules dated January 14, 1970 regulating the method of recruitment to that post. The appellant, therefore, must be taken to have completed 5 years' service in the post of Officer on Special Duty on January 23, 1975.

8. It is also necessary to clarify that the decision of the Departmental Promotion Committee to carve out three time the number of vacancies viz., six as the zone of consideration for promotion to the grade of Industrial Adviser is open to no exception and has in fact not been challenged by the appellant. The official memorandum dated May 16, 1957 issued by the Ministry of Home Affairs incorporates a decision taken by the Government after considering the replies received from the various ministries and the Union Public Service Commission and keeping in view the policy of Government, settled at the highest level, that greater emphasis should be placed on merit as a criterion for promotion. It records, inter alia, that the Departmental Promotion Committee or other selecting authority should first decide the field of choice, i.e. the number of eligible officers awaiting promotion who should be considered for inclusion in the select list and that the field of choice, wherever possible, should extend to five or six times the number of vacancies expected within a year. In the instant case, two vacancies were to be filled in the post of Technical Adviser

but instead of carving out 10 or 12 persons as the field of choice for promotion, the committee decided to select a panel of six officers as the zone of consideration. The official memorandum reflects but a policy decision which cannot have the force of a rule made under Article 309 of the Constitution and therefore, the fixation of ratio for consideration for promotion may reasonably and rationally differ from case to case. The decision to select a panel of six officers for appointment to the two posts of Technical Adviser cannot be characterized as arbitrary or unreasonable. Besides, even if a panel of 12 officers were to be selected for consideration, the appellant would still be out of it by the application of the impugned test adopted by the committee.

9. That test forms the centre of controversy in this appeal. The test adopted by the Departmental Promotion Committee for selecting a panel of officers for consideration for promotion to the post of Industrial Adviser may, in terms of the counter affidavit filed on behalf of the Government be described as a 'chronological test'. Under the Amendment Rules, 1974 the channel of promotion to the post of Technical Adviser is this : (i) Officer on Special Duty with five years' regular service in the grade; or (ii) failing that, persons with 10 years' regular combined service in the grade of Development Officer and in the grade of Officer on Special Duty, of which 4 years of service has to be in the latter grade; or (iii) persons in the grade of Development Officers having at least 10 years' regular service in that grade, provided that in respect of Development Officers working in the grade of Rs. 1300-1800, 5 years' regular would be sufficient to qualify the officer for promotion. The amended rule does not, of course, mean that Development Officers can be considered for promotion to the post of Technical Adviser only in the event that qualified persons from the first categories are not available. A person belonging to the first category; failing which, persons belonging to the second category; and persons in the third category are, all and together, eligible for being considered for promotion, subject to the fixation of the field of choice under the Home Ministry's memorandum dated March 16, 1957. That field of choice was fixed in the instant case at three times the number of vacancies viz., 6. The appellant belongs to the first category and there was therefore no question of going to the second category. The choice of eligible promotes was accordingly restricted to the first and third categories. But in selecting the panel, what has been done by the application of the chronological test is to ascertain the respective dates on which the Officer on Special Duty completed 5 years' regular service in that grade and the Development Officers completed 10 years' regular service in their grade, to arrange them in the order of seniority according to the dates on which they completed the qualifying service in their respective grades and to select the first six only from the list so made, for being considered for promotion to the two vacancies in the post of Technical Adviser. In the integrated list of Development Officers and Officer on Special Duty, appellant occupied the 19th position, since 18 Development Officers had completed 10 years' regular service in his grade. As the Departmental Promotion Committee and decided to carve out a field of choice consisting of six persons only, the appellant, being outside the first six, was left out of the select panel. As we have indicated earlier, even if the field of choice were to extend to 12 officers, being six times the number of vacancies, the appellant being 19th in the integrated list would still be out of that panel.

10. Learned Counsel appearing on behalf of the Union of India has strongly defended the method adopted by the Departmental Promotion Committee for preparing the panel of selection. She contends that the Officer on Special Duty and Development Officers work in the same grade namely, the grade of Development Officer, save with the difference that a Development Officer working as an Officer on Special Duty draws a special pay of Rs. 200 in addition to the pay drawn by him in the grade of Development Officer. Therefore, according to the Counsel, the committee was justified in preparing an integrated list comprising the appellant as well as the Development Officers and in arranging them, for the purpose of being considered for promotion, according to the

dates on which they completed the period of qualifying service. On the record as it stands we find it difficult to hold that the Officer on Special Duty, for the purposes of the Amendment Rules of 1974, can be said to be in the same to be in the same grade as the Development Officers. Those rules contemplate on their plain language and are framed on the basis that the Officer on Special Duty is in a separate grade of Development Officers. The rules refer to Officer on Special Duty with 5 years' regular service "in the grade" and Development Officers having 10 years' regular service "in the grade". In the particular context in which the words "in the grade" occur, they mean "in the particular grade" indicating thereby in clear terms that the two grades are different. Even if it be true that the Officer on Special Duty draws, except for the special monthly pay of Rs. 200, the same pay as a Development Officers and that, generally, the two are in a similar scale of pay that would not justify the conclusion, for the purposes of the 1974 Rules, that they are in the same grade. Their scale of pay may be identical, we will so assume, and yet they will be working in different grades, one in the grade of Officer on Special Duty and the working in different grades, one in the grade of Development Officers. This position may not be true universally and we propose to lay down no proposition of universal application. We are called upon to interpret the 1974 Rules which, in our opinion, leave no doubt that within the contemplation of those Rules is the supposition that the Officer on Special Duty is in a grade different from that of the Development Officer.

11. It is significant in this regard that the counter-affidavit filed on behalf of the Union of India by Shri K. Srinivasan, Under Secretary, Ministry of Industry and Civil Supplies, Department of Industrial Development, says in terms that the grade of Officer on Special Duty is different from the grade of Development Officer and that these two being separate cadres, there was no question of drawing up a combined seniority list of officers on the two cadres. The affidavit further concedes that the post of Officer on Special Duty carries higher responsibilities. We might also mention that in the counter-affidavit which was filed on behalf of the Government in the Delhi High Court in Writ Petition 612 of 1974, it was stated that the Director-General (Technical Development) had recommended the appellant as "the only suitable officer" for appointment to the post of Officer on Special Duty. That writ petition was filed by respondents 6 to 11 was strongly resisted by the Government which took the stand that the appellant was eligible for being considered for promotion and that a stay order ought not to be granted as no irreparable harm would result if the appellant was appointed to the post of Technical Adviser after being found suitable for the promotion. That affidavit, also sworn by Shri K. Srinivasan, stated even in the clearer terms that on confirmation as an Officer on Special Duty, the appellant "ceased to belong to the grade of Development Officers". The stand now taken by the Government is directly contrary, its contention being that the Officer on Special Duty is in the same grade as the Development Officers Considering the wording of the 1974 Rules and 1974 Rules and the context in which the words "in the grade" occur, we are inclined to the view that the stand taken by the Government in the writ petition filed by respondents 6 to 11 was more in consonance with the recruitment rules. The crux of the Government's answer to that writ petition was that the appellant "was eligible for consideration for promotion as Technical Adviser (Chemicals) in terms of the Statutory Rules" and their stand, broadly, was that the claims of all persons eligible for the post of Technical Adviser and "within the field of considered. The appellant then was obviously considered to be both eligible and within the field of consideration. The recruitment rules of 1974 have undergone no change since then and whereas only one vacancy was to be filled then, there are two to be filled now. It is therefore difficult to appreciate the change in the attitude of the Government and the diametrically opposite stand it is taking now that the appellant's name is beyond the field of choice. It has to be remembered that the writ petition filed by respondents 6 to 11 and other Development Officers asking, inter alia, that the appellant's name ought not to be considered for the post of Industrial Adviser was dismissed on the opposition of the

Government. The Government now wants to do exactly what the Development Officers asked it to do by their writ petition and which writ petition the Government succeeded in having dismissed on the strength of its contention, amongst others, that the appellant was eligible for the higher post and on the strength of the right it asserted to consider the appellant for promotion. In fact, the Government even opposed the stay application in the earlier writ petition, indicating the impending possibility of the appellant's appointment as Industrial Adviser.

12. No rule or notification is cited before us to support the "practice" adopted by the Departmental Promotion Committee whereby though the Officer on Special Duty and the Development Officers belong to different grades, a common list of officers was prepared according to the dates on which the appellant, who is the sole incumbent of the post of Officer on Special Duty, and Development Officers completed 5 and 10 years of service respectively. By this process, the appellant who belongs to a separate and distinct grade or cadre was placed 19th in the integrated list, much below the field of choice which, though, was rightly limited to six officers.

13. We do not suggest that the method or practice, by which an integrated list of officers is prepared according to the date on which they acquire eligibility in order to find out which of those who are eligible fall within the field of choice, is necessarily or in all circumstances bad. That practice, not having the authority of law, is vitiated in the instant case because of the 1974 recruitment rules which envisage that an Officer on Special Duty is in a separate grade, cadre or class. It is for that reason wrong to put him in an integrated list. The practice adopted by the Departmental Promotion Committee overlooks that the rule-making authority, being conscious while framing the Rules of 1974 that there was only one Officer on Special Duty for the time being to be considered for appointment as Industrial Adviser, considered him to be in a separate grade and gave him a separate treatment by dealing with him in a separate clause, namely clause (i) which uses the singular. In fact the history of the recruitment rules itself shows that it was thought necessary to bring an Officer on Special Duty of certain experience within the area of eligibility. The rules of 1963 restricted eligibility to Development Officers and it was for the first time in 1974 that an Officer on Special Duty was brought within that area. The circumstance that the Officer on Special Duty is placed in clause (i) and Development Officers in clause (ii) is not the point of matter and can confer no special privilege on the former. Such a sequence may well be fortuitous. But what is important is that if the Rules intended that the two grades of officers should be clubbed together and that an Officer on Special Duty should be considered to be in the same grade as Development Officers, the easiest thing to do would have been to say, for example, that Development Officers of ten years' experience would be eligible for promotion as Industrial Adviser, provided that in the case of a Development Officer who is working as an Officer on Special Duty, five years' experience in the latter post would be enough. The integrated list, in the light of these facts and because of the peculiar wording of the 1974 Rules, must therefore go.

14. This might apparently create an impasse but the solution is simple. The field of choice fixed at six may be retained but amongst those six shall be the appellant, the other five being Development Officers according to the dates on which they acquired eligibility. Alternatively, the field of choice may, for instance, be expanded to eight, being four times the number of vacancies, in which case the appellant and seven Development Officers can be considered for promotion. This latter course may obviate possible hardship which would result if one Development Officer is required to be dropped from the list by restricting the field of choice to six. In either event, suitability for promotion is entirely for the concerned authority to decide and the fact that the appellant must be included in the list of eligible officers who fall within the field of choice does not mean that he must be promoted to one of the posts of Industrial Advisers. Mere inclusion in such a list confers no right on anyone to

be promoted to the higher post. It only gives an opportunity to be considered for promotion.

15. For these reasons we allow the appeal, set aside the decision of the High Court, and direct that the appellant's name be included in the list of eligible officers for considering whether he is suitable for promotion to the post of Industrial Adviser (Chemicals). The recommendation already made by the Departmental Promotion Committee for appointment to the two posts of Industrial Advisers is quashed. Appellant shall get his costs, here and in the High Court, from respondent 1.

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