

State of Maharashtra

Vs

Jagannath Achyut Karandikar

Civil Appeals Nos. 3037-338 of 1984

(K. N. Singh, K. Jagannatha Shetty JJ)

08.03.1989

JUDGMENT

K JAGANNATHA SHETTY, J. –

1. These two appeals by special leave are by the State of Maharashtra. They are directed against the judgment of the High Court of Bombay dated January 12, 1983 by which the High Court issued the following two directives to the State Government :

(1) To recast the Revised/Final seniority list dated December 20, 1982 vis-a-vis the persons shown in the category of 'Late Passing' and assign them seniority strictly in accordance with Rule 2 and the other government orders referred to in paragraph 96 of the judgment; and

(2) The seniority in the Superintendent's cadre so fixed should also be considered as seniority for further promotions.

2. The background to these directives is, in outline, this :

Respondents 1 to 8 are Assistant Secretaries/Section Officers/Superintendents in different departments of the Government of Maharashtra. The State Government prescribed departmental examinations as a condition precedent for promotion to the cadre of Superintendents. The examinations were required to be conducted every year, and the officials have to pass within the stipulated period. Those who could not pass within the time frame would lose their seniority but they would be promoted as and when they qualify themselves. The government for some reason or the other could not hold the examinations every year. Particularly in 1968, 1969 and 1970, the government did not hold the examinations. The government, however, did not pass any order extending the period prescribed for passing the examinations, nor promoted the seniors subject to their passing the examination. The juniors who qualified themselves were promoted overlooking the case of seniors and seniors were only promoted upon their passing the examination. In the cadre of Superintendents, however, the government revised the seniority list so as to reflect the ranking in the lower cadre irrespective of the date of promotion. The validity of the revision of seniority was challenged before the High Court. The High Court conceded the power to the government to relax the rules relating to passing of the examination in case of hardship, but refused to recognise the power of the government to give seniority to those who could not pass the examination within the time schedule. The High Court

was of opinion that without specific orders of the government relaxing the conditions of the rules, the persons could not be given seniority for 'Late Passing'. There are also other reasons given by the High Court which we will presently consider. But before that, it is important that we should have a chronology of the relevant rules and resolutions of the government. It is follows :

3. On August 22, 1951, the government made a resolution prescribing departmental examination for the members of the Upper Division of the Subordinate Secretariat Service, and further directing that only those persons who pass the examination should be promoted as Superintendents. The accompanying rules (the 1951 Rules) thereunder provided the procedure for passing the examinations as well as the consequences of failure to pass the examination. On August 24, 1955, the government framed rules (the 1955 Rules) under the proviso to Article 309 of the Constitution specifically providing power to dispense with, or relax, the requirements of the operation of any rule regulating the conditions of service of government servants; or of any class thereof if it causes undue hardships in any particular case. On January 15, 1962, the government issued a circular purporting to restrict the scope of the rule permitting relaxation only in respect of travelling allowance rules, leave rules, etc. The circular also clarified that the 1955 Rules could not be invoked for conferring benefit on an individual by relaxing the conditions relating to recruitment, promotion, grant of extension of service or re-employment. On December 28, 1961, the government made the revised rules in supersession of the 1951 Rules. They were brought into force with effect from January 1, 1962 (the 1962 Rules). They were made applicable to all persons recruited to the Upper Division of the Subordinate Secretariat Service on or after that date and also to those who have been in service prior to January 1, 1962 unless they had already passed the examination under the 1951 Rules. The Rules 1 to 5 are as follows :

(1) Every member of the Upper Division of the Subordinate Secretariat Service will be required to pass within nine years from the date of his entry in the Upper Division, a departmental examination for promotion to the posts of Superintendents according to the prescribed syllabus. For being eligible to appear for the examination a candidate must have passed post-Recruitment Training Examination for Junior Assistants and must have also completed not less than five years' continuous service in the Upper Division.

(2) Subject to Rule 1, a candidate will be allowed to appear for the examination in three chances which must be availed of within a period of four years. This period of four years will not be extended for any reasons irrespective of the fact whether a candidate has availed himself of three chance or not during the period. Similarly no candidate will be allowed to take during this period more than three chances. A candidate who does not pass the examination at the end of nine years' service in the Upper Division, will lose his seniority to all those candidates who pass the examination before he passes it.

(3) No persons shall be appointed to the post of Superintendent unless he has passed the Superintendents' Examination. Provided that this rule shall not apply to short term vacancies not exceeding two months.

(4) Subject to the condition of loss of seniority laid down in Rule 2, a candidate will be allowed to take the examination in any number of chances after the completion of nine years' service.

(5) The examination will be held once a year.

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On December 28, 1970, proviso to above Rule 3 has been added. The said proviso reads :

Provided that if the Superintendent's examination is not held in any year, a person who has completed 9 years' service and who has not exhausted all the permissible chances, may be promoted to the post of Superintendents, provided further that he is otherwise suitable for promotion, subject to the clear condition that he will have to pass the examination at the earliest opportunity whenever it is held.

It is further clarified that promotions to the posts of Superintendents should, in view of the above amendments, be given only after ensuring that there are no persons who have passed the Superintendents Examination earlier for being promoted to the posts of Superintendents.

4. We may incidentally refer to the subsequent rules made by the government, although it is not applicable to the present case. On June 6, 1977, the government framed the rules called "the Maharashtra Government Subordinate Rules, 1977". Rule 7 of the Rules provides that if, for any reason, the examination is not held in any particular year, that year shall be excluded in computing the period specified under the Rules. This is, indeed, the true reflection of the underlying concept of purpose of the earlier Rules.

5. Against this backdrop, we may now consider whether the government was justified in rearranging the seniority by giving benefit to persons in the category of "Late Passing".

6. We are not concerned herein about the seniority of persons in whose favour the government has made individual orders extending the period for passing the examination. We will consider such cases a little later. For the present, we may examine the rights of those "Late Passing" where the government has not made any specific order relaxing the conditions for passing the examination. Under the 1951 Rules, the candidate could appear for the examination after two years of his entering into the cadre. He has three chances and he must pass within six years of his joining service. Under the 1962 Rules the scheme provided was slightly different. Under that scheme, candidate was allowed to take the examination only after completing five years' service in the cadre. He had three chances for taking the examination and that must be availed of within four years. That means he must pass the examination within the nine years' service. Under both the Rules, the government was required to hold the examination every year, but no examination was held in 1968, 1969 and 1970. This is not in dispute. For a proper appreciation of the question raised, we must first try to understand the hardship resulted by not holding the examination in 1968, 1969 and 1970. It is as follows : The candidates recruited in 1960 have lost one chance in 1968. Those recruited in 1961 are deprived of two chances in 1968 and 1969. The candidates recruited in 1962 are denied of three chances in 1968, 1969 and 1970 and those of the year 1963 have lost two chances in 1969 and 1970. The last batch to lose one chance in 1970 is of the year 1964.

7. The aforesaid Rules expressly provided power to the government to grant more chances for passing the examination in any individual case or in class of cases. Under the 1955 Rules, the government preserved power to dispense with, or relax the requirements of any rule regulating "the conditions of service of government servants; or of any class thereof". In the exercise of this power,

the government could dispense with or relax the operation of any rule, if it causes undue hardships in any particular case. It is needless to state that this power includes the power to relax the conditions prescribed for promotion since promotion is a condition of service. There is no restriction as to the exercise of the power or discretion. The High Court, however, has observed that the scope of this power has been constrained by the circular dated January 15, 1962. The circular states that the 1955 Rules permitting relaxation cannot be utilised to relax the rules which regulate conditions of service. It further states that the scope of the Rules should be limited only to matters relating to travelling allowance, leave, etc. But this appears to be an exercise in vain. The circular is an executive instruction. The executive instruction may supplement but not supplant the statutory rules. The High Court was in error in ignoring this well accepted principle.

8. When we turn to the 1962 Rules with the amendments made in 1970, it becomes more clear about the power of the government to relax the conditions for passing the examination. The proviso dated December 28, 1970 to Rule 3 specifically provides that if the examination is not held in any year, a person could be promoted to the cadre of Superintendents if he has completed nine years' service. The only condition is that he should not have exhausted all the permissible chances. The promotion made should be subject to the condition that he will have to pass the examination at the earliest opportunity whenever it is held. The benefit of this proviso was evidently not extended to any of the persons falling in the category of "Late Passing".

9. Counsel for the contesting respondents however, urged that the proviso does not entitle the candidate to get his legitimate seniority if he does not pass the examination at the end of nine years' service. He depended upon Rule 2 of the 1962 Rules which states that the candidate who does not pass the examination within nine years' service will lose his seniority to all those candidates who pass the examination earlier. He also argued that the proviso is only to Rule 3 and not to Rule 2 and the government has no power to restore the seniority of a person who has lost it by the operation of Rule 2.

10. This is a question of construction of the rules which form part of the scheme prescribing a condition for promotion. We do not have to reflect upon the rules of interpretation since they are well settled. They are now like the habits of driving which have become ingrained. They come to our assistance by instinct. We are to use the different rules meticulously to give effect to the scheme as we use the clutch, brake and accelerator for smooth driving. These rules are to be harmoniously construed. We should not concentrate too much on one rule and pay too little attention on the other. That would lead us astray and result in hardship. We must avoid such construction. Rule 2 of the 1962 Rules no doubt states that a candidate who does not pass the examination at the end of nine years' service will lose his seniority. But this rule cannot be read in isolation as the High Court did. It has to be read along with the other rules since it is a part of the scheme provided for promotion. Rule 5 requires the government to hold the examination every year. This rule is the basis of the entire scheme and the effect of other rules depends upon holding the examination. If examination is not held in any year, Rule 2 cannot operate to the prejudice of a person who has not exhausted all his chances. The person who has not exhausted the available chances to appear in the examination cannot be denied of his seniority. It would be unjust, unreasonable and arbitrary to penalise a person for the default of the government to hold the examination every year. That does not also appear to be the intent or purpose of the 1962 Rules.

11. If the examination is not held in any year, the person who has not exhausted all the permissible chances has a right to have his case considered for promotion even if he has completed nine years' service. The government instead of promotion such persons in their turn made them to wait till they

passed the examination. They are the persons falling into the category of "Late Passing". To remove the hardship caused to them the government wisely restored their legitimate seniority in the promotion cadre. There is, in our opinion, nothing improper or illegal in this action and indeed, it is in harmony with the object of the 1962 Rules.

12. This takes us to the question whether the government was justified in individual cases to relax the period for passing the examination. It is said that the number of persons falling into this category are not more than five. In the rejoinder filed on behalf of the government, it is stated that the government made some orders extending the period for individuals to pass the examination on administrative grounds or on some genuine hardships. It is also stated that such orders were made upon recommendations by the respective departments and those persons passed the examination within the period extended. There is no reason to doubt the correctness of these statements made in the rejoinder. The power to relax the conditions of the rules to avoid undue hardship in any case or class of cases cannot now be gainsaid. It would be, therefore, futile for the respondents to make any grievance.

13. In the result and for the reasons stated, we allow these appeals and in reversal of the judgment of the High Court, we dismiss the writ petitions filed by the contesting respondents. In the circumstances of the case, however, we make no order as to costs.

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