

PETITIONER:
DISTT. REGISTRAR PALGHAT & ORS.

Vs.

RESPONDENT:
M. B. KOYYAKUTI & ORS.

DATE OF JUDGMENT 20/02/1979

BENCH:
SARKARIA, RANJIT SINGH
BENCH:
SARKARIA, RANJIT SINGH
REDDY, O. CHINNAPPA (J)

CITATION:
1979 AIR 1060 1979 SCR (3) 242
1979 SCC (2) 150

ACT:

Kerala State & Subordinate Service Rules, 1958-r. 28(b)
(ii)-Scope of-Government servant appointed as lower division clerk relaxing minimum educational qualification-No provision in rule prescribing minimum educational qualification for promotion-Executive order prescribing qualifying test for promotion-Validity of.

HEADNOTE:

The respondent, who originally belonged to the Madras Ministerial Service, was allotted to the State of Kerala as a lower division clerk on the reorganisation of States. On the ground that he belonged to a community which was educationally backward the State Government of Madras appointed him as a lower division clerk relaxing the requirements of r. 29 of the Special Rules for Madras Ministerial Service which prescribed minimum general educational qualification for appointment to service under the State Government.

In 1957 the State Government of Kerala issued an order providing that, until common service rules were framed, every officer in the service of the new State of Kerala would be bound by the service rules of Travancore-Cochin or Madras, to which he belonged prior to November 1, 1956.

Thereafter in supersession of all earlier rules the Kerala State and Subordinate Service Rules, 1958 were framed. Rule 1 of the General Rules in Part II stated that the rules in that part shall apply to all State and Subordinate Services and the holders of all posts appointed before or after the date on which those rules came into force. The Special Rules contemplated by r. 2(16) of Part I had however, not been framed.

Rule 28(b) (ii) of Part II provided that all promotions or appointments by transfer [other than those mentioned in cl. (i) of this rule] shall be made in accordance with the seniority, subject to the person's fitness for appointment.

In 1961, persons who did not possess the general minimum educational qualifications but were appointed as lower division clerks, were allowed to sit for a qualifying test for promotion to upper division clerks.

In the gradation list of officiating lower division clerks prepared, the respondent was shown at no. 1 place.

Even so, when two vacancies of upper division clerks occurred, two persons junior to him in the gradation list were promoted ignoring the respondent.

In his writ petition under Art. 226 of the Constitution the respondent contended that the exemption granted to him removing the bar of educational qualification enured to him for all purposes, and therefore, promotions of two juniors, ignoring r. 28(b)(ii) under which seniority was the basis for promotion, amounted to denial of equal treatment guaranteed under Arts. 14 and 16 of the Constitution.

243

A single Judge of the High Court dismissed the petition on the ground that the exemption granted was for the limited purpose of enabling the respondent to be appointed and continued in the post of lower division clerk but that it did not remove the bar of minimum qualification for promotion.

On appeal the division bench reversed the order of the single Judge, and directed the Government to promote him and determine his rank in the cadre of upper division clerks.

On appeal to this Court it was contended on behalf of the appellant that (1) the Special Rules contemplated by r. 2 of Part I read with the State Government's order of 1957, were the Special Rules contained in the Madras Ministerial Service Rules; (2) even if r. 28(b)(ii) was applicable it was well within the power of the State Government to prescribe a test to judge the fitness of persons who were exempted from the minimum educational qualifications when appointed as lower division clerks and (3) there was a reasonable basis for classifying those persons who did not possess the minimum educational qualification as a category apart from those who possessed such a qualification.

Dismissing the appeal,

^

HELD: 1 (a) The Special Rules, for the purposes of Kerala Rules of 1958, would be as defined in r. 2(16) of Part I. That definition contemplated that Special Rules would be framed by the Governor but no such rules had been framed. [248 H]

(b) In the matter of promotion as on upper division clerk the respondent was governed by r. 28(b)(ii) in Part II. [249 A]

2. It cannot be said that the impugned notification merely "supplemented" or filled up a gap in the statutory rules. It tended to superimpose or super-add by an executive fiat on the statutory rules something inconsistent with the same. If the statutory rules framed by the Governor or any law enacted under Art. 309 is silent on any particular point, the government can fill up that gap and supplement the rule by issuing administrative instructions not inconstant with the statutory provisions already framed or enacted. [253 D; 250 C]

In the instant case, however, it could not be said that there was a gap in the statutory provisions in the matter of promotion from the cadre of lower division clerks to that of upper division clerks.

3(a) The classification made by the impugned government order was not only unfair and irrational but also, virtually amounted to abandonment of the test of seniority-cum-fitness provided in r. 28(b)(ii). [252 G-H]

(h) By virtue of s. 3 of the Kerala Public Services Act, 1968, the 1958 Rules were deemed to have been made under the Act and were continued until superseded by rules made under that Act. No Special Rules relating to upper division clerks having been made the General Rules in Part

II would be applicable to upper division clerks, also. [250 E]

(c) The 1958 Rules superseded all earlier rules. The General Rules did not provide any minimum general educational qualification for promotion to

244

the cadre of upper division clerks. There is nothing in r. 28(b)(ii) or elsewhere, which provides that a lower division clerk would be presumed to be unfit for promotion to upper division unless he possessed the minimum general educational qualification or passed the qualifying test. [250 G-H]

There is nothing to show that the respondent was considered for promotion but was found unfit. [251 B]

(d)(i) The impugned notification prescribed the qualifying test for promotion, not for all, but only for one category of persons with reference to the manner in which they initially entered service. The respondent and others like him, appointed as lower division clerks after granting them exemption, had been singled out for this discriminatory treatment. [251 F]

(d)(ii) There is nothing on record to show that the duties discharged by the clerks of the upper division were substantially different from those in the lower division. [251 G-H]

(iii) The statutory rule did not warrant the classification made by the impugned order. It impinged upon the statutory rule inasmuch as it laid down that even if a lower division clerk who entered service as a result of exemption from possessing minimum educational qualification satisfied the criterion of seniority-cum-fitness prescribed by this rule, he shall not be considered for promotion unless he qualified in the test. The relevant rule did not provide any minimum general educational qualification for promotion to upper division. [252 A-B]

Roshan Lal Tandon v. Union of India, [1968] 1 SCR 185; followed.

State of Jammu & Kashmir v. Triloki Nath Khosa & Ors. AIR 1974 SC 1; held inapplicable.

4. Though ordinarily the court would not issue a direction requiring the government to promote an aggrieved employee and thereafter determine his rank in the cadre, in the peculiar facts of this case the respondent satisfied the two-fold criterion for promotion laid down in r. 28(b)(ii) and since the existence of both the criteria for promotion were not in dispute the High Court was justified in issuing the direction, it did. [253 A-B; E]

JUDGMENT:

CIVIL APPELLATE JURISDICTION: Civil Appeal No. 2036 of 1969.

Appeal by special leave from the Judgment and Order dated 18-12-1968 of the Kerala High Court in W.A. No. 167/67.

Dr. V. A. Sayied Muhammed and K. M. K. Nair for the Appellant.

A. S. Nambiar and D. D. Gupta for the Respondents.

The Judgment of the Court was delivered by

SARKARIA, J. This appeal by special leave, directed against a judgment, dated December 18, 1968, of the High Court of Kerala, arises out of these facts:

245

Koyakutty, Respondent herein, entered service of the former, Madras State on May 1, 1943 as temporary Section Writer on

probation in the Registration Department. He did not possess the minimum, general educational qualification prescribed by Rule 29 of the Madras Ministerial Service Rules. This rule, inter alia, provided that no person shall be eligible for appointment to the service in any post either by direct recruitment or by recruitment by transfer on promotion unless he possesses the minimum general educational qualification prescribed in the Schedule to the General Rules. The General Rules provided that the passing of the Secondary School Leaving Examination or other equivalent examination shall be the minimum educational qualification for appointment to the Ministerial Service.

The State Government, however, had the power to exempt a person from this qualification. The Madras Government passed an Order, dated April 15, 1954, (Ex. P-II), exempting, him from the said qualification for being appointed as a Lower Division Clerk in the Registration Department. It will be useful to quote this order in extenso:

"The Government consider that in view of the fact that Sri M. B. Koyakutty belongs to a community which is educationally backward, the petitioner should be exempted from the minimum general educational qualification, so as to enable him to be appointed as a Lower Division Clerk in the Registration Department under G.O. MS. No. 2858 Rev. dt. 2-11-50 in his turn..... The Governor of Madras accordingly relaxes rules 28 and 29 of the Special Rules for the Madras Ministerial Service in favour of Sri M. B. Koyakutty, a temporary Section Writer in the Registration Department in the Registration District of Palghat in order to enable him to be appointed as a Lower Division Clerk in that department.

Sd/-S. K. Chettu,
Secretary to Govt."

As a result of this exemption, Koyakutty was appointed a Lower Division Clerk in the Registration Department on May 19, 1954.

Consequent on the reorganisation of the States in 1956, Koyakutty was allotted to the Kerala State Service as Lower Division Clerk in the Registration Department.

On May 16, 1961, the Government of Kerala issued an Order, in consultation with the Public Service Commission, that "all such

246

persons who did not possess the general minimum educational qualification and were appointed as Lower Division Clerks, after granting them exemption from that qualification", may be allowed to sit for a qualifying test to be conducted by the Commission, and in case they secure a certain minimum percentage of marks, they may be regarded as possessing the minimum general qualification of the S.S.L.C. Standard for purpose of promotion to Upper Division and higher grades or continuance in the Upper Division, as the case may be. The order further stated that the case of those who have been appointed and are continuing in the Upper Division, they need not be disturbed for the present, but they should be reverted, if they fail to qualify at the next such examination of the Commission. According to para 3 of the Order, "the minimum marks to be obtained for being declared eligible for promotion to or continuance in the Upper Division etc..... will be issued separately."

A gradation list of Clerks was prepared by the District Registrar, Palghat, in which Koyakutty was shown at No. 1 among the officiating Lower Division Clerks, while the

original respondents 1 and 2 were shown at Nos. 7 and 6, respectively.

In July 1966, two vacancies occurred in the cadre of Upper Division Clerks in the Department. The original respondents 1 and 2, who were junior to Koyakutty, were promoted against those vacancies as Upper Division Clerks.

Koyakutty thereupon filed a writ petition under Article 226 of the Constitution in the Kerala High Court, praying that the promotion of original respondents 1 and 2 be quashed and a direction be issued requiring the District Registrar, Palghat, and the State of Kerala to consider his claim and to promote him in preference to the original respondents 1 and 2.

Koyakutty's contention was that under the Rules, seniority should be the basis for promotion; and promotion of his juniors amounted to a denial of equable treatment guaranteed under Article 14 and 16 of the Constitution. His stand was that the exemption granted to him by the Government, removing the bar from being appointed in the Ministerial Service enured for all purposes. This contention was rejected by the trial Judge, who held that the exemption granted to Koyakutty was for the limited object of enabling him to be appointed and continued in the post of a Lower Division Clerk and did not remove the bar of minimum educational qualification for his promotion to the post of Upper Division Clerk. In the result, Koyakutty's writ petition was dismissed.

247

On appeal by Koyakutty, a Division Bench of the High Court reversed the judgment of the learned Single Judge, and directed the District Registrar, Palghat, and the State Government to treat Koyakutty as eligible for promotion as an Upper Division Clerk and pass necessary orders on that basis. The Division Bench further directed that Koyakutty's rank in the cadre of Upper Division Clerks will, also, be determined after he is promoted to that Cadre.

Hence this appeal by the District Registrar, Palghat and the State.

The first question that falls to be considered is, whether in the matter of promotion to the cadre of Upper Division Clerks, the respondent was governed by the Madras Ministerial Service Rules or by the Kerala State and Subordinate Service Rules, 1958 ?

The Government of Kerala, on February 25, 1957, issued an Order S(D)S-43405/56/PD to the effect that as an interim arrangement, every officer in the service of the new State would be bound by the Service Rules of Travancore-Cochin or Madras, as the case may be, to which he belonged prior to November 1, 1956 until common service rules are framed and issued.

Thereafter, in exercise of the powers under the proviso to Article 309 of the Constitution, the Governor of Kerala in supersession of all rules on the subject, framed the Kerala State and Subordinate Services Rules, 1958. Part I of these Rules deals with preliminary matters. Rule 2(16) in Part I defines "Special Rules" as meaning "the rules in Part III applicable to each service or class of service." Such Special Rules have not, however, been framed by the Governor. Part II contains the General Rules. Rule 1 in Part II delineates the scope of the General Rules. It runs thus:

"The rules in this Part shall apply to all State and Subordinate Services and the holders of all posts, whether temporary or permanent in any such service, appointed thereto before, or after the date on which these rules come into force as provided in sub-rule (b)

of rule 1 in Part 1 except to the extent otherwise expressly, provided (a) by or under any law for the time being in force, or (b) in respect of any member of such service by a contract or agreement subsisting between such member and the State Government."

248

Rule 2 in the same Part provides:

"2. Relation to the Special Rules.-If any provision in the General Rules contained in the Part is repugnant to a provision in the Special Rules applicable to any particular service contained in Part III, the latter shall in respect of that service, prevail over the provision in the General Rules in this Part."

It will bear repetition that since no Special Rules, as defined in Rule 2(16) of Part I, have so far been framed by the Governor under Article 309 of the Constitution, Rule 2 in Part II has remained otiose.

Rule 28 in Part II provides regarding promotion. Clause (i) of clause (b) of this rule deals with promotion and appointment by transfer to a selection category or Selection Grade in a service. Such promotion shall be made on the basis of merit and ability, seniority being considered only where merit and ability are approximately equal. Sub-clause (ii) of clause (b) of Rule 28 is captioned: "Promotion and appointment by transfer to higher posts according to seniority". Its material part, as it stood before the amendment of December 28, 1970, reads as under:

"All other promotions or appointments by transfer shall, subject to the provisions of these rules and the special rules, be made in accordance with seniority subject to the person's fitness for appointment."

It is contended on behalf of the appellants that by virtue of the Kerala Government Order dated February 25, 1957, referred to earlier, the Special Rules contained in the Madras Ministerial Service Rules, continued to govern the respondent because those Special Rules have not been superseded by the Kerala Rules of 1958. The point sought to be made out is that the Special Rules, within the meaning of Rule 2 in Part II read with the aforesaid Government Order dated February 25, 1957, will mean the Special Rules contained in the Madras Rules. A similar argument was raised before the Appellate Bench of the High Court, also, and it was repelled, and, in our opinion, rightly. Special Rules for the purpose of the Kerala Rules, 1958, will be as defined in Rule 2(16) in Part I. That definition contemplates that Special Rules in Part III will be framed by the Governor of Kerala. But, no such rules have so far been framed.

We have, therefore, no hesitation in holding, in agreement with the High Court, that in the matter of promotion as an Upper Division

249

Clerk, the appellant was governed by Rule 28(b)(ii) in Part II.

The alternative contention that has been advanced on behalf of the appellant is that even if Rule 28(b)(ii) was applicable, then also, it was well within the power of the State Government to prescribe a test to judge the fitness of those persons who did not possess the minimum educational qualification and were appointed as Lower Division Clerks on being exempted from that qualification by Government Order.

In this connection, reference has been made to Article 162 of the Constitution, to show what the State Government could do by framing a statutory rule under Article 309,

proviso, could well be done by an executive order, the executive power of the State being co-extensive with its legislative power. It is maintained that the power of the Government to prescribe selective test for promotion to higher service has been recognised by this Court in several decisions. Reference has been made in this connection to the decisions of this Court in *B. N. Nagarajan & Ors. v. State of Mysore & Ors.*, *Union of India etc. v. Majji Jangamayya etc.*, *State of Jammu & Kashmir v. Triloki Nath Khosa & Ors.*

It was further submitted that the possession of the minimum educational qualification, i.e. a certificate of having passed the S.L.C. Examination or any equivalent examination is presumptive proof of the fitness of the holder thereof, for promotion to the cadre of Upper Division Clerks. Therefore, according to the counsel, there was a reasonable basis for classifying those who did not possess this minimum educational qualification as a category apart from those who possessed such a qualification. In this context, it is further emphasised that the exemption was granted only for the purpose of being appointed as a Lower Division Clerk, and not for the purpose of further promotion.

As against this, Mr. Nambiar, appearing for the respondents, submits that once the bar of minimum educational qualification was removed for appointment as Lower Division Clerk, further promotion of the respondent was governed by Rule 28(b)(ii), Part I of the Kerala Rules of 1958. After their appointment, the respondent or others like him who had been exempted from possessing the minimum educational qualification, had become integral members of the same cadre. They could not be singled out for hostile treatment. Counsel has submitted that the rule enunciated by this Court in *Triloki Nath*

250

Khosa's case (ibid), is not applicable because the facts of that case were entirely different. Counsel further stated that any executive order issued by the Government, cannot supplant the statutory rules framed by the Governor under Article 309. Executive instructions can operate only in areas not covered by the rules. But here the area was fully occupied by the statutory rule 28(b)(ii).

There can be no quarrel with the proposition that if the statutory rules framed by the Governor or any law enacted by the State Legislature under Article 309 is silent on any particular point, the Government can fill up that gap and supplement the rule by issuing administrative instructions not inconsistent with the statutory provisions already framed or enacted. The Executive instructions in order to be valid must run subservient to the statutory provisions. In the instant case, however, it could not be said that there was a gap or a void in the statutory provisions in the matter of promotion from the cadre of Lower Division Clerks to that of Upper Division Clerks.

After the enactment of the Kerala Public Services Act of 1968, the position was that by virtue of Section 3 of that Act, the Kerala State Subordinate Services Rules of 1958 framed by the Governor under the proviso to Article 309 of the Constitution were deemed to have been made under the Act and were continued until superseded by rules made under that Act. As noticed already, no Special Rules relating to Upper Division Clerks have been framed. The General Rules in Part II will, therefore, be applicable to Upper Division Clerks, also.

It will bear repetition that the preamble to the Rules and Rule 1 in Part II, indicate that all the previous rules

have been superseded. These General Rules do not provide any minimum general educational qualification for promotion to the cadre of Upper Division Clerks from that of Lower Division Clerks. All that is required by rule 28 (b) (ii) which governs the promotions from the Lower Division to the Upper Division, is that promotions shall be made in accordance with seniority subject to the person's fitness for appointment. There is nothing in this sub-rule or elsewhere which provides that a member of the Lower Division will be presumed to be unfit for promotion to the Upper Division unless he possesses the minimum general educational qualification, or

251

passes a qualifying test. It is conceivable that the State Government may prescribe a general test for all Clerks of the Lower Division to judge their fitness for promotion to the Upper Division. But, such is not the case here. The respondent and the others like him who were appointed as Lower Division Clerks after granting them exemption from possessing the minimum general educational qualification have been singled out for this discriminatory treatment. There is nothing on the record to show that the case of the respondent was considered for promotion and he was found unfit.

The ratio of Triloki Nath Khosa's case (ibid) does not advance the case of the appellant State. Therein, persons appointed directly and by promotion were integrated into a common class of Assistant Engineers. Rule 12 provided that Graduates among the Assistant Engineers, shall be eligible for promotion to the cadre of Executive Engineers, to the exclusion of diploma-holders. This rule was a statutory rule. Its constitutional validity was challenged on the ground that it violated Articles 14 and 16 of the Constitution. This Court, speaking through Chandrachud J. (as he then was), repelled this contention with the reasoning that the classification of Assistant Engineers into degree-holders and diploma-holders could not be held to rest on any unreal or unreasonable basis. The classification was made with a view to achieving administrative efficiency in the Engineering Services.

It will be seen that Triloki Nath's case, is distinguishable from the one before us, at least, in three important aspects. Firstly, in that case, the statutory rule in question did not make any discrimination in relation to the source of recruitment, it simply provided that Graduates alone shall go into the higher cadre of Executive Engineers, irrespective of whether they were appointed as Assistant Engineers directly or by promotion. In the present case, the impugned notification prescribes a qualifying test for promotion, not for all but only for one category of persons with reference to the manner in which they initially entered service. Secondly, in Triloki Nath's case the post of the Executive Engineer carries higher responsibility and duties of a supervisory character requiring higher mental equipment and administrative skill. Thus, there, the classification rested on intelligible differentia having a direct nexus to the object (viz., administrative efficiency), to be achieved. In the instant case, there is nothing on record to show that the duties discharged by the clerks of the Upper Division are substantially different from those in the Lower Division. Thirdly, in the instant case the statutory rule does not warrant the classification made by the impugned Government Order. The primary criterion for promotion to the Upper Division prescribed by Rule 28(b) (ii) is seniority if the person concerned is otherwise not unfit. The

252

impugned Government Order impinges upon that statutory rule inasmuch as it lays down that even if a Lower Division Clerk who entered service as a result of exemption from possession minimum educational qualification, satisfied the criterion of seniority-cum-fitness prescribed by this Rule, he shall not be considered for promotion unless he qualifies in the test.

The relevant statutory Rules governing the appellant do not provide any minimum general education qualification for promotion to the Upper Division.

The case in point is *Roshal Lal Tandon v. Union of India*. In that case, before the impugned notification was issued, there was only one rule of promotion for both the departmental promotees and the direct recruits, and that rule was seniority-cum-suitability, and there was no rule of promotion separately made for application to direct recruits. As a result of the impugned notification, a discriminatory treatment was made in favour of the direct recruits, i.e. existing Apprentice Train Examiners who had already been absorbed in Grade 'D' by March 31, 1966, because the notification provided that this group of Apprentice Train Examiners should first be accommodated en bloc in Grade 'C' upto 80 per cent of vacancies reserved for them without undergoing any selection. Ramaswami J., speaking for a Bench of five learned Judges, held that the impugned notification violated the guarantee under Articles 14 and 16 of the Constitution. The reason was that once the direct recruits and promotees were absorbed in one cadre, they formed one class and they could not be discriminated against for the purpose of further promotion to the higher Grade 'C'. In that case, it was not disputed that before the impugned notification was issued there was only one rule of promotion for both the departmental promotees and the direct recruits and that rule was 'seniority-cum-suitability'. The impugned notification was discriminatory because in the case of that category who were appointed as Train Examiners by promotion the aforesaid test of 'seniority-cum-suitability' prescribed by the rule for further promotion to the higher Grade 'C' was abandoned and, instead, selection on merit only was adopted.

The principle enunciated in *Roshan Lal Tandon v. Union of India* applied with greater force to the facts of the present case because here the classification made by the impugned Government Order is not only unfair and irrational but also, virtually amounts to abandonment of the test of seniority-cum-fitness provided in rule 28 (b) (ii).

The last point for consideration is, whether it was proper for the High Court to issue a positive direction requiring the appellant to

253

promote the respondent to the Upper Division and thereafter to determine his rank in the cadre of Upper Division Clerks. Ordinarily, the court does not issue a direction in such positive terms, but the peculiar feature of this case is that it has not been disputed that Koyakutty respondent satisfies the two-fold criterion for promotion laid down in the statutory rule 28(b)(ii). Indeed, the District Registrar, Palghat, who was impleaded as respondent 3 in the writ petition, expressly admitted in paragraph 8 of his counter-affidavit filed before the High Court, "that the seniority of service is the basis of promotion from the ranks of Lower Division Clerks to the ranks of Upper Division Clerks provided they are fully qualified by passing the departmental tests for the purpose". It was never the

case of the Registrar that Koyakutty was not otherwise fit for promotion. Indeed, even in the grounds of appeal to this Court, incorporated in the Special Leave Petition, it is not alleged that Koyakutty did not satisfy the criterion of seniority-cum-fitness prescribed by Rule 28(b)(ii). The position taken by the appellant, throughout, was that this rule should be deemed to have been "supplemented" by the impugned Government Notification. It is not correct that the impugned Notification merely "supplements" or fills up a gap in the statutory rules. It tends to super-add or super impose by an Executive fiat on the statutory rules something inconsistent with the same. Since the existence of both the criteria viz., seniority and fitness for promotion to the Upper Division prescribed by the statutory Rule 28(b)(ii), in the case of Koyakutty was not disputed, the High Court was justified in issuing the direction, it did.

For the foregoing reasons the appeal fails and is dismissed with costs.

P.B.R.

Appeal dismissed

254