

K. B. Shukla and Others

Vs

Union of India and Others

Civil Appeal No. 1089 of 1969

(R. S. Sarkaria, V. D. Tulzapurkar JJ)

31.01.1979

JUDGMENT

SARKARIA, J. –

1. This appeal by certificate, directed against a judgment, dated May 6, 1968, of the High Court of Delhi, arises out of these facts :

1a. As Per Government Notification No. F. 1/12/58, Delhi, dated March 15, 1961, the President of India in exercise of his powers under the proviso to Article 309 of the Constitution framed Delhi and Himachal Pradesh Civil Service Rules, 1961 (hereinafter called the 1961 Rules).

2. Rule 3 of the 1961 Rules constituted the Delhi and Himachal Pradesh Civil Service consisting of two grades, namely, Grade I and Grade II. The posts in Grade I were Central Civil Posts, Class II (Gazetted). Rules 5 and 29 of the 1961 Rules, respectively provide for : (i) the method of recruitment to the Service; and (ii) the manner in which the seniority of the persons so appointed was to be determined.

3. Rule 5 prescribes for these methods of appointment to the service, namely :

(a) "by direct recruitment in the manner specified in Part IV of these Rules" to not more than 50 per cent of the substantive vacancies which occur from time to time to time in the permanent strength of the service; and

(b) "by selection" to the remaining substantive vacancies, in the manner specified in Part V of these rules from amongst -

(i) officers who are substantively borne on the cadre of Tehsildars employed in either of the Union Territory of Delhi or Himachal Pradesh; and

(ii) officers who hold substantively any of the posts mentioned in Schedule II, Parts A and B.

Proviso I of Rule 5 indicates a third method of appointment to the Service. Under the Proviso, "for a period of three years from the constitution of the Service if a sufficient number of suitable officers is not available under clause (b), the requisite number of officers may, in consultation with the Commission be appointed to the Service by transfer of members of a State Civil Service or other Service". Proviso II

to the rule reserves the right of the Central Government to hold a vacancy in abeyance, or to fill it on an officiating basis. Sub-rule (2) of Rule 5 empowers the government "if the exigencies of service so require", to vary, in consultation with the Commission, the percentage of vacancies to be filled by each method specified in sub-rule (1).

4. Rule 17 (to which Rule 5 was subject) of the 1961 Rules entitled the Central Government to appoint at the commencement of these Rules, to the Service any person who at such commencement was holding any of the posts specified in Schedule I or any equivalent post in the State of Punjab and Uttar Pradesh.

5. Thus, the personnel of the Service, under the 1961 Rules, was to be composed of :

(a) Persons initially appointed under Rule 17.

(b) Direct recruits under clause (a) of Rule 5(1) to the extent of 50 per cent of the substantive vacancies in the authorised permanent strength.

(c) Promotees under clause (b) of Rule 5(1).

(d) Transferees under the first proviso to clause (b) of sub-rule (1) of Rule 5.

6. Rules 6 to 12 of the 1961 Rules relate to direct recruitment. Rule 9 requires the Commission to forward to the Central Government a list arranged in the order of merit of the candidates who have qualified in a competitive examination.

7. Recruitment by selection of persons mentioned in clause (b) of sub-rule (1) of Rule 5 is dealt with in Rules 13 or 16. Rule 13 provides for selection by a Selection Committee. The selection was to be made on the basis of merit and suitability with due regard to seniority.

8. Rule 18 of the 1961 Rules provides that all appointments to the Service shall be made to Grade I or Grade II and not against any specific post included in the Service.

9. Rule 29 of the 1961 Rules provides with regard to fixation of seniority of persons recruited to the 1961 Service from the various sources indicated above. This rule reads as under :

The Central Government shall prepare a list of members of the Service arranged in order of seniority as determined in the manner specified below :

(i) In the case of persons appointed on the result of competitive examination, and by selection under clause (b) of sub-rule (1) of Rule 5, seniority in the Service shall be determined by the order in which appointments are made to the Service :

Provided that :

(a) persons recruited on the results of competitive examination in any year shall be ranked inter se in the order of merit in which they are placed at the competitive examination on the results of which they are recruited, those recruited on the basis of an earlier examination being ranked senior to those recruited on the basis of later examination.

(b) the relative seniority inter se of persons recruited by selection shall be determined on the basis of the order in which their names are arranged in the list prepared under Rule 14.

(ii) The seniority of members of the Service appointed by transfer under the first proviso to sub-rule (1) of Rule 5, and of those appointed at the initial constitution of the Service in accordance with provisions of Part VI of these Rules, shall be determined ad hoc by the Central Government in consultation with the Commission, due regard being had to the posts previously held by them under the Central Government/State Government and the length of service rendered by them therein :

Provided that in the case of persons appointed under the first proviso to sub-rule (1) of Rule 5, or the first proviso to sub-rule (1) of Rule 17, if two or more persons belong to the same parent Service or Department are thus appointed, they shall be ranked inter se in the order of the relative seniority in the parent Service or Department, as the case may be.

(iii) The relative seniority of direct recruits and of promotees shall be determined according to the rotation of vacancies between direct recruits and promotees which shall be based on the quotas of vacancies reserved for direct recruitment and promotion under Rule 5.

10. Rule 31 of the 1961 Rules required the members of the Service to be appointed to the Selection Grade in consultation with the Union Public Service Commission on the basis of merit with due regard to seniority. Sub-rule (2) of Rule 31 provided that an officer with a minimum of 12 years' service in Grade II shall be eligible for being considered for appointment to the Selection Grade provided that if any person in Grade II was considered for promotion to the Selection Grade, all persons senior to him in this grade shall also be considered irrespective of whether or not they fulfilled the requirements as to the minimum of 12 years' service.

11. A combined competitive examination known as the Indian Administrative Service etc. Examination 1961 was conducted by the Union Public Service Commission for direct recruitment to the various Central Services, including Delhi and Himachal Pradesh Civil Service. The appellants appeared in this examination and on being declared successful, opted for and were appointed in the Delhi and Himachal Pradesh Civil Service, vide Government Notification No. F. 6/35/61-Delhi (1) of December 20, 1962 and were confirmed in December, 1964

12. In 1965, the President of India framed the Delhi, Himachal Pradesh and Andaman and Nicobar Islands Civil Service Rules, 1965, (hereinafter referred to as DHANICS Rules, 1965) in exercise of his powers under Article 309 of the Constitution, under the Government of India, Ministry of Home Affairs Notification No. F. 1/1/65/DH(S)(i), dated November 8, 1965, to be effective from December 1, 1965, and thus the Service, shortly called the DHANICS, was constituted under Rule 3 of these Rules.

13. The 1961 Rules were repealed by Rules 37 of the DHANICS Rules, 1965, and the appellants herein, who were originally appointed and confirmed in the Delhi and Himachal Pradesh Civil Service, became, by the operation of Rule 17, members of the DHANICS.

14. The main difference between Rule 5 of the 1961 Rules and Rule 5 of the DHANICS Rules,

1965 is that while under the former, persons could be appointed to the Service by transfer from a State Civil Service or other Service, within a period of three years only after the constitution of the 1961 Service, under the DHANICS Rules of 1965, such persons could be appointed "at any time". Nevertheless, under both the Rules such appointments by transfer could be made only if suitable officers in sufficient number were not available under clause (b) of Rule 5(1).

15. Subsequently, on November 3, 1966, the first proviso to Rule 5(1) of the DHANICS Rules was amended, vide Home Ministry Notification No. 1/13-66 DS(S), enabling the Central Government, in consultation with the Commission, to appoint to the Service by transfer members of a State Civil Service, if in the opinion of the Central Government, the exigencies of the Service so require. Such appointments by transfer could only be made up to December 1, 1967.

16. Respondents 3 to 10, who belonged to different State Civil Services were transferred to the DHANICS. Respondents 3 and 4 were appointed to Grade I by Home Ministry Notification No. 2/31/67-DS(S), dated November 29, 1967, and respondents 5 to 10 were appointed to Grade II by Home Ministry Notification No. F. 2/41/67-DH (S), dated November 29, 1967. As a result of these transfers, the petitioners, who were already members of the DHANICS, became junior to respondents 3 to 10.

17. The appellants on March 12, 1968 filed a writ petition in the Delhi High Court, challenging the constitutional validity and legality of sub-rule (3) of Rule 5 of the DHANICS Rules, 1965, on the ground that it does not provide any guidelines to determine the exigency of the Service and is therefore violative of Articles 14 and 16 of the Constitution, that there was no exigency of the Service (DHANICS) which required the appointment of respondents 3 to 10 to that Service by transfer from the respective State Civil Services. It was also contended that the impugned sub-rule (3) of Rule 5 adversely affects the existing rights of the writ petitioners and the terms of service on which they were appointed.

18. Respondents 3 to 10 resisted the petition and filed a counter affidavit on March 30, 1968, while the appellants filed a rejoinder affidavit on April 2, 1968.

19. The writ petition was heard by a Division Bench of the High Court which held that the power conferred by the impugned rules to make appointments to the DHANICS by transfer, on the Central Government, is not unguided and its exercise is controlled, and that the formation of the opinion on ground of exigency is not wholly subjective and is subject to scrutiny of the courts to a limited extent. On these premises, it held that the impugned rules were valid and did not violate Article 14 of the Constitution. The High Court also found no substance in the appellant's contention that sub-rule (3) of Rule 5 affects their seniority in DHANICS and that respondents 3 and 4 could not have been appointed the selection posts. In the result, it dismissed the writ petition by a common judgment, but granted a certificate under Article 133(1)(c) of the Constitution.

20. This is how the appellants have now come in appeal before us.

21. The contentions canvassed before the High Court have been repeated before us. Here, as there, the main contention is with regard to the constitutional validity of sub-rule (3) of Rule 5 of the DHANICS Rules, 1965. The arguments is that this sub-rule confers arbitrary uncanalised and absolute powers on the Central Government to determine an exigency of the Service and under that pretence to induct by transfer persons with consequent impairment of the seniority and prospects of promotion of the existing members of the Service. The second contention, which seems to be an

alternative argument, is that the exercise of the power under the impugned sub-rule was arbitrary and lacked good faith. It is maintained that there was in fact no exigency requiring the induction of respondents 3 to 10 into DHANICS because on November 29, 1967 immediately before their induction by transfer under the Government Notifications of that date, 138 officers (shown in Annexure 'H' to the writ petition) of varying seniority were already available to man 141 specific duty posts in the cadre of DHANICS. The Government was, proceeds the argument, short of only 3 officers to man the entire strength of DHANICS, after excluding 45 posts of the categories of Deputation, Leave and Training Reserves. It is pointed out that respondents were already serving the Central Government in connection with the affairs of the Union Territory of Delhi, having come here on deputation, and there could be no urgent need or emergency, such as the expression exigency implies, to absorb them permanently in to DHANICS, particularly after giving them the benefit of the length of their service in the Civil Services of their parent States, for purposes of seniority. Stress has also been placed on the fact that in the Government Notification dated November 27, 1967, by which respondents 3 to 7 were appointed, there is no mention of the existence of such "exigencies of Service". According to the counsel, this circumstance coupled with the other two circumstances, namely, that respondents 3 to 10 were inducted into DHANICS only three days before the expiry of the date, arbitrarily fixed in sub-rule (3) of Rule 5, and that so many officers of similar seniority as of the aforesaid respondents were already available, shows that the motive of the Government in appointing these respondents to the Service was to confer undue favour upon them, and the action of the Government in inserting sub-rule (3) in Rule 5, and appointing these respondents in pursuance of the amended Rule 5(3) was mala fide. The third contention is that placement of respondents 3 to 10 above the appellants in seniority amounts to unfair discrimination and constitutes procedural violation of Articles 14 and 16 of the Constitution.

22. The first and second contentions being inter-linked will be dealt with together.

23. The material part of sub-rule (3) of Rule 5 of DHANICS Rules, 1965, as amended by Government Notification No. 1/36-66-DS (S), Ministry of Home Affairs, dated November 3, 1966, reads as under :

Notwithstanding anything contained in sub-rule (1) during the period beginning with the commencement of the Delhi, Himachal Pradesh and Andaman and Nicobar Island Civil Service (Third Amendment) Rules, 1966, and ending with December 1, 1967, if in the opinion of the Central Government the exigencies of the service so required, the Central Government may, in consultation with the Commission, appoint to the Service by transfer, members of a State Civil Service.

24. The crucial words in the above provision are those that have been underlined.

25. From an analysis of sub-rule (3) extracted above, it is clear that the exercise of the power conferred on the Central Government to appoint to DHANICS, persons by transfer, is neither unfettered, not unguided. It is conditional as well as hedged around by safeguards. It is conditional because the existence of "existences of the service" is a sine qua non for the exercise of the power. It is absolute to uncontrolled because in exercising it, the Central Government is bound to consult and seek the advice of the Union Public Service Commission. As a further check against capricious exercise of the power, the field of choice is restricted to the members of State Civil Services. Furthermore, the exercise of this power is limited to the period ending with December 1, 1967.

26. It is true that formation of opinion by the Central Government as to the existence of "exigencies

of the Service" requiring appointment by such method, is a prerequisite for the exercise of the power. But the formation of such opinion is a matter which, in view of the peculiar nature of the subjective satisfaction of the government. Indeed, it is as it ought to be. The responsibility for good administration is that of the government. The maintenance of an efficient, honest and experienced administrative service is a must for the due discharge of that responsibility. Therefore, the government alone is best suited to judge as to the existence of exigencies of such a Service, requiring appointments by transfer. The term "exigency" being understood in its widest and pragmatic sense as a rule, the Court would not judge the propriety or sufficiency of such opinion by objective standards, save where the subjective process of forming it, is vitiated by mala fides, dishonesty, extraneous purpose, or transgression of the limits circumscribed by the legislation.

27. In the instant case, although there is a general allegation of mala fides, bereft of specific details or particulars, nothing of this kind has been established.

28. In the counter-affidavit on behalf of the Government of India, all the circumstances, including facts and figures, have been set out, on the basis of which the Central Government formed an opinion that the exigencies of the Service required appointment of respondents 3 to 10 to DHANICS by transfer from the other State Civil Services. It is stated in the affidavit that at the material time, "the sanctioned strength of the cadre was 187, while there were only 138 officers in the cadre leaving a gap of 49". There was shortage of officers of the proper caliber and seniority in the P.C.S. Cadre of Delhi and Himachal, which "preponderance of promotees affected the quality of the Cadre as a whole". The views of the government of Delhi Administration, Himachal Pradesh, and Andaman and Nicobar Islands were solicited. On receipt of their views, the matter was considered and it was decided to bring in the impugned amendments to the Rules of 1965. "It was also decided that the case of officers who were working on deputation and whose names were recommended by Delhi Administration should also be looked into." It is further stated in the affidavits :

An overall review of the administrative problems justified the amendment inasmuch as there was a big gap between the authorised permanent strength of the Service and its actual strength. The gap (of 49) could not be filled immediately by direct recruitment and promotion. Direct recruits take quite some time to get the necessary experience to man senior posts. Promotees who are drawn from a medley of sources could not be expected to do adequate justice to the arduous and complex work which the capital city of Delhi need requiring an alert and active mind and quick and correct response to its growing problems. The result was that the quality of the cadre was suffering as a whole to the prejudice of public interest. The induction of experienced officers of other States could improve the stability and efficiency of the cadre.

29. There is no good reason to doubt the correctness of the circumstances set out in the counter-affidavit filed on behalf of the Government of India. In view of the same, we have no hesitation in holding, in agreement with the High Court, that the formation of the Government of India's opinion as to the existence of exigencies of service requiring appointment of respondents 3 to 10 to DHANICS by transfer from their parent State Services, rested on good grounds; and the exercise of this power under sub-rule (3) of Rule 5 of DHANICS Rules, 1965, was not vitiated by mala fides. Indeed, the charges of mala fides has not been seriously pressed before us.

30. This takes us to the third contention advanced by the appellants.

31. The argument is that the appointment of respondents 3 and 4 directly to Grade I of the Service

and that of 5 to 10 Grade II of the Service adversely affects the rights of the appellants in the matter of promotion to the Selection Grade and their seniority. The point sought to be made out is that the Government should not have planted these respondents over the heads of the direct recruits, but for the purpose of seniority ought to have clubbed them with the promotees, so that their seniority vis-a-vis the direct recruits was fixed by rotation under sub-rule (iii) and not under sub-rule (ii) of Rule 29.

32. The contention is wholly misconceived. It was recalled that in the writ petition, the constitutional validity of Rule 29 was not challenged. Only Rule 5(3) of the DHANICS Rules, 1965 was impugned. We, therefore, decline to permit the appellants to travel beyond what they had pleaded in the writ petition. Rule 5(3) has nothing to do with seniority. It only specifies three sources from which the members of the Services may be appointed. The matter of seniority is in Rule 29. For that purpose, the rule treats the persons appointed by transfer under the first proviso to sub-rule (i) of Rule 5 and those appointed at the initial constitution of the Service in accordance with provisions of Part VI of the Rules, as a class separate from direct recruits and promotees. The provision applicable for the purpose of fixing the seniority of persons appointed by transfer, is in sub-rule (ii), according to which, their seniority is determined ad hoc by the Central Government in consultation with Commission, due regard being had to the posts previously held by them under the Central Government State Government and the length of the service rendered by them therein. The provision applicable for fixing the relative seniority of direct recruits and of promotees is to be found in sub-rule (iii), which provides that such seniority is to be determined according to the rotation of vacancies between direct recruits and promotees, which shall be based on the quotas of vacancies reserved for direct recruitment and promotion under Rule 5. This sub-rule is obviously inapplicable to persons appointed by transfer under sub-rule (3) of Rule 5. There is nothing unreasonable in this classification made by the legislature. It rests on a rational basis. The main criterion under sub-rule (ii) of Rule 29, is the length of service rendered by the persons. Indeed, in our opinion, this is infinitely the best criterion which could ever be devised by any rule governing the conditions of a Service, to ensure fairness and equal treatment guaranteed by Article 16 of the Constitution. It was pointed out by this Court in *S. B. Patwardhan v. State of Maharashtra* ((1977) 3 SCR 775 : (1977) 3 SCC 399 : 1977 SCC (L&S) 391), that a rule which leaves the valuable right of seniority to depend upon the mere accident of confirmation suffers from the vice of the unfair discrimination which is impermissible under Articles 14 and 16 of the Constitution.

33. In the instant case, respondents 3 to 10 are of the seniority of various years between 1946 and 1961, taking their length of service in their respective State Services into consideration. As against this, the petitioners were appointed to the Service in 1962. Consequently, if the respondents were otherwise found suitable, their placement in the seniority list above the appellants was quite in accord with the Rules an fair play.

34. As regards the promotion to the Selection Grade, no member of the Service can claim promotion as a matter of right. Further, under sub-rule (ii) of Rule 31, no officer is eligible for being considered for appointment to the Selection Grade unless he has put in a minimum of 12 years' service in Grade II. In the instant case, at the time of the appointment of respondents 3 to 10, the appellants had hardly put in 5 years' service. They completed 12 years' service only on December 20, 1974. On the other hand, respondents 3 and 4 had put in more than 12 years of service in their respective State Services and even the last of them would be eligible for appointment to the Selection Grade in 1973. This being the position, by no stretch of imagination, in can be said that the chances of promotion of the appellants to the Selection Grade were adversely affected by the appointment of respondents 5 and 10.

35. It will not be out of place to mention here that out of the ten respondents who were appointed by transfer to Grade I of the Service, one has since died and the other has retired from service.

36. For the foregoing reasons, the appeal fails and is dismissed, but in the circumstances, without any order as to costs.

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