Accountant General and Another

Vs

S. Doraiswamy and Others

Civil Appeals Nos. 1584-88 of 1973

Vs

S. Thankappan and Others

Vs

Union of India and Others

Writ Petition No. 357 of 1979

Vs

K. Venkatapathy and 20 Others

Vs

Union of India and Others

Writ Petition No. 4367 of 1978

Civil Appeals Nos. 1584-88 of 1973

(V. R. krishna Iyer, O. Chinnappa Reddy, R. S. Pathak JJ)

13.11.1980

JUDGMENT

PATHAK, J. –

1. These appeals, by special leave, raise the question whether the respondents are entitled to claim fixation of their seniority in the Subordinate Accounts Service after taking into account their length of service as Upper Division Clerks. The respondents entered service in the Office of the Accountant General, Tamil Nadu as Upper Division Clerks. They appeared in the Subordinate Accounts Service Examination but it was only after a number of attempts that they succeeded in passing. They passed the examination held in November 1969 and were promoted shortly thereafter. They claimed seniority on the basis that their length of service in the inferior post should be taken into account, and rested their claim on paragraph 143 of the Manual of Standing Orders issued by the Comptroller and Auditor General as it stood before its amendment by a correction slip of July 27, 1956. The correction slip removed the factor of weightage on the basis of length of service in the determination of seniority. The claim was rejected by the Comptroller and Auditor General. A writ petition filed by them in the High Court of Madras was allowed by a learned Single Judge, and

his judgment was affirmed by Appellate Bench of the High Court. Against the judgment of the Appellate Bench, the Accountant General, Tamil Nadu and the Comptroller and Auditor General have appealed to this Court, and those appeals are pending as Civil Appeals 1584 to 1588 of 1973. During the pendency of those appeals the President enacted the Indian Audit and Accounts Department (Subordinate Accounts Service & Subordinate Railway Audit Service) Service Rules, 1974 (referred to hereinafter as "the Rules of 1974"). The Rules of 1974 purport to give statutory recognition to the amendment of paragraph 143 by the Comptroller and Auditor General. The validity of the Rules of 1974 and the amendment made in paragraph 143 are assailed by the respondents in the instant appeals.

2. The Rules of 1974 have been enacted by the President. They are deemed to have come into force on July 27, 1956, which has been defined, for the purposes of the Rules as the "appointed day". The Subordinate Accounts Service (the "Service") includes members appointed to it before the appointed day as well as persons recruited to it on or before that day. Rule 5 provides that recruitment shall be made by direct recruitment in accordance with the orders or directions issued by the Comptroller and Auditor General from time to time and also by promotion. Rule 6 provides :

6. Appointments. - Appointments to the Service shall be made from the list prepared in accordance with the orders and instructions issued by the Comptroller and Auditor General from time to time and applicable at the time of appointment to the Service.

Rule 7 deals with seniority, and declares :

> 7. Seniority. - (1) The seniority inter se of the persons appointed to the service before the appointed day shall be regulated by the orders or instructions issued by the Comptroller and Auditor General as were in force at the relevant time before such day.
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> (2) The seniority inter se of the persons appointed to the Service on or after the appointed day shall be in the order in which the appointments are made to the service in accordance with Rule 6 :
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> Provided that a direct recruit shall on appointment to the Service rank senior to all officiating persons in the service (excluding a direct recruit) passing in the same departmental examination or subsequent departmental examinations :
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> Provided further that the seniority of a person who had declined the appointment to the Service but who is subsequently appointed to the Service shall be determined with reference to the date on which he assumed charge of the post in the cadre.

3. By virtue of Rule 9, in matters not specifically provided for in the Rules, every person appointed to the Service is governed by the rules, regulations, orders or instructions made or issued in respect of the Central Civil Services as applicable to the Indian Audit and Accounts Department. Rule 10 empowers the Comptroller and Auditor General to issue, from time to time, such general or special instructions or orders as he may consider necessary or expedient for the purpose of giving effect to the Rules.

4. The respondents have raised two contentions. The first is that the Rules are invalid as clause (5) of Article 148 to which alone, it is said, they must be ascribed, does not permit the retrospective enactment of rules made thereunder. The other contention is that the specific rules affecting the

seniority of the respondents are invalid because in entrusting power to the Comptroller and Auditor General to issue orders and instructions in his discretion the doctrine against excessive delegation of legislative power has been violated.

5. Taking the first contention first, it may be noted that the Rules of 1974 purport, according to the recital in the notification dated November 4, 1974 publishing them, to have been made by the President "in exercise of the powers conferred by the proviso to Article 309 and clause (5) of Article 148 of the Constitution and after consultation with the Comptroller and Auditor General of India". The respondents say that the only provision of the Constitution under which those Rules could be made is clause (5) of Article 148, and we should ignore reference to the proviso to Article 309. If that is done, they urge, there will be no justification for holding that the Rules of 1974 can be given retrospective operation. Unlike the proviso to Article 309, it is pointed out, clause (5) of Article 148 does not permit the enactment of retrospectively operating rules. We think that the respondents are right.

6. Article 309 provides for legislation by the appropriate Legislature to regulate the recruitment and conditions of service of persons appointed to public services and posts in connection with the affairs of the Union or of any State, an the proviso to Article 309 declares that until such legislation is enacted by the appropriate Legislature the President is empowered in the case of services and posts in connection with the affairs of the Union, and the Governor of a State in the case of services and posts in connection with the affairs of a State, to make rules regulating the recruitment and the conditions of service of persons appointed to such services and posts. There is a clear dichotomy in the power conferred by Article 309, a division of power between the Parliament or President, as the case may be, on the one side and the State Legislature or Governor on the other. The division is marked by the circumstance that under Article 309 services and posts in connection with the affairs of the Union are dealt with by a separate authority from the services and posts in connection with the affairs of a State. That dichotomy, it seems, is not possible in the power employed for appointing persons in the Indian Audit and Accounts Department and for prescribing their conditions of service. The Comptroller and Auditor General of India, who is the head of that Department, is a constitutional functionary holding a special position under the Constitution. Under Article 149, he performs duties and exercises powers in relation to the accounts of the Union and also of the State. Clause (1) of Article 151 requires him to submit a report relating to the accounts of the Union to the President, who causes them to be laid before each House of Parliament. Likewise, clause (2) of Article 151 requires him to submit a report relating to the accounts of a State to the Governor of the State, who causes them to be laid before the Legislature of the State. It cannot be said, in the circumstances, that the persons serving in the Indian Audit and Accounts Department are holding office in connection with the affairs of the Union exclusively. It may be pointed out that when the Constitutional Adviser prepared the Draft Constitution for consideration by the Constituent Assembly the document contained separate provisions for the appointment of the Auditor General of the Federation and Auditors General for the Provinces. The Auditor General for the Federation was to be appointed by the President and his functions extended to the accounts of the Federation as well as of the Provinces. But it was open to a Provincial Legislature to provide by law for the appointment of an Auditor General for the Province and the appointment to that office was to be made by the Governor. The Expert Committee on the financial provisions of the Union Constitution favoured the continuance of a single Auditor General for the Government of India as well as for the Provincial Governments and hoped that the Provincial Governments would refrain from using their power of appointing separate Auditors General of their own. When the matter came before the Drafting Committee, it decided that the persons performing the functions of the Auditor General in a State should be designated Auditor-in-Chief in order to distinguish him from the Auditor General

of India, and that the salaries and allowances of the staff of these officer should be fixed by the Auditor General of India and the Auditor-in-Chief in consultation with the President and the Governor respectively. Thereafter, the Drafting Committee reconsidered the desirability of permitting a multiplicity of audit authorities, one for the Union and one for each State. On August 1, 1949 Shri T.T. Krishnamachari moved an amendment deleting the draft articles enabling the State Legislatures to create their own Auditors-in-Chief. He pointed out that since the Constituent Assembly had already adopted articles whereby the auditing and accounting would become "one institution, so to say, under the authority of the Comptroller and Auditor General", it was not necessary to have separate provision for the States. Accordingly, he proposed the addition of new article [now clause (2) of Article 151] about the Comptroller and Auditor General, requiring him to submit the reports of the accounts of a State to the Governor for being laid before the State Legislature. These amendments were adopted by the Constituent Assembly [B. Shiva Rao : THE FRAMING OF INDIA'S CONSTITUTION : A STUDY, (1968), Chap. 12, pp. 414-17]. It is evident that the authority vested in the Comptroller and Auditor General ranges over functions associated with the affairs of the Union as well as over functions associated with the affairs of the State. It is a single office, and the Indian Audit and Accounts Department, which it heads, is a single department. They cannot be said to be concerned with the affairs of the Union exclusively. Consequently, the regulation of the recruitment and conditions of service of persons serving in the Indian Audit and Accounts Department cannot be regarded as a matter falling within the domain of the President within the terms of the proviso to Article 309. A special provision was necessary to entrust the President with that power, and that provision is clause (5) of Article 148. The power contained in clause (5) of Article 148 is not related to the power under the proviso to Article 309. The two powers are separate and distinct from each other and are not complementary to one another. In our opinion, the reference to the proviso under Article 309 in the recital of the notification publishing the Rules of 1974 is meaningless and must be ignored.

7. The next question is whether clause (5) of Article 148 permits the enactment of rules having retrospective operation. It is settled law that unless a statute conferring the power to make rules provides for the making of rules with retrospective operation, the rules made pursuant to that power can have prospective operation only. An exception, however, is the proviso to Article 309. In B.S. Vadera v. Union of India [(1968) 3 SCR 575 : AIR 1969 SC 118 : 1969 Lab IC 100] this Court held that the rules framed under the proviso to Article 309 of the Constitution could have retrospective operation. The conclusion followed from the circumstance that the power conferred under the proviso to Article 309 was intended to fill a hiatus, that is to say, until Parliament or a State Legislature enacted a law on the subject-matter of Article 309. The rules framed under the proviso to Article 309 were transient in character and were to do duty only until legislation was enacted. As interim substitutes for such legislation it was clearly intended that the rules should have the same range of operation as an Act of Parliament or of the State Legislature. The intent was reinforced by the declaration in the proviso to Article 309 that "any rules so made shall have effect subject to the provisions of any such Act". Those features are absent in clause (5) of Article 148. There is nothing in the language of that clause to indicate that the rules framed therein were intended to serve until parliamentary legislation was enacted. All that the clause says is that the rules framed would be subject to the provisions of the Constitution and of any law made by Parliament. We are satisfied that clause (5) of Article 148 confers power on the President to frame rules operating prospectively only. Clearly then, the Rules of 1974 cannot have retrospective operation, and therefore sub-rule (2) of Rule 1, which declares that they will be deemed to have come into force on July 27, 1956 must be held ultra vires.

8. If the Rules of 1974 do not cover the case of the respondents then admittedly the only question

which remains in regard to them is whether the amendment intended by the Comptroller and Auditor General in 1956 to paragraph 143 of the Manual of Standing Orders results in amending that paragraph. The amendment is in the form of a correction slip which, it is not disputed, possesses the status of an administrative instruction. The contention on behalf of the respondents is that paragraph 143 possesses the status of a statutory rule and, therefore, the amendment attempted by the correction slip has no legal effect on it. The High Court held that paragraph 143 was a statutory rule and it proceeded to hold so on the basis of affidavits filed before it. But the matter has been more carefully researched since, and the relevant material is now set out in the special leave petition, which has given rise to this appeal. It appears that in 1921 the Auditor General, as the administrative head of the Indian Audit Department, inserted Article 1666-A by a circular No. 1757-E/1129 dated April 18, 1921 giving weight to the length of service in the fixation of seniority. In the Audit Code prepared subsequently, Article 1666-A appeared as Article 52. Thereafter, in the Manual of Standing Orders issued by the Auditor General in 1938, Article 52 found expression as paragraph 143. The provision never acquired statutory force under the Government of India Act, 1919. Learned counsel for the respondents urges that it acquired statutory force under sub-section (2) of Section 252, Government of India Act, 1935. Sub-section (1) and (2) of Section 252 provide :

> 252. (1) All persons who immediately before the commencement of Part III of this Act were members of the staff of the High Commissioner for India, or members of the staff of the Auditor of the accounts of the Secretary of State in Council, shall continue to be, or shall become, members of the staff of the High Commissioner for India or, as the case may be, of the Auditor of Indian Home Accounts.
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> (2) All such persons aforesaid shall hold their offices or posts subject to like conditions of service as to remuneration, pensions or otherwise, as theretofore, or not less favourable conditions, and shall be entitled to reckon for purposes of pension any service which they would have been, entitled to reckon if this Act had not been passed.
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9. Sub-section (2) of Section 252 does not help the respondents. Firstly, the guarantee conferred by it covered those persons who held offices or posts on the staff of the Auditor of the accounts of the Secretary of State in Council and on the staff of the Indian Home Accounts immediately before the commencement of Part III of the Act. The respondents are clearly not such persons. Secondly, even if it be assumed that the benefit of sub-section (2) can be extended to the respondents, sub-section (2) merely protects the conditions of service enjoyed by them as they existed before. The sub-section does not enlarge or improve on the quality of those conditions of service. If seniority was determined by a departmental instruction, sub-section (2) did not give that provision the higher status of a statutory rule. It remained what it always was, a departmental instruction. We were also referred to Article 313 of the Constitution, but that provision also does not result in converting a departmental instruction into a statutory rule. Plainly, paragraph 143 in the Manual of Standing Orders remained throughout a departmental instruction and, therefore, could be amended by the departmental instruction contained in the correction slip issued by the Comptroller and Auditor General in 1956. On that conclusion being reached, the claim of the respondents must fail. The appeals have to be allowed.

10. In the connected Writ Petition 357 of 1979 there are 15 petitioners. The first ten passed the Subordinate Accounts Service Examination and were promoted to the Service after 1956 and before

the enactment of the Rules of 1974. They will be governed by the legal position enunciated in the aforesaid appeals. The eleventh, twelfth and thirteenth petitioners passed the examination immediately before the enactment of the Rules of 1974 but were promoted after the Rules were enacted. The remaining petitioners appeared at the examination and were promoted after the enactment of the Rules. In the case of the last two categories the Rules of 1974 will apply. Having regard to the provision determining the fixation of seniority under the Rules of 1974 and the position obtaining thereafter, none of the petitioners can claim the benefit of weightage on the basis of length of service. But these petitioners rely on the second of the two contentions concerning the validity of the Rules of 1974. They assail specifically the validity of Rule 7(2) which provides for fixation of seniority. The argument is that the fixation of seniority has been made by Rule 7(2) to depend on the order in which appointments to the service are made under Rule 6, and that, it is pointed out, depends on an arbitrary power conferred on the Comptroller and Auditor General to pass orders and instructions. We see no force in the contention. The Comptroller and Auditor General is a high ranking constitutional authority, and can be expected to act according to the needs of the service and without arbitrariness. He is the constitutional head of one of the most important departments of the State, and is expected to know what the department requires and how best to fulfil those requirements. We are unable to hold that the power conferred on him under the Rules violates the principle against excessive delegation.

11. The Writ Petition 4367 of 1978 must be also be treated on the basis that the petitioners are not, in the fixation of their seniority, entitled to weightage with reference to their length of service. Both writ petitions must, therefore, be dismissed.

12. Civil Appeals 1584-1588 of 1973 are allowed, the judgment and order of the Madras High Court is set aside and the writ petition is dismissed. Writ Petition 357 of 1979 and 4367 of 1978 are also dismissed.

13. In the circumstances, there is no order as to costs.

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