State of U.P. and Another

Vs

Ram Gopal Shukla

and

B.P. Sharma, Intervener

Civil Appeal No. 282 of 1980 and Civil Miscellaneous Petitions Nos. 4905 and 11949 of 1980

(A.D. Koshal, R.B. Misra JJ)

10.04.1981

JUDGMENT

MISRA, J. -

1. The present appeal by special leave is directed against the judgment dated March 29, 1979 of the Allahabad High Court, allowing a petition under Article 226 of the Constitution.

2. In the State of Uttar Pradesh, there is a Service commonly known as Naib Tehsildars. They have always formed the backbone of the revenue administration in that State. Sixty per cent of the posts of Naib Tehsildars are filled through a competitive examination held by the State Public Service Commission. The remaining posts are filled by promotion. There is another Service in the State known as the Service of Tehsildars. Cent per cent of the posts of Tehsildars are filled by promotion from amongst various sources such as Naib Tehsildars, Peshkars of the Kumaon Division, Kanungos, Kanungo Inspector or Instructors and Sadar Kanungos.

3. Ram Gopal Shukla, the respondent, started his service as Kanungo in 1949. In due course, he was promoted as Naib Tehsildar. In 1962, he was confirmed as such, and in 1963 he was appointed as Tehsildar in an officiating capacity.

4. It appears that a regular selection for the posts of Tehsildars was held in 1966 in accordance with the Uttar Pradesh Adheenath Rajaswa Karyakari (Tehsildar) Sewa Niyamavali, 1966 (hereinafter referred to as 'the Tehsildar Rules 1966'). Rule 5 of these Rules provides the sources of recruitment to the post of Tehsildar. Rule 6 thereof lays down conditions for eligibility and provides, -

> For the purposes of recruitment to the Service a selection strictly on merit shall be made from amongst all the permanent Naib Tehsildars, Peshkars of the Kumaon Division, Kanungo Inspectors or Instructors and Sadar Kanungos, who have put in not less than seven years' service in the aggregate as such or in an equivalent or higher post in a substantive or officiating capacity on the first day of January of the year in which the selection is made.

Rule 7 enjoins upon the Parishad to report by 1st of March every year to the government the number of vacancies in the Service expected during the following calendar year, and then provides that the

Governor shall fix the number of appointments to be made. Rule 8 lays down the criterion for selection. Rule 9 prescribes the procedure for selection. As this rule is important for the purpose of the present case, it is reproduced insofar as it is relevant, -

> 9. The procedure for selection shall be as follows :
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> (1) The Parishad shall draw up, in order of merit, a list of most suitable candidates from amongst those who are eligible for promotion to the posts of Tehsildars. The names in the list shall ordinarily be double the number of substantive vacancies to be filled during the course of the year.
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> (2) The Parishad shall also draw up, in order of merit, a supplementary list containing names of officials considered suitable for officiating or temporary vacancies expected to occur during the course of the year.
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> (3) The two lists drawn up under clauses (1) and (2) above together with a gradation list prepared under clause (b) of Rule 10, indicating therein the reasons for passing over the seniors, if any and the character rolls of all the eligible officials shall be forwarded by the Parishad to the Commission . . .
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> (4) The Parishad shall thereafter, in consultation with the Commission, fix date, on which a Selection Committee consisting of -
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shall consider the cases of the eligible candidates whose names are contained in the final lists drawn up by the Commission and interview such of them as are indicated by the Commission under clause (3) above.

> (5) The lists of the names selected by the Committee shall be taken with him by the representative of the Commission for placing them before the Commission, and the Commission shall thereafter send their final recommendations to the Parishad.
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> (6) The Parishad shall draw from the first list received from the Commission under clause (5) above, as many candidates as there are permanent vacancies and will thereafter rearrange their names in accordance with their seniority in the present service and they will be appointed against the substantive vacancies. The remaining names of the first list and those of the second list will be regarded as forming the 'Select List' to be drawn up in order of merit. The officials will be offered officiating or temporary vacancies in the order in which their names have been arranged in the aforesaid 'Select List' as and when the vacancies occur during the course of the year. This 'Select List' will hold good only for one year or until such time a review is made at the following selection.
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> (7) In case permanent vacancies do not occur for two consecutive years and it becomes necessary to make a selection for temporary or officiating vacancies only, then also the procedure prescribed above will be followed.

5. In accordance with the aforesaid Rules, the Uttar Pradesh Public Service Commission selected 148 persons for substantive appointment as Tehsildars and their names were shown in a list known

as List 'A'. The Commission also selected 300 other persons for temporary and officiating appointment as Tehsildars during the coming years and their names figured in what was called List 'B'. The respondent was, however, not selected and consequently his name could not be included in either of the aforesaid two lists, presumably because he had an adverse entry forming part of the remarks recorded on his work and conduct and had also been shown down below at serial No. 557 in the seniority list of Naib Tehsildars in the year 1966. Though the adverse entry was expunged in the year 1969 and his seniority was also re-fixed at serial No. 216 on October 6, 1970, as there was no selection after 1966, his name could not be included in either of the two lists. He has, however, no grievance on that account.

6. Subsequently, the State Government made the Uttar Pradesh Promotion by Selection in Consultation with Public Service Commission (Procedure) Rules, 1970 (hereinafter referred to as 'the 1970 Rules'). These Rules govern various Services, to be more specific 29 U.P. Services including the Service of Tehsildars. The purpose of these Rules obviously was to standardise the procedure for promotion and make it uniform in respect of all such Services. The procedure laid down in the 1970 Rules for promotion as Tehsildar was not substantially different from that laid down in the Tehsildar Rules, 1966. The respondent, therefore, did not feel aggrieved even by the introduction of the 1970 Rules. His grievance started only with the introduction of Rules 7-A and 7-B to the 1970 Rules by notification No. 42/4/1966-Apptt. 3 dated July 4, 1972. As the question to be decided in this case is about the vires of Rules 7-A and 7-B, it will be appropriate to read them at this stage :

> 7-A. Notwithstanding anything contained in these Rules, but subject to the proviso to Rule 18, the names of candidates on the Select List appointed in temporary or officiating vacancies prior to the date of issue of this notification, shall be rearranged in order of seniority.
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> 7-B. The candidates of the Select List as rearranged in accordance with Rule 7-A shall be appointed against substantive vacancies in preference to any candidate selected in accordance with the provisions of these Rules.

7. The complaint of the respondent was that the aforesaid new Rules 7-A and 7-B were discriminatory and violative of Articles 14 and 16 of the Constitution, inasmuch as the candidates in the Select List of 1966 were to be appointed against substantive vacancies in preference to any candidate selected in accordance with the provisions of the 1970 Rules and unless the candidates in the list were exhausted, other eligible candidates were not to be considered for promotion so that their chances of promotion would be deferred to an undated future. The further grievance of the respondent was to the following effect. The Select List was to hold good only for one year or until such time a review was made at the following selection. Thus, the life of the Select List of 1966 was for one year only on the expiry of which it died its natural death. In this view of the legal position, the appointment of Tehsildars from the Select List of 1966 after the expiry of a year from the date of its operation was illegal on the face of it. On the strength of Rule 7-A and Rule 7-B, no selection was to be held unless 300 persons included in List B were absorbed.

8. The respondent challenged the vires of Rules 7-A and 7-B by filing a petition under Article 226 of the Constitution in the High Court of Allahabad. That petition was allowed in part and Rules 7-A and 7-B were declared ultra vires Articles 14 and 16 of the Constitution in the impugned judgment.

9. Shri Dixit, appearing for the State has contended that a mere chance of promotion is not a

condition of service giving rise to a fundamental right. We are afraid this contention is irrelevant to the decision of this case. The precise grievance of the respondent has been that he had a fundamental right of being considered for promotion when others similarly situated were so considered and that if he was not considered in a situation like that, he was discriminated against and was denied equality of opportunity. This grievance, if factually correct, must be held to be well-founded.

10. It was next contended by Shri Dixit that the candidates covered by Rule 7-A are a class by themselves, that the classification is a reasonable classification and that as the respondent does not satisfy the requirements of Rule 7-A, he cannot claim that any infraction of Article 14 or 16 has taken place.

11. According to Shri Dixit, two conditions are necessary to bring a person within the fold of that rule : (1) the candidate's name must have been included in the Select List; and (2) he must have been appointed in a temporary or officiating vacancy prior to the date of issue of the notification of July 4, 1972. The respondent did not satisfy these requirements and therefore did not fall within the purview of Rule 7-A. Rule 7-B gives preference to the candidates in the Select List as rearranged in accordance with Rule 7-A, which, according to Shri Dixit, was based on a reasonable classification and therefore the respondent can have no grievance. In support of this contention, reliance has been placed on Reserve Bank of India v. C.S. Rajappan Nair (ILR (1977) 1 Ker 398); State of J. & K. v. Triloki Nath Khosa ((1974) 1 SCC 19 : 1974 SCC (L&S) 49 : (1974) 1 SCR 771); Ramesh Prasad Singh v. State of Bihar ((1978) 1 SCC 37 : 1978 SCC (Cri) 23 : (1978) 1 SCR 787) and Ganga Ram v. Union of India ((1970) 1 SCC 377 : (1970) 3 SCR 481). In C.S. Rajappan Nair (ILR (1977) 1 Ker 398), the classification of a group of employees who had officiated in a particular capacity as a different class, treating them differently from others who had not the opportunity to function as such, was held to be an intelligible differentia which can stand the test of equality provided by Article 16 of the Constitution. In Triloki Nath Khosa ((1974) 1 SCC 19 : 1974 SCC (L&S) 49 : (1974) 1 SCR 771), persons appointed directly and by promotion had integrated into a common class of Assistant Engineers. The question arose whether for the purpose of promotion to the cadre of Executive Engineers, they could be classified on the basis of educational qualification. It was held by this Court that the rule providing that graduates shall be eligible for such promotion to the exclusion of diploma holders did not violate Articles 14 and 16 of the Constitution. In Ramesh Prasad Singh ((1978) 1 SCC 37 : 1978 SCC (Cri) 23 : (1978) 1 SCR 787), this Court, dealing with principle of equality under Articles 14 and 16, observed : (SCC p. 42, para 6)

> The doctrine of equality before law and equal protection of laws and equality of opportunity in the master of employment and promotion enshrined in Articles 14 and 16 of the Constitution which is intended to advance justice by avoiding discrimination is attracted only when equals are treated as unequals or where unequals are treated as equals. The guarantee of equality does not imply that the same rules should be made applicable to all persons in spite of differences in their circumstances and conditions. Although Articles 14 and 16 of the Constitution forbid hostile discrimination, they do not forbid reasonable classification and equality of opportunity in matters of promotion means equality as between members of the same class of employees and not equality between members of separate independent classes.

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Equality is for equals, that is to say those who are similarly circumstances are entitled to an equal treatment but the guarantees enshrined in Articles 14 and 16 of the Constitution cannot be carried beyond the point which is well-settled by a catena of decisions of this Court.

In Ganga Ram ((1970) 1 SCC 377 : (1970) 3 SCR 481), dealing with Articles 14 and 16 of the Constitution, this Court again held :

> Mere production of inequality is not enough to attract the constitutional inhibition because every classification is likely in some degree to produce some inequality. The classification need not be scientifically perfect or logically complete. The matter has to be considered in a practical way without whittling down the equality clause. The classification must, however, be founded on intelligible differentia which on rational grounds distinguishes persons grouped together from those left out, and it must bear a just and reasonable relation to the object sought to be achieved. (Ed. : From SCR headnote p. 481 : see SCC para 2)

12. There is no dispute with the principles of law laid down in the aforesaid cases. By now, the principles of classification are well settled and need not be repeated. The question is of application of those principles to the facts of the present case. The only basis for grouping the 300 persons in one category is that they were included in the Select List of 1966 and that they were officiating. The respondent in the instant case could not be selected in the selection of 1966 on account of an adverse entry which, as stated earlier, was subsequently expunged. His position in the seniority list was also corrected but because no selection took place after 1966, the respondent could not be included in the list for no fault of his. If there had been a selection and the list had been revised every year as is the requirement of the rules, the respondent, and like him many others, would have been included in the list. For example, some candidates who had not completed seven years could not be eligible for promotion and could not be included in the Select List of 1966 but after a lapse of time they became eligible and they might have been selected if selection had taken place. But, the door for promotion had been foreclosed for the respondent and many others like him by Rules 7-A and 7-B for no fault of theirs. In this connection reference may be made to the objection of the Public Service Commission and the letter of the Secretary of the Board of Revenue, to show that it would take about 24 years to absorb 300 persons included in List 'B'. The Secretary, Board of Revenue, vide his letter No. 14708/T.N.T.-59-A/70 dated January 30, 1973, to the Secretary, Government Revenue Department (filed as Annexure II to the counter-affidavit), recommended that the List 'B' may not be enforced. Insofar as it is pertinent for the present purpose, it reads :

> On the basis of the selection in the year 1966, the list 'B' was prepared for 300 names. During this period all the candidates of list 'B' are working. So long as all these candidates are not absorbed in the regular vacancies, the question of second selection does not arise till then. Only 56 vacancies have occurred after the selection of 1966. According to this the average vacancies in a year are at 10, with the result, it will take 24 years to exhaust the above list. Till then no selection is possible.

In the circumstances, the Secretary requested the government to take steps to recommend to the Public Service Commission to make the next selection of Tehsildars without any further delay. The objections of the Secretary, Board of Revenue, were similar to the objections raised by the Public Service Commission. These letters and objections point out unmistakably that the selection was unnecessarily postponed only to accommodate the 300 persons included in the Select List of 1966. There appears to be no rational basis for such a departure from the ordinary operation of the 1970

Rules which envisaged the preparation of a new list every year and for singling out one particular list for according preferential treatment to the persons whose names were contained therein. The classification in this case therefore cannot be said to be a reasonable classification based on intelligible differentia having a nexus to the object sought to be achieved.

13. It is, however, contended for the State that the selection could not take place for all these long years because of a stay order passed by the High Court in petitions filed by some candidates challenging the Tehsildar Rules, 1966. This has been refuted by Shri S.N. Kacker, and a finding recorded by the High Court makes out that there was no order staying the holding of selection. All that was stayed was the confirmation of the officers promoted to the posts of Tehsildars. It is therefore not correct that selection could not take place because of a stay order from the High Court.

14. As a second limb of this argument, it was contended on behalf of the State that the government was the sole judge of the administrative necessities and there being no rule to the contrary, the government could hold selection according to the need and no exception can be taken to the power of the State.

15. There is no denying the fact that the rules regulating the conditions of service are within the executive power of the State or its legislative power under the proviso to Article 309 but even so, such rules have to be reasonable, fair and not grossly unjust, if they are to survive the test of Articles 14 and 16 of the Constitution. A rule which contemplates that unless the list of 300 persons is exhausted no other person can be selected, obviously is unjust and it deprives other persons in the same situation of the opportunity of being considered for promotion.

16. It was next contended for the State that the declaration of Rules 7-A and 7-B as ultra vires the Constitution would affect not only the incumbents of one Service but of 29 Services and a fairly large number of persons would be affected in that situation, that the respondent did not implead any of those persons likely to be affected in the various Services, that in any case, at least the Naib Tehsildars or other persons who have been promoted as Tehsildars and who are likely to be affected by the declaration of Rules 7-A and 7-B as ultra vires should have been impleaded as parties and that in the absence of those parties, the writ petition was not maintainable and should have been dismissed by the High Court on that score.

17. Shri S.N. Kacker appearing for the respondent, on the other hand, has contended that no such plea was taken on behalf of the State before the High Court and that, therefore, it cannot be permitted to take up a new plea for the first time before this Court. Elaborating the point, Shri Kacker urged that if such a plea had been taken before the High Court, the respondent would have impleaded all those persons as parties and filled up the lacuna, if any, and that if the State is permitted to take such a plea for the first time before this Court, it would seriously prejudice the case of the respondent. Alternatively, it was contended that the respondent is aggrieved by the amendment of the 1970 Rules by the 1972 notification which introduced Rules 7-A and 7-B, that the respondent has challenged the vires of Rules 7-A and 7-B and only the State is a necessary party who has already been impleaded, and that at the most, those persons who are likely to be affected in case the said rules are declared ultra vires, may be proper parties but are not necessary parties. He sought to take support for his contention from B. Gopalaiah v. Government of A.P. (AIR 1969 AP 204); J.S. Sachdev v. Reserve Bank of India (ILR (1973) 11 Del 392) and General Manager, South Central Railway, Secunderabad v. A.V.R. Siddhanti ((1974) 4 SCC 335 : 1974 SCC (L&S) 290 : (1974) 3 SCR 207). In Gopalaiah case (AIR 1969 AP 204) dealing with a situation as in the present case, the Andhra Pradesh High Court held :

> This is not a case of discrimination of individual against individual. This is a case where a whole class of citizens have been discriminated against and the court cannot refuse to give relief to them on the ground that the class of persons who will be benefited as a result of the discrimination are not before the court. The person who complains of discrimination cannot be expected to search the country for all persons who are likely to be benefited by its discriminatory policy. Of course, if the discrimination is in favour of an individual against and individual different considerations might arise. But this is not such a case. In my opinion, where a scheme formulated by the government is attacked on the ground of its being discriminatory the position is precisely the same as if a statute is attacked as being discriminatory and it can never be an answer to such an attack that persons likely to be benefited by a discriminatory statute should be brought before the court before the statute is struck down.

In J.S. Sachdev case (ILR (1973) 11 Del 392), a Division Bench of the Delhi High Court endorsed the view taken in Gopalaiah case (AIR 1969 AP 204). In South Central Railway case ((1974) 4 SCC 335 : 1974 SCC (L&S) 290 : (1974) 3 SCR 207), a similar objection taken before the Supreme Court was repelled on two grounds, firstly, because this point was not canvassed in the lower courts, and secondly, because the employees who were likely to be affected as a result of the readjustment of the petitioner's seniority were at the most proper parties and not necessary parties and their non-joinder could not be fatal to the writ petition.

18. In view of the law laid down in South Central Railway case ((1974) 4 SCC 335 : 1974 SCC (L&S) 290 : (1974) 3 SCR 207), the State cannot be permitted to take up a new plea which was not taken before the High Court.

19. Shri B.P. Sharma had moved an application (C.M.P. No. 4905 of 1980) for permission to intervene in the appeal on the ground that he was vitally interested in the outcome of the instant appeal which would have a great bearing upon the claim petition pending before the Service Tribunal, Lucknow. This application was ordered to be listed at the time of the hearing of this appeal. He also moved an application (C.M.P. No. 11949 of 1980) for modification of the stay order dated April 23, 1980 in the appeal filed by the State, so as to govern other cases affected by Rules 7-A and 7-B of the 1970 Rules, as amended by the 1972 notification. Later on, he realised that such an application could not be moved on behalf of an intervener, and therefore, instead of pursuing this application, he filed Writ Petition 3806 of 1980, which has been dealt with separately. Both these application are, therefore, dismissed.

20. For the reasons given above, we find no error in the impugned judgment. We accordingly dismiss the appeal. Parties shall, however, bear their own costs.

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