

KARNATAKA HIGH COURT

A. Krishnamurthy C.K

Vs.

Director General

W.Ps. 2091, 4026 and 4027 of 1976

(Rama Jois, J.)

08.03.1978

ORDER

Rama Jois, J.

1. The petitioners in the above three writ petitions are Upper Division Clerks serving in the Savings Bank Control Organization and Internal Check Organization (hereinafter referred to as 'SBCO-ICO') of the Posts and Telegraphs Department, which is a Central Govt Department. Their grievance is that the legitimate promotion due to them to the cadre of Selection Grade Upper Division Clerks (now Head Clerks) has been denied. In these three cases common questions of law and fact arise for consideration. Therefore they are being disposed of by this common order.

2. Before 1962 the auditing and accounting work relating to the Savings Bank was done by the Audit Department under the control of the Accountant General of the Posts and Telegraphs. For the purpose of administrative convenience, it was decided to set up a new organization called "SBCO-ICO" and accordingly the said set up came into existence with effect from 1-4-1962. The personnel for this new set up were drawn from the Audit Office and also from other units of the Posts and Telegraphs Department. The petitioners, who were working in the Audit Office were also among the clerks who were taken on the establishment of SBCO-ICO. After the above set up came into existence an order dated 29-5-1965 was issued by the Director General of Posts and Telegraphs laying down the manner of promotion to the next higher cadre of Selection Grade from the category of Upper Division Clerks working in the SBCO-ICO Exhibit-B in WP.2091/76 The relevant portion of the order reads as follows :

".....It, has, therefore, been decided in consultation with the AG P and T that the number of selection grade posts for the UDCs of the audit office should be 10% of the total No. of audit office UDCS working in that organization.

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For the purpose of promotion to the Selection grade, the UDCs of the audit office will be borne on a separate gradation list and their inter-seniority will be the same as in their parent audit offices."

In the year 1969, the President of India in exercise of his powers conferred by the proviso to Art.309 of the Constitution of India framed rules called the Indian Posts and Telegraphs (Clerks in Savings Bank Control and Internal Check Organisation) Recruitment Rules, 1969 (hereinafter referred to as 'the Recruitment Rules'). In Schedule II to the Recruitment Rules, the method of promotion to the cadre of Selection Grade Upper Division Clerks in the SBCO-TCO were prescribed. In the Recruitment Rules, for Upper Division Clerks, ten years service in that grade in case of Audit Office staff or five years service in that grade in case of other Upper Division Clerks was prescribed as the qualification for promotion. The clear effect of the Recruitment Rules is that for the purpose of promotion all the Upper Division Clerks serving on the establishment of SBCO-ICO were merged together. The only difference made in the case of persons who earlier belonged to the Audit, Office staff and other Upper Division Clerks was in respect of the period of qualifying service in the cadre of Upper Division Clerks for promotions; the former were required to put in ten years of service, and the latter were required to put in five years of service before becoming eligible for promotion. The petitioner in WP.2091/76 was promoted as Upper Division Clerk on 19-7-1962 and the petitioners in WPs.4026 and 4027 of 1976 were promoted earlier with effect from 1-4-1962 and are seniors to the petitioner in WP. 2091 of 1976. After the Recruitment Rules came into force a gradation list of officials on the establishment of SBCO - ICO as on 1-7-1964 was prepared, a copy of which is produced as Exhibit'J' in WP.2091/76. In the said seniority list, the petitioner in WP.4026/76 is at S1.No.1. The petitioner in WP.4027/76 is at S1.No.2 and the petitioner in WP.2091/76 is at S1. No. 5.

3. At this stage, it is relevant to state that the Govt passed an order dated 10-4-1975 on the recommendation of the Third Pay Commission, a copy of which is produced as Exhibit 'G' in WP.2091/76. According to the said Govt Order posts of Head Clerks in the scale of Rs. 425-15-500- EB-15-560-20-700 was created in place of the posts of Selection Grade Clerks. The ratio of the posts of Head Clerks was fixed to the extent of 20% of the posts of Upper Division Clerks both temporary and permanent. After the posts of Head Clerks were created by the aforesaid order, by an order dated 5-5-1975 (Exhibit-H in WP.2091/76), the petitioner in the said writ petition was promoted to the post of Head Clerk In the same order his juniors, namely, D.N.Prabhu, S.K.Kamath, K.Bhaskara and G.R. Kulkarni, were also promoted. They are at S1. Nos. 8, 9, 25 and 11, respectively, in the gradation list of Upper Division Clerks as on 1-4-1974. Thereafter by order dated 16-7-1975 the promotion given to the petitioner in WP 2091/76 was cancelled and one H.S. Naiasimhaiah, who is at S1. No. 12 in the aforesaid gradation list and who is also junior to the petitioner in WP.2091/76, was promoted. The said cancellation of promotion was on the basis of certain clarification issued by the Director General of Posts and

Telegraphs as per letter dated 16-5-1975 (Exhibit-L in WP.2091/76). In the said letter, inter alia, it was clarified that under the new scheme, the Upper Division Clerks who were formerly working in the Audit Office are entitled to get the post of Head Clerks only to the extent of 20% instead of 10% as it was, and the remaining posts of Head Clerks will go to the Upper Division Clerks of the non-Audit Office staff working in the SBCO-ICO.

4. Aggrieved by the cancellation of promotion, representations were made to the Department by the petitioner in WP.2091/76 and an endorsement dated 29-11-1975 was issued to the petitioner informing him that in the letter dated 11-11-1975 of the Director General of Posts and Telegraphs, New Delhi, intimation has been given to the effect that his representation dated 13-8-1975 has been considered carefully and the same has been rejected. In the circumstances, aggrieved by the cancellation of promotion, the petitioner has presented this writ petition.

5. Sri K.Subba Rao, learned Counsel appearing for the petitioner in WP.2091/76, urged the following contention :

Whatever may be the position before the promulgation of the Recruitment Rules in the year 1969, after the said Recruitment Rules there cannot be any separate quota for the Upper Division Clerks who were formerly working in the Audit Office and other Upper Division Clerks who were working in the other offices in the matter of promotion to the cadre of Head Clerks on the establishment of SBCO-ICO and as the promotion given to the petitioner has been cancelled on the basis of executive instructions which are contrary to Rules. the cancellation of promotion is liable to be quashed.

6. Before considering the aforesaid contention, it is, however, necessary to refer to the challenge made by the petitioner to the difference in the qualification prescribed in the Recruitment Rules, according to which. ten years of service in the cadre of Upper Division Clerks for the Upper Division Clerks who came from Audit Office and five years of service for other Upper Division Clerks, is prescribed as the qualification for promotion to the Selection Grade Clerks, now Head Clerks. In the present case, as all the petitioners have put in more than ten years of service even before the petitioner in WP 2091/76 was promoted and also for the reason that the validity of the Recruitment Rules framed by the President cannot be gone into by this Court, it was submitted by the learned Counsel for the petitioners that they are not pressing the said contention.

7. Coming the contention urged for the petitioner in WP.2091/76, it is seen that SBCO-ICO came to be set up with effect from 1-4-1962. It is not disputed that the personnel on the establishment of SBCO-ICO consists of some of the officials who were formerly working in the Audit Office and others who were working in the other units of Posts and Telegraphs Department. It is also not in dispute that the cadre strength of Selection Grade Upper Division Clerks which were the promotional posts for the Upper Division Clerks was fixed at 10% of the total strength of the cadre of Upper Division Clerks. It is also not disputed that the Upper Division Clerks, who were

formerly working in the Audit Office were treated as belonging to a separate unit for purposes of promotion and only 10% of the posts in the cadre of Selection Grade Upper Division Clerks calculated on the basis of the number of Upper Division Clerks who were formerly working in the Audit Office alone was made available for their promotion and the rest of the promotional posts in the cadre of Selection Grade Upper Division Clerks were reserved for promotion to the Upper Division Clerks coming from other units of the Posts and Telegraphs Department. It is also not in dispute that in the year 1969 the Recruitment Rules were promulgated by the President in exercise of his powers under the proviso to Article 309 of the Constitution of India. The question for consideration is whether after the promulgation of the said Rules also the earlier instructions issued by the executive orders fixing separate quota for promotion to the Selection Grade Upper Division Clerks (new Head Clerks) can continue to be operated.

8. Sri U.L. Narayana Rao, learned Senior Standing Counsel for the Central Govt, appearing for the department, contended that the Recruitment Rules' have not brought about any change in the quota fixed in the order dated 29-5-1965 (Ext. B) read with order dated 25-4-1975 (Ext. G) as clarified in the letter dated 16-5-1975 (Ext.L). I am unable to accept the submission made on behalf of the Department. The Recruitment Rules promulgated in the year 1969 by the President under the proviso to Art.309 of the Constitution which has the force of law clearly brought about the merger of all the Upper Division Clerks into one category for purposes of promotion to the cadre of Selection Grade Upper Division Clerks (now Head Clerks), the only difference being that the Upper Division Clerks, who were working formerly in the Audit Office become eligible for promotion to the next higher grade after putting in a service of 10 years in the cadre of Upper Division Clerks and the other Upper Division Clerks become eligible for promotion after they put in 5 years of Service. Therefore, in view of the Recruitment Rules there can be only one common seniority list of all the Upper Division Clerks irrespective of the source from which they came to SBCO-ICO. In fact common seniority lists have been prepared. One such seniority list prepared as on 1-7-1974 is produced as Exhibit 'J' in WP. 2091/76. I am also informed that similar seniority list has also been prepared as on 1-7-1977 and a copy of this list was also produced at the time of hearing. In the said list, the petitioner in WP. 4026/76 is at Sl. No. 1, the petitioner in WP. 402/7176 is at Sl. No. 2 and the petitioner in WP.2091/76 at Sl. No. 5 and the ranking of the juniors promoted in the order dated 5-5-1975 (Exhibit-H in WP.2091/76) are as follows:

Sl. No.	Name	Ranking assigned
1.	D.N. Prabhu	7
2.	S.A. Kamath	8
3.	G.R. Kulkarni	10
4.	K. Bhaskar	34

The preparation of the seniority lists as aforesaid is consistent with the Recruitment Rules promulgated by President. But notwithstanding; the promulgation of the Recruitment Rules in 1969 and notwithstanding the preparation of a common seniority list, on the basis of the earlier instructions and subsequent clarification issued by the Director General of Posts and Telegraphs, the Upper Division Clerks of the SBCO-ICO who were formerly working in the Audit Office are treated as separate unit and only 20% of the posts in the cadre of Head Clerks calculated on the basis of the number of such Upper Division Clerks alone are made available to them for promotion. This action taken on the basis of administrative instructions is not only in contravention of the statutory rules framed under Art.309 of the Constitution, but also violates Arts.14 and 16(l) of the Constitution. (See *State Of Mysore v. Krishna Murthy*¹,

9. The learned Counsel for the Department relied on the decision of the Andhra Pradesh High Court in *V. Subramanyam and others v. The Director General of Posts and*

¹ AIR 1973 SC 1146

*Telegraphs, New Delhi*², and also the decision of the Madras High Court in *V. S. Rajagopalan v. Post-master General*³, In both the decisions, the claims put forward by the petitioners therein who were similarly placed as the petitioners in these writ petitions were rejected holding that there was no discrimination in fixing the separate quota for purposes of promotion of the Upper Division Clerks who were earlier working in the Audit Office. He was also fair enough to refer to a decision of the Kerala High Court in *P.H. Balakrishnan v. The Comptroller and Auditor General of India*,⁴ Oin which the aforesaid classification for the purpose of promotion to the cadre of Head Clerks on the establishment SECO-ICO was held to be discriminatory. In the judgments of the Andhra Pradesh and Madras High Courts, there is no reference to the merger brought about in the Recruitment Rules, 1969. The classification for purposes of promotion was upheld without noticing that such classification no longer exists on or after the promulgation of the Recruitment Rules. Therefore, I am unable to follow the judgment of the Andhra Pradesh and Madras High Courts referred to above. In the judgment of the Kerala High Court also there is no reference to the Recruitment Rules. Even so, the said High Court has come to the conclusion that there was absolutely no justification for making classification for promotion, relying on the decisions of the Supreme Court in the following cases: (*R.S. Deodhar v. State of Maharashtra*⁵), (*Joginder Nath v. Union of India*⁶), (*Roshanlal Tandon v. Union of India*⁷), and (*Mervyn Continho v. Collector of Customs*⁸),

I am in entire agreement with the view expressed by the Kerala High Court. Further as stated above, in my opinion, it is not even necessary to find out whether the separate classification made for purposes of promotion in respect of the Upper Divn Clerks working on the establishment of SBCO-ICO on the basis that some of there were working earlier in the Audit Office and others who were working in the other offices of the Posts and Telegraphs Department is discriminatory in view of the merger brought about by the Recruitment Rules, 1969. Therefore, there could be no classification by way of prescribing separate quota for promotion, when all the Upper Division Clerks have been merged into one category by the Recruitment Rules, 1969.

10. In WP.2091/76 all the persons who according to the petitioners are juniors in the cadre of Upper Division Clerks have been impleaded as respondents 4 to 16. All of them have remained ex parte and have not contested the claim of the petitioner. It follows that if they were not in a position to contest the seniority of the petitioner in WPs.2091/76, they also cannot claim seniority as against the petitioners in WPs. 4026 and 4027 of 1976 as they are admittedly seniors to the petitioner in WP. 2091 of 1976.

11. Before concluding it is necessary to refer to the objection raised on the ground of

² W.P. 3935/75 D/d. 18.11.76, A.P

⁴ P. 1220/74 D/d. 12.10.75 (Ker)

³ W.P. 3796/75 D/d. 24.11.76 Mad

⁵ AIR 1974 SC 254

⁶ AIR 1975 SC 511

⁷ AIR 1967 SC 1889

⁸ AIR 1967 SC 52

delay as against the petitioners in WPs.4026 and 4027 of 1976. The petitioners therein have alleged that their juniors have been promoted on various dates commencing from the year 1968. The writ petitions have been presented on 3-5-1976. In my opinion as the right for consideration for promotion is a fundamental right guaranteed under Art.16(1) of the Constitution, the wrong caused to them is a continuing wrong and therefore the writ petitions cannot be dismissed on the ground of delay and the delay can be taken into account only to the extent of rejecting the claim for retrospective promotion from such earlier dates. Further it is not in dispute that the petitioners in these writ petitions are seniors to the petitioner in WP.2091/76 who was promoted on 5-5-1975 and whose promotion was cancelled by the order dated 16-7-1975. Therefore the petitioners in WPs.4026 and 4027 of 1976 can claim to be promoted with effect from the date on which the petitioner. in WP. 2091 /76 was promoted.

12. For the reasons aforesaid, the Rule is made absolute in all the three writ petitions and the following order is passed:

(i) In WP.2091/76 the impugned Order dated 16-7-1975 (Exhibit-K) under which the promotion given to the petitioner as per order dated 5-5-1975 (Exhibit-H) was cancelled is hereby quashed and consequently a direction shall issue to respondents 1 to 3 to give effect to the promotion given to the petitioner as per order dated 5-5-1975 (Exhibit-H) with all consequential benefits.

(ii) In WPs.4026 and 4027 of 1976, a writ in the nature of mandamus shall issue directing

respondents 1 and 2 to consider the case of the petitioners for promotion to the cadre of Head Clerk with effect from 5-5-1975 on which date their juniors were promoted, and if on such consideration they are found fit for promotion, their promotion shall be made effective from the said date and they will be entitled to all consequential benefits.

(iii) The seniority of the petitioners in the cadre of Head Clerks shall be fixed above such of their juniors in the cadre of Upper Division Clerks who have been promoted after the promulgation of 1969 Recruitment Rules and after the date on which the petitioners completed ten years of service in the cadre of Upper Division Clerks notwithstanding the promotion of such persons earlier to the petitioners.

(iv) The petitioners will be entitled to the costs of the petitions from respondent-1 in these writ petitions. Advocate's fee Rs. 100/- in each of the petitions.