

UNION OF INDIA AND ORS.

v.

TUSHAR RANJAN MOHANTY

JULY 14, 1994

[KULDIP SINGH AND S. MOHAN, JJ.]

Service Law—Indian Statistical Service Rules, 1961—Rules 8(1)(b)(i) & Rule 13 as amended by ISS (Amendment) Rules, 1989—Retrospective amendment of Rule 13—Validity—Promotion to Grade III—Vested right of general category candidates to be considered for promotion—Whether such a right can be rendered nugatory by retrospective legislation—Held, No—Retrospective operation of amended rule 13 not sustainable.

Constitution of India, 1950—Articles 14 and 16.

Respondents 2 to 9, members of the Scheduled Castes were promoted from Grade IV to Grade III in the Indian Statistical Service, against the vacancies reserved for the Schedule Castes & Schedule Tribes, Respondent 1, a general category candidate being senior to respondents 2 to 9 in Grade IV, submitted a representation to consider his case for promotion under the proviso to Rule 8(1)(b)(i) of the Indian Statistical Service Rules as his juniors had been promoted without declaring him unfit. The representation was rejected on the ground that respondents 2 to 9 had been promoted on the basis of reservation policy. Respondent 1 challenged the promotion of respondents 2 to 9 before the Central Administrative Tribunal on the ground that the reservation, in respect of appointments to the service by promotion, was not permitted under the Rules. The Tribunal allowed the application and held that promotion of respondents 2 to 9 in supersession of the claim of respondent 1 was against the rules. This appeal, by the Union of India, is against the judgment of the Tribunal.

The rules were amended with effect from November 27, 1972 by Notification dated February 20, 1989. It was contended by the Union of India that in view of the amendment of the rules with retrospective effect, the judgment of the Tribunal was liable to be set aside and the promotions of respondents 2 to 9 to Grade III of the service were to be upheld. Members of the general category have, however, challenged the validity of the retrospective amendment of the rules. It is urged that the retrospective

A operation of amended rules 13 takes away the vested rights of the general category candidates senior to respondents 2 to 9 and therefore, the retrospective operation of amended rule 13 is arbitrary and, as such, violative of Articles 14 & 16 of the Constitution of India.

B There can be no dispute that when respondents 2 to 9 were promoted to Grade III, other general category candidates senior to them had a vested right to be considered for promotion. Therefore, the question for consideration was whether such a right can be rendered nugatory by retrospective operation.

C Dismissing the appeal, this Court

D HELD : 1.1. The legislatures and the competent authority under Article 309 of the Constitution of India have the power to make laws with retrospective effect. This power, however, cannot be used to justify the arbitrary, illegal or unconstitutional acts of the executive. When a person is deprived of an accrued-right vested in him under a statute or under the Constitution and he successfully challenges the same in the Court of law, the legislature cannot render the said right and the relief obtained nugatory by enacting retrospective legislation. [662-C-D]

E 1.2. The retrospective operation of the amended rule 13 cannot be sustained. This Court is satisfied that the retrospective amendment of rule 13 of the rules takes away the vested rights of other general candidates senior to respondents 2 to 9. Therefore, it is declared that amended rule 13 to the extent it has been made operative retrospectively to be unreasonable, arbitrary and, as such violative Articles 14 & 16 of the Constitution of India. [655-H, 656-A]

F *State of Gujarat & Anr. v. Raman Lal Keshav Lal Soni & Ors.*, [1983] 2 SCC 33; *Ex. Capt. K.C. Arora & Anr. v. State of Haryana & Ors.*, [1984] 3 SCR 623; *T. R. Kapoor & Ors. v. State of Haryana & Ors.*, [1987] 1 SCR 584 and *P.D. Aggarwal & Ors. v. State of U.P. & Ors.*, [1987] 3 SCC 622, G relied on.

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 3844 of 1989.

H From the Judgment and Order dated 28.11.88 of the Central Administrative Tribunal, Calcutta in O.A. No. 336 of 1988.

N.N. Goswamy, C.V.S. Rao and Ms. Sushma Suri, for the Appellants. A

Sudhir Kr. Gupta, Gobind Mukhoty, M.K. Ramamurthy, B. Upad-haya, P.C. Kapur, R.K. Gupta, Tushar Ranjan Mohanty (Respondent-in-person), K.K. Rai, Ms. Malini Poduval, A.K. Balwal, (in-person), and Vimal Dave for the Respondents.

The Judgment of the Court was delivered by B

KULDIP SINGH, J. Indian Statistical Service (the service) is governed by statutory rules called the Indian Statistical Service Rules, 1961 (the rules). Respondents, in the appeal herein, are the members of the service. Tushar Ranjan Mohanty (Mohanty) - respondent 1 belongs to the general category whereas respondents 2 to 9 are members of the Scheduled Castes. Respondents 2 to 9 were promoted from Grade IV to Grade III in the service. They were promoted against the vacancies reserved for the Scheduled Castes and Scheduled Tribes under the instructions issued by the Government of India from time to time. Mohanty, being senior to respondents 2 to 9 in Grade IV, challenged their promotions before the Central Administrative Tribunal, Calcutta Bench, (the Tribunal) on the ground that under the reservation, in respect of appointments to the service by promotion, was not permitted under the Rules. The Tribunal accepted the contention of Mohanty and came to the conclusion that promotion of respondents 2 to 9 in supersession of the claim of Mohanty was against the rules. The Tribunal, however, did not disturb the promotions already given to the respondents and directed that Mohanty be deemed to have been promoted to Grade III from the same date when respondents were promoted and he would be placed above the respondents in the seniority list of Grade III. This appeal, by the Union of India, is against the Judgment of the Tribunal. C D E F

We have no hesitation in holding that the Tribunal correctly interpreted the rules as they existed on November 28, 1988 when the Tribunal delivered its judgment. These rules were, however, amended with effect from November 27, 1972 by the Notification dated February 20, 1989 and the reservation for Scheduled Castes and Scheduled Tribes was provided even in the appointments made by way of promotion. It is contended on behalf of the Union of India that in view of the amendment of the rules with retrospective effect, the judgment of the Tribunal is liable to be set aside and the promotions of respondents 2 to 9 to Grade III of the service G H

A are to be upheld. Mohanty and other members of the general category have, however, challenged before us the validity of the retrospective amendment of the rules. We shall state the grounds of challenge in the later part of the judgment.

B Rule 8(1)(b)(i) and Rule 13 (before amendment) of the rules are as under :

"8(1)(b) Grade III -

C (i) All the vacancies in this grade shall be filled by promotion from amongst Grade IV officers who have completed not less than four years of service on a regular basis in that grade. Promotions shall be made in the order of seniority subject to rejection of the unfit by the Controlling Authority on the advice of the Board :

D Provided that if any junior officer in grade IV is eligible and is considered for promotion all officers senior to him in that grade shall also be considered for promotion, notwithstanding that they may not have completed four years of service on a regular basis in that grade.

E 13. Reservation for Scheduled Castes and Scheduled Tribes etc:- Appointments to the Service made otherwise than by promotion will be subject to orders regarding special representation in the Service for Scheduled Castes and Scheduled Tribes issued by the Government from time to time."

F The ISS (Amendment) Rules, 1989 were framed under Article 309 of the Constitution of India and were published by the Notification dated February 20, 1989. In the rules, for rule 13, the following rule was substituted:

G "13. *Reservation for Scheduled Castes and Scheduled Tribes, etc.* - Appointments to the service shall be made subject to the orders relating to reservation for SCs and STs issued by the Central Government from time to time."

H Rule 1(2) of these rules provided that "they shall be deemed to have come into force on 27.11.1972."

Executive instructions dated November 27, 1972 issued by the Government of India provide reservation for scheduled Castes and Scheduled Tribes in the posts filled by promotion on the basis of seniority subject to fitness. The amended rule 13 was made operative with effect from November 27, 1972 with a view to extend the benefit of reservation in promotional posts in the service in terms of the executive instructions of the Government dated November 27, 1972.

Seniority list of Grade IV of the service was published on May, 8, 1986. In the said list, Mohanty was shown senior to respondents 2 to 9. On November 24, 1987, respondents 2 to 9 were promoted to Grade III in the service. Mohanty submitted a representation requesting the Cadre Controlling Authority to consider his case for promotion under the proviso to rule 8(1)(b)(i) of the rules as his juniors had been promoted without declaring him unfit. The representation was rejected by the order dated February 11, 1988 on the ground that respondents 2 to 9 had been promoted on the basis of reservation policy. Mohanty challenged the promotion of respondents 2 to 9 before the Tribunal. As mentioned above, the Tribunal allowed the application of Mohanty and, as such, this appeal.

It is stated by Mohanty in his counter-affidavit that the reservation was for the first time introduced on May 22, 1986 and thereafter on September 1, 1987. According to him, the said two orders did not affect him. The order applying reservation quota was issued on November 24, 1987 when respondents 2 to 9 were promoted and the same was successfully challenged by Mohanty before the Tribunal. It has been categorically stated by Mohanty that until May 22, 1986 the reservation policy was not made applicable by the Cadre Controlling Authority in the service and in fact no Scheduled Caste or Scheduled Tribe officer was given out of turn promotion superseding the general category officers. These averments have not been specifically denied by the Union of India in its rejoinder.

On behalf of Mohanty and other general category members of the service, the following contentions have been raised :

1. The retrospective operation of amended rule 13 takes away the vested rights of the general category candidates senior to respondents 2 to 9. It is settled proposition of law that the vested rights cannot be abrogated by retrospective legislation.

A 2. The retrospective operation of amended rule 13 is arbitrary and, as such violative of Articles 14 and 16 of the Constitution of India.

B 3. That the judgment of the Tribunal was delivered on November 28, 1988 and rule 13 was amended on February 20, 1989. On that date neither the Union of India nor any of the respondents 2 to 9 had filed special leave petition against the judgment of the Tribunal in this Court. The only purpose of bringing in the retrospective amendment was to wash away the effect of the judgment of the Tribunal. The legislature was not competent to override the judgment without enacting the validation clause.

C 4. The Government instructions dated November 27, 1972 are applicable to those posts which are filled by promotion on the basis of "seniority subject to fitness". Under rule 8(1)(b)(i) promotions are to be made in the order of seniority subject to rejection of the unfit. The instructions meant for promotions on the basis of "seniority subject to fitness" cannot be made applicable to the promotions based on "seniority subject to rejection of the unfit".

E 5. Mohanty having been promoted to Grade III prior to February 20, 1989, he is entitled to the benefit of the explanatory memorandum added under rule 13 to the effect that the benefit of promotion actually enjoyed by any person belonging to the general category shall not be withdrawn.

F 6. Proviso to rule 8(1)(b)(i) states that if any junior officer in Grade-IV is eligible and is considered for promotion, all officers senior to him in that grade shall also be considered for promotion. Even if a reserve category officer who is junior to the general category officer is considered for promotion all officers senior to him in the general category shall have to be considered for promotion along with the junior Schedule Caste candidate.

G We take up the first and the second contentions together for consideration. It is obvious from the plain language of rule 8(1)(b)(i) that all Grade-IV officers who have completed four years of service on regular basis are entitled to be considered for promotion to grade-III on the basis of their seniority provided they are not found unfit by the Controlling Authority. The rule gives a statutory right to Grade-IV officers to be considered for promotion in the order of their seniority. The said right is

H further strengthened by the proviso to rule 8(1)(b)(i). The proviso makes

it obligatory that when a junior officer in Grade-IV is eligible and is considered for promotion all officers senior to him in that grade shall also be considered for promotion. Even otherwise, "to be considered for promotion" is a guaranteed right under Article 16(1) of the Constitution of India. It is, therefore, clear that Mohanty and other senior general category Grade-IV officers had a vested right under the rules - as also under Article 16(1) of the Constitution - to be considered for promotion when persons junior to them were being considered and in fact promoted. Respondents 2 to 9 were admittedly junior to mohanty and as such they could not be promoted, without considering the case of Mohanty. Rule 13 of the rules - before its amendment - did not permit any reservation in respect of appointments to be made by way of promotion. There can, therefore, be no dispute that on November 24, 1987 when respondents 2 to 9 were promoted to Grade-III, Mohanty and other general category candidates senior to him had a vested right to be considered for promotion. Whether such a right can be rendered nugatory by retrospective - legislation? The question is not *res integra*. There are several pronouncements of this Court on the subject.

In *State of Gujarat & Anr. v. Raman Lal Keshav Lal Soni & Ors.*, [1983] 2 SCC 33, this Court had an occasion to deal with the question as to whether the status as civil servant conferred on the Panchayat employees could be taken away by retrospective operation of amended law. The Gujarat Panchayats Act, 1961 aimed at democratic decentralisation of important governmental functions by vesting such functions in Gram Nagar, Taluqa and District Panchayats and by enabling the State Government to transfer other powers, functions and duties to the Panchayat Institutions. The dispute having arisen regarding the status of the Panchayat employees, some of them filed a writ petition before the Gujarat High Court seeking various reliefs. The High Court allowed the writ petition holding that the members of the Panchayat service belonging to the local cadre were government servants and issued consequential directions for equation of posts, revision of pay-scales and payment of salaries. The State Government filed appeal against the judgment of the High Court before this Court, but during the pendency of the appeal, the Gujarat Panchayats (Third Amendment) Act, 1978 was enforced with a view to nullify the basis of the decision of the High Court. The employees filed writ petitions under Article 32 of the Constitution of India before this Court challenging the constitutional validity of the Amending Act. The State

A appeal and the writ petitions were heard together by a Constitution Bench of this Court. This Court held that the Gujarat Panchayats (Third Amendment) Act, 1978 was arbitrary, unreasonable and unconstitutional on the following reasoning :-

B "The law must satisfy the requirements of the Constitution today
C taking into account the accrued or acquired rights of the parties today. The law cannot say, 20 years ago the parties had no rights, therefore, the requirements of the Constitution will be satisfied if the law is dated back by 20 years. We are concerned with today's rights not yesterday's. A legislature cannot legislate today with reference to a situation that obtained 20 years ago and ignore the march of events and the constitutional rights accrued in the course of the 20 years. That would be most arbitrary, unreasonable and a negation of history. It was pointed out by a Constitution Bench of this Court in *B.S. Yadav v. State of Haryana*, [1981] 1 SCR 1024
D Chandrachud, C.J., speaking for the Court held : (SCC head-note)

E Since the governor exercises the legislative power under the proviso to Article 309 of the Constitution it is open to him to give retrospective operation to the rules made under that provision. But the date from which the rules are made to operate must be shown to bear either from the face of the rules or by extrinsic evidence, reasonable nexus with the provisions contained in the rules, especially when the retrospective effect extends over a long period as in this case.

F Today's equal cannot be made unequal by saying that they were unequal 20 years ago and we will restore that position by making a law today and making it retrospective. Constitutional rights, constitutional obligations and constitutional consequences cannot be tampered with that way. A law which if made today would be plainly invalid as offending constitutional provisions in the context
G of the existing situation cannot become valid by being made retrospective. Past virtue (constitutional) cannot be made to wipe out present vice (constitutional) by making retrospective laws. We are, therefore, firmly of the view that the Gujarat Panchayats (Third Amendment) Act, 1978 is unconstitutional, as it offends
H Articles 311 and 14 and is arbitrary and unreasonable."

This Court in *Ex. Capt. K.C. Arora & Anr. v. State of Haryana & Ors.*, [1984] 3 SCR 623 declared *ultra vires* retrospective amendments made to the Punjab National Emergency (Concessions) Rules, 1965 as applicable to Haryana. Under the Punjab National Emergency (Concessions) Rules, 1965 ex-emergency commissioned officers were entitled to the benefit of their military service on their re-appointment in the State Civil Service against the vacancies reserved for ex-army officers. The Haryana Government by a Notification dated August 9, 1976 amended the definition of the expression "Military Service" in the 1965 rules thereby restricting the benefit of military service only upto January 10, 1968 with the result that the petitioners before this Court were deprived of their army service for the purpose of fixation of seniority in the Civil service for the period 1969 - 1971. The amendment was challenged on the ground that it was *ultra vires* the Constitution in so far as it affected prejudicially persons who had acquired vested rights. This Court following the Constitution Bench in *State of Gujarat v. Raman Lal Keshav Lal Soni*, (supra) struck down the amendment on the following reasoning :

"The question, however, has been pointedly considered recently by a Constitution Bench of this Court in *State of Gujarat v. Raman Lal Keshav Lal Soni*..... In view of this latest pronouncement by the Constitution Bench of this Court, the law appears to be well-settled and the Haryana Government cannot take away the accrued rights of the petitioners and the appellants by making amendment of the rules with retrospective effect.

For the foregoing discussion, the writ petitions as well as the appeals are allowed and the orders of the High Court dated October 10, 1980 are quashed and the impugned rule 4 (ii) of the Punjab Government National Emergency (Concessions) Rules 1965 as amended by the Haryana Government Gazette Notification No. GSR 77/Const./Art.309/Amend/(1)/76 dated 22nd March, 1976 and the Notification No. GSR 182/Const./Art.309/Amended/(2)/76 dated 9th August, 1976 amending the definition of the expression 'Military Service' in rule 2 are declared to be *ultra vires* the Constitution in so far as they affect prejudicially persons who had acquired rights as stated above."

A three petitioners T.R. Kapur, Mahinder Singh and V.D. Grover, who were diploma-holders, were working as Sub Divisional Officers on regular basis under the unamended rule 6(b) of the Punjab Service of Engineers, Class I, Public Works Department (Irrigation Branch) Rules, 1964. They were eligible for promotion as Executive Engineers in Class I service despite the fact that they did not possess a degree in engineering. By the Notification dated June 22, 1984, rule 6(b) was amended and it was provided that a degree in engineering was an essential qualification for promotion of Assistant Engineers (Irrigation Branch) to Class I service and thereby the petitioners were rendered ineligible for promotion to the post of Executive Engineer in Class I service. The Amendment was challenged in this Court by way of a petition under Article 32 of the Constitution of India. This Court came to the conclusion that the retrospective effect given to the amendment was violative of Articles 14 and 16 of the Constitution of India on the following reasoning :

D "It is well-settled that the power to frame rules to regulate conditions of service under the proviso to Article 309 of the Constitution carries with it the power to amend or alter the rules with a retrospective effect : *B.S. Vadhera v. Union of India*, [1968] 3 SCR 575, *Raj Kumar v. Union of India*, [1975] 3 SCR 963, *K. Nagaraj & Ors. v. State of A.P. & Anr.*, [1985] 1 SCC 523 and *State of J & K v. Triloki Nath Khosla & Ors.*, [1974] 1 SCR 771. It is equally well settled that any rule which affects the right of a person to be considered for promotion is a condition of service although mere chances of promotion may not be. It may further be stated that an authority competent to lay down qualifications for promotion, is also competent to change the qualifications. The rules defining Qualifications and suitability for promotion are conditions of service and they can be changed retrospectively. This rule is however subject to a well recognised principle that the benefits acquired under the existing rules cannot be taken away by an amendment with retrospective effect, that is to say, there is no power to make such a rule under the proviso to Art. 309 which affects or impairs vested rights"

Finally this Court considered the effect of retrospective legislation on the vested rights of the affected persons in *P.D. Aggarwal & Ors. v. State of U.P. & Ors.*, [1987] 3 SCC 622. Under the U.P. Service of Engineers (Buildings & Roads Branch) Class II Rules, 1936, the Assistant Engineers

substantively appointed against temporary vacancies became members of the service and were entitled to seniority on the basis of continuous length of service. The rules were amended in the years 1969 and 1971 wherein it was provided that the Assistant Engineers would only become members when they are selected and appointed against the quota meant for them and their seniority would be determined only from the date of order of appointment in substantive vacancies. These amendments were made with retrospective effect thereby taking away the vested rights of the Assistant Engineers appointed against temporary posts. The High Court held the retrospective amendment of the rules to be arbitrary and unconstitutional. This Court upheld the judgment of the High Court on the following reasoning :

"It has been urged that Government has the power to amend rules retrospectively and such rules are quite valid. Several decisions have been cited of this Court at the bar. Undoubtedly, the Government has got the power under proviso to Article 309 of the Constitution to make rules and amend the rules giving retrospective effect. Nevertheless, such retrospective amendments cannot take away the vested rights and the amendments must be reasonable, not arbitrary or discriminatory violating Articles 14 and 16 of the Constitution..... As has been stated hereinbefore, the Assistant Engineers who have already become members of the Service on being appointed substantively against temporary posts have already acquired the benefit of 1936 Rules for having their seniority computed from the date of their becoming member of the service. 1969 and 1971 Amended Rules take away this right of these temporary Assistant Engineers by expressly providing that those Assistant Engineers who are selected and appointed in permanent vacancies against 50 per cent quota provided by Rules 6 of the Amended 1969 Rules will only be considered for the purpose computation of seniority from the date of their appointment against permanent vacancies. Therefore the temporary Assistant Engineers who are not only deprived of the right that accrued to them in the matter of determination of their seniority but they are driven to a very peculiar position inasmuch as they are to wait until they are selected and appointed against permanent vacancies in the quota set up for this purpose by the Amended Rule 6..... These amendments are not only disadvantageous to the future recruits against temporary vacancies but

- A they were made applicable retrospectively from March 1, 1962 even to existing officers recruited against temporary vacancies through Public Service Commission. As has been stated hereinbefore that the government has power to make retrospective amendments to the Rules but if the Rules purport to take away the vested rights and are arbitrary and not reasonable then such retrospective amendments are subject to judicial scrutiny if they have infringed Articles 14 and 16 of the Constitution."
- B

- C The legislatures and the competent authority under Article 309 of the Constitution of India have the power to make laws with retrospective effect. This power, however, cannot be used to justify the arbitrary, illegal or unconstitutional acts of the Executive. When a person is deprived of an accrued-right vested in him under a statute or under the Constitution and he successfully challenges the same in the court of law, the legislature cannot render the said right and the relief obtained nugatory by enacting retrospective legislation.

- D Respectfully following the law laid-down by this Court in the judgments referred to and quoted above, we are of the view that the retrospective operation of the amended rule 13 cannot be sustained. We are satisfied that the retrospective amendment of rule 13 of the rules takes away the vested rights of Mohanty and other general category candidates senior to respondents 2 to 9. We, therefore, declare amended rule 13 to the extent it has been made operative retrospectively to be unreasonable, arbitrary and, as such, violative of Articles 14 and 16 of the Constitution of India. We strike down the retrospective operation of the rule. In the view we have taken on the point it is not necessary to deal with the other contentions raised by Mohanty.
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The appeal is dismissed with cost. We quantify the cost as Rs. 10,000 to be paid by the Union of India to Mohanty - respondent 1.

Order

- G We have pronounced judgment in Civil Appeal No. 3844 of 1989 titled *Union of India & Ors. v. Tushar Ranjan Mohanty* today. For the reasons given and the conclusions recorded in the said appeal, this appeal is dismissed. No. costs.

A.G.

Appeals dismissed.