

N. Abdul Basheer and Others

Vs

K. K. Karunakaran and Others

Civil Appeal Nos. 1553 to 1556 of 1981 etc.

(CJI R. S. Pathak, S. Natarajan, Sabyasachi Mukharji JJ)

05.05.1989

JUDGEMENT

PATHAK, C.J. –

1. These appeals by graduate Excise Inspectors are directed against the judgment and order dated March 20, 1981 of the High Court of Kerala holding that the amendment to Special Rule 2 of the Kerala Excise and Prohibition Subordinate Service Rules us ultra vires.
2. The writ petitions were filed by non-graduate Excise Inspectors alleging that the amendment to Special Rule 2 of the aforesaid Rules violates Articles 14 and 16 of the Constitution inasmuch as an invidious discrimination has been made between graduates and non-graduates by prescribing a ratio between them in the matter of promotion from the post of Excise Preventive Officer to that of Second Grade Excise Inspectors. As all the cases have proceeded on a common factual basis, we shall take up the appeal arising out of O.P. 3760 of 1978 for the purpose of this judgment.
3. The petitioner in O.P. 3760 of 1978 joined the post of Excise Guard on April 2, 1960. He was promoted on January 12, 1966 as Excise Preventive Officer. In the list of Preventive Officers in the Excise Department as on August 1, 1970 he was ranked No. 131 while the third respondent was ranked at No. 390. The third respondent was promoted earlier although he was junior to the petitioner. This was on the ground that he was a graduate and the petitioner was a non-graduate. The petitioner contended that as graduates and non-graduates were both regarded as eligible for promotion to the post of Second Grade Excise Inspectors no differentiation should have been made between them when prescribing a rule of quota for promotion. The writ petition was heard by a learned Single Judge, who held that the amendment to Special Rule 2 was violative of Articles 14 and 16 of the Constitution. It may be noted that the original Special Rule 2 of the Special Rules for the Kerala Excise and Prohibition Subordinate Service was amended by G.O.P. No. 79/78/TD dated June 23, 1978 whereby the ratio 1 : 3 between graduate and non-graduates was introduced into the Special Rules in the matter of promotion from the category of Excise Preventive Officers to that of Second Grade Excise Inspectors. The amendment was deemed to have come into force retrospectively from September 9, 1974 when the Special Rules were brought in. The learned Single Judge directed the respondents in the case to cause the Departmental Promotion Committee to be convened within two months to prepare a select list in order that promotions on a regular basis could be made.
4. Against the judgment of the learned Single Judge in the different cases, appeals were filed before a Division Bench of the High Court. Two contentions were raised on behalf of the appellants, who in some of the appeals were the State of Kerala and the Deputy Commissioner of Excise, Board of

Revenue, Trivandrum and in other cases were a number of private respondents in the original petitions and who held the post of Excise Inspector.

5. Two contentions were raised by the appellants before the Division Bench of the High Court. It was contended that the preference shown to graduates by prescribing under the amended Special Rule 2 the ratio 1 : 3 represent the recognition of graduation as a standard of merit and, it was urged, officers with more merit in the post of Excise Inspectors would promote administrative efficiency. It was also contended that the amendment to Special Rule 2 is the result of an historical background which justifies preferential treatment. It was pointed out that as graduates and non-graduates had all along been treated differently in the matter of promotion to the post of Excise Inspector, the classification brought about by amending Special Rule 2 could not be regarded as unreasonable.

6. It will be appropriate to set forth the historical background out of which the present controversy arises. From the year 1935, in the erstwhile State of Travancore preference was given to graduates in the matter of promotion. When the State of Kerala was constituted by the merger of the Travancore and Cochin areas with effect from November 1, 1956 a rule was promulgated in the Excise Department of Kerala prescribing a ratio in the matter of promotion to the post of Excise Inspectors by an order dated August 23, 1957. The rule regulated appointments to posts of Guards, Preventive Officers and Second Grade Inspectors in the Excise Department. Clause (d) related to Second Grade Excise Inspectors and it provided :

"(d) Second Grade Excise Inspectors : A margin of twenty-five per cent of the vacancies in the cadre of Second Grade Excise Inspectors will be left for being filled up by direct recruitment by the Public Service Commission of graduates The remaining seventy-five per cent will be filled up by promoting L.D. Clerks and Preventive Officers on a 50 : 50 basis observing the ratio of 3 : 1 between graduates and non-graduates in either case."

7. Clause (d) applied to personnel of the Travancore-Cochin area. The officers allotted from Madras were governed by the Madras Rules pending the issue of common rules applicable to both. By reason of this Order 25 per cent of the posts of Second Grade Excise Inspectors were to be filled up by direct recruitment, 37 1/2 per cent by promoting Lower Division Clerks and 37 1/2 per cent by promoting Preventive Officers. Within the promotion quota of Preventive Officers promotion was to be effected between graduates and non-graduates in the ratio of 3 : 1. This rule applied to Travancore and Cochin personnel appointed prior to November 1, 1956. After taking note of the situation in different parts of the State, the Government Order dated November 19, 1957 prescribed the ratio of 1 : 1 between graduates and non-graduates on an interim basis. It was mentioned there that the ultimate aim was to do away with the distinction between graduates and non-graduates in offices other than the Secretariat, the Public Service Commission and the High Court. Subsequently, however, it was clarified on July 8, 1966 that the order was intended to apply to ministerial posts only and not to executive posts such as those of Preventive Officers.

8. The question of the applicability of the graduate and non-graduate ratio was examined by the High Court in writ petitions filed in 1972, and the High Court directed the government to look into the matter and finalise the provisional promotion of Excise Inspectors accordingly. It was thereafter that Special Rules for the Kerala Excise and Prohibition Subordinate Service dated September 9, 1974 were published. They provide for appointment to the posts of Excise Inspectors by direct recruitment, promotion from the category of Excise Preventive Officers and recruitment by transfer

from among Upper Division Clerks employed in the Excise Department. The Rules did not provide for any graduate non-graduate ratio in the matter of promotion, apparently because the ratio had already been provided earlier by the Government Order dated August 23, 1957. But meanwhile the High Court held that the Government Order dated August 23, 1957 could not be applied to those appointed after the formation of the State of Kerala. To fill up the vacuum in respect of appointments after November 1, 1956 an order dated October 4, 1974 was made applicable retrospectively to all appointments on or after November 1, 1956 till the date of issue of the Special Rules for the Excise Subordinate Service. It adopted the ratio of 3 : 1 between graduates and non-graduates for promotion to the post of Second Grade Excise Inspectors for the entire State of Kerala, and it specifically provided that this graduate non-graduate ratio 3 : 1 would apply to the case of persons who had entered the Excise Department on or after November 1, 1956, and that it would operate until the coming into force of the Kerala Excise and Prohibition Subordinate Service Rules. This was, however, challenged in the High Court and the High Court held that it was not open to the government to apply the ratio of 3 : 1 by an executive order passed in 1974 and made retrospective from November 1, 1956 inasmuch as an executive order could not be given retrospective effect. There was, therefore, no provision in law prescribing a graduate non-graduate ratio governing appointments made on and from November 1, 1956. As has been stated Special Rules for the Excise Subordinate Service dated September 9, 1974 had been published meanwhile. Special Rule 2 was amended with effect from September 9, 1974, the date of commencement of the Special Rules, providing for a ratio of 1 : 3 between graduates and non-graduates as from September 9, 1974. In consequence, while up to September 9, 1974 there was no valid rule in force applying a graduate non-graduate ratio for promotion, there was a rule introduced in 1978 by amendment to the Special Rules prescribing a ratio from September 9, 1974 onwards. The gap between November 1, 1956 and September 9, 1974 was sought to be filled thereafter by an order dated March 6, 1980 which provided that the appointment of Excise Inspectors during the period from November 1, 1956 and ending September 8, 1974 from among clerks and Preventive Officers who have entered service on or after November 1, 1956 would be made in the ratio of 1 : 1 between Clerks and Preventive Officers, simultaneously observing the ratio of 3 : 1 between graduates and non-graduates. The rule was deemed to have come into force from November 1, 1956.

9. It will thus be evident that in the case of Preventive Officers appointed on or after November 1, 1956, the graduate non-graduate ratio of 3 : 1 was observed between November 1, 1956 and September 8, 1974, and it became 1 : 3 from September 9, 1974 onwards.

10. The plea of the non-graduate Preventive Officers that there should be no preference in favour of the graduate officers was accepted, as we have seen, by the learned Single Judge and Upheld in appeal by the Division Bench of the High Court.

11. In these appeals by graduate Excise Inspectors, it is contended that there was good and substantial reason for maintaining the ratio between graduate and non-graduate officers, and the history of the evolution of the service supported the maintenance of such ratio, and that the High Court proceeded erroneously in assuming that the observance of the ratio between graduates and non-graduates, produced an invidious discrimination violative of Articles 14 and 16 of the Constitution. We were referred to *Mohammad Shujat Ali v. Union of India* ((1975) 3 SCC 76 : 1974 SCC (L&S) 454 : (1975) 1 SCR 449) where this Court upheld the differentiation between graduate supervisors and non-graduate supervisors for the purpose of promotion as Assistant Engineers. But it is clear that this was on the ground that the two categories of supervisors had been kept distinct and apart under the Cadre Rules from the beginning, with different pay scales and different treatment for the purpose of promotion. Reference was also made to *State of Jammu & Kashmir v.*

Triloki Nath Khosa ((1974) 1 SCC 19 : 1974 SCC (L&S) 49 : (1974) 1 SCR 771) but it was held there that having regard to the object of achieving administrative efficiency in the Engineering Service it was a just qualification to maintain a distinction between Assistant Engineers who were degree holders and those who were merely diploma holders. In *S. L. Sachdev v. Union of India* ((1980) 4 SCC 562 : 1981 SCC (L&S) 24 : (1981) 1 SCR 971) again the discrimination between UDCs drawn from Audit Offices and other UDCs in the matter of the eligibility qualification for promotion was justified on the basis that the one enjoyed greater experience and that the distinction based on length of service was directly related to the object of the classification. In *Col. A. S. Iyer v. V. Balasubramanyam* ((1980) 1 SCC 634 : 1980 SCC (L&S) 145), upon which reliance has been placed by the appellants, the recruits were from two different sources which had not completely fused into one integrated service but were instead allowed to maintain their separate identity, and regard was had to their basic functional character, operational capabilities and 'futuristic' uses to support the differential treatment between military engineers and civilian engineers. *H. H. Shri Swamiji of Shri Amar Mitt v. Commissioner, Hindu Religious & Charitable Endowments Department* ((1979) 4 SCC 642 : 1980 SCC (Tax) 16 : (1980) 1 SCR 368) is a case where we find it difficult to see any argument in favour of the appellants, for the passage therein to which our attention has been drawn specifically alludes to the circumstance that the passing of time results in altering a fact situation which has the consequence of wearing out the basis on which the differentiation is founded. So also in *Motor General Traders v. State of Andhra Pradesh* ((1984) 1 SCC 222) it was observed by this Court that an exemption provision initially valid could become discriminatory where with the passage of time the nexus with the object did not survive any longer.

12. We have also heard submissions made by learned counsel for the appellants in Civil Appeals Nos. 1554 and 1556 of 1981, and they have elaborated on the points raised by learned counsel in Civil Appeal No. 1553 of 1981 with some differences of nuance and emphasis. In essence, the contention remains the same.

13. It seems to us that history of the evolution of the Kerala Excise and Prohibition Subordinate Service has shown no uniformity either in approach or in object. The history has varied with the circumstances prevailing before and after the reorganisation of the State on November 1, 1956. Originally when more emphasis was laid on the induction of graduates the ratio of graduate to non-graduate officers was maintained at 3 : 1. But from September 9, 1974 the ratio was changed inversely to 1 : 3. More non-graduates were now inducted into the Service. The trend shows, if anything, that it ran in favour of absorbing more non-graduates. The conditions pertaining to the service, and respecting which the constitution of the service varied from time to time, showed fluctuations. A consistent or coherent policy in favour of graduates was absent. This is not a case whether the cadre of officers was kept in two separate divisions. It was a single cadre, and they were all equal members of it. There is no evidence that graduate Preventive Officers enjoyed higher pay than non-graduate Preventive Officers. The High Court has noted that the nature of the duties of Preventive Officers whether graduate or non-graduate was identical, and both were put to field work. Non-graduate Preventive Officers were regarded as competent as graduate Preventive Officers. There is no evidence of any special responsibility being vested in graduate Preventive Officers. Once they were promoted as Excise Inspectors there was no distinction between graduate and non-graduate Excise Inspectors.

14. In our opinion the learned Single Judge as well as the Division Bench are right in holding that the prescription of a ratio dividing the quota of promotion between graduate Preventive Officers and non-graduate Preventive Officers is invalid on the ground that it violates Articles 14 and 16 of the Constitution.

15. The other contention raised before the High Court, namely that the ratio 1 : 3 between graduates and non-graduates is supportable on the ground that the recognition of graduation is recognition of merit, and that more merit in the post of Excise Inspectors would be conducive to better administrative efficiency, is shortly disposed of. Ordinarily, it is for the government to decide upon the considerations which, in its judgment, should underlie a policy to be formulated by it. But if the considerations are such as prove to be of no relevance to the object of the measure framed by the government it is always open to the court to strike down the differentiation as being violative of Articles 14 and 16 of the Constitution. In the present case, we have already commented on the circumstance that the conditions of employment and the incidents of service recognise no distinction between graduate and non-graduate officers and that for all material purposes they are effectively treated as equivalent. Accordingly, this contention must also be rejected.

16. In the result, the appeals fail and are dismissed but there is no order as to costs.

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