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HIGH COURT OF GUJARAT

V L POONEKAR
V/S
L S KAUL, COLLECTOR, CENTRAL EXCISE, BARODA

Date of Decision: 10 December 1968

Citation: 1968 LawSuit(Guj) 98

Hon'ble Judges: J B Mehta

Eq. Citations: 1969 GLR 136, 1970 (1) LLJ 408, 1969 LabIC 1019

Case Type: Special Civil Application

Case No: 566 of 1963; ARTS 311(2)

Subject: Constitution

Head Note:

R.7(2) deals with the procedure to consider the eligible quasi - permanent servants for permanent appointment - Important rights of the quasi permanent employees depend on statutory list - List be prepared by Government - Whether such safeguard be treated as only directory - whether it is necessary to maintain rule of law even though there may be no duty to act judicially - The appointing authority must perform its statutory function as required by R.7(2).

Rule 7(2) of the Central Civil Services (Temporary Service) Rules 1949 deals with the procedure in accordance with which these eligible quasi-permanent servants would be considered for permanent appointment. The appointing authority has first to consult the appropriate Departmental Promotion Committee. After such consultation with the expert committee a list would be prepared in order of precedence of these eligible quasi-permanent servants. While preparing this list under Rule 7(2) the appointing authority has to consider both the seniority and

the merit of the concerned Government servants. The rule has laid fetters on the discretion of the appointing authority on this vexed question by making it obligatory on him to consult appropriate Departmental Promotions Committee, which can give expert advice in this connection for evaluating the rival merits of the concerned candidates. That is why the rule making authority has not only prescribed the relevant seniority test, which has to be applied. but it has provided for a list being prepared after applying such test on an uniform basis and after first consulting Departmental Promotions Committee in this connection. It is this list, which determines the order of precedence in confirmation of these quasi-permanent employees. The list therefore. must be maintained if these employees are not to be discriminated as important rights of these quasi-permanent employees depend on this statutory list. if the State Government for all these years did not prepare such a list it would not be open to them to plead that because of their neglect this important safeguard in Rule 7(2) or in Rule 6(1) second proviso should be treated as only directory. (Para 6). Even in matters of privileges in view of Art. 14 or 16 of the Constitution, which has introduced the concept of rule of law in our country the State, cannot act arbitrarily. The State must show some appropriate statutory rule or principle showing rational purpose for its action, which relates to the function the State performs in passing any such order to the detriment of the citizen or the Government servant concerned. Even though there may be no duty to act judicially the order can be reviewed by a suitable writ by keeping the State within the bounds of the rule of law in view of this settled legal position. In view of the explanation to rule 7(1) the declaration of quasi-permanent status conferred ordinarily no right of confirmation but even on the footing that it is a privilege the State has to decide this question of the prospect of permanency of quasi-permanent servant in accordance with the mandatory requirements of Rules particularly Rule 7(2). Mere neglect in discharging statutory duties would not justify the authorities in ignoring this mandatory provisions of Rule 7(2) (Paras 7 and 8). The scheme of Rule 7(2) is to obtain prior sanction of the Departmental Promotions Committee and to prepare a general list by applying the same relevant factors of seniority and merits to all the concerned servants. If therefore the petitioner alone were picked out by applying some other norms, which were not applied to others, he would be discriminated. Therefore the appointing authority must perform its statutory function as required by Rule 7(2) and if it is not done the matter must go back to it. (Para 9). Kalubhai v. State Baseshvar v. The Income-tax Commissioner In re Binapani Devi Union of India v. Anglo Afghan Agency State of Mysore v. Syed Mehmood S. K. Ghosh v.

Union of India referred to.

Acts Referred:

Constitution Of India Art 16, Art 311, Art 14

Central Civil Services (Temporary Service) Rules, 1949 R 7(2), R 6(1)

Final Decision: Petition allowed

Advocates: K S Nanavati, G T Nanavati

Reference Cases:

Cases Cited in (+): **1**

Cases Referred in (+): **6**

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Judgement Text:-

Mehta J

[1] The petitioner, Central Excise Inspector, challenges in this petition under Art. 226 of the Constitution the order of respondent No. 1, Collector, Central Excise, dated 7th November 1959, which confirms the petitioner with effect from 3rd March 1956 but refuses to confirm him from the earlier date i.e. 1st October 1951, which according to the petitioner was the due date on which the vacancy arose in which he should have been confirmed. The petitioner was originally appointed as a Tobacco Inspector in the former Baroda State on 1st March 1945 In the grade of Rs. 80 to 110. On 1st April 1948 he was promoted as a senior grade inspector. The petitioner was not made permanent during the former Baroda State regime and had no lien on any substantive post. On the merger of the Baroda State on 1st May 1949 the petitioner was absorbed as the Inspector of Central Excise from 1st May 1949. He was given seniority from 3rd July 1946 on the basis of the orders of seniority and as per the provisional list of Inspectors of Central Excise Issued on 15th November 1954, the petitioner's name stood at Entry No. 153. The petitioner's case is that this is the final list of seniority, while the authority claimed that final orders regarding the seniority of the former State employees absorbed in the State service were awaited and the seniority of the Ex-State employees was shown only as provisional. By the order, dated 16th January 1958, the competent authority made a declaration under Rules 3 and 4 of Central Civil Services (Temporary

Service) Rules, 1949, hereinafter referred to as 'the Rules' declaring the petitioner to be a fit person to be appointed in a quasi-permanent capacity and in pursuance thereof, the order was Issued giving quasi-permanent status to the petitioner on 19th January 1958, which took effect from 1st July 1952. Meanwhile, by the order of the Government of India, dated 25th September 1951, certain number of temporary posts were converted into permanent posts with effect from 1st October 1951 and accordingly, 192 posts were allotted from 1st October 1951 to the Baroda Collectorate. By the Establishment order No. 171 of 1955 issued on 1st August 1955, 21 persons were confirmed, 6 persons wers superseded as they were not considered fit for confirmation, while the remaining 26 persons, whose names were mentioned in the said order at Annexure 'B' including the petitioner who stood at Entry No. 14, were informed that their cases for confirmation were pending consideration in those permanent posts created with effect from 1-10-51 which had been reserved for these 26 officers, including the petitioner. It is the petitioner's case that by the impugned order, dated 7-9-59 he was confirmed only with effect from 3-3-56 and the authorities refused to confirm him from 1-10-1951, on which date permanent post was reserved for him as per the aforesaid Establishment order No. 171 of 1955. The petitioner made representation on 10-11-59 to the Collector. He was replied on 1-2-60 that even on the earlier occasion the petitioner was wrongly declared quasi-permanent as at that stage he was not entitled to be so treated looking to the confidential record and that his present good reports would help him in future. The petitioner's record was disclosed to him. The petitioner thereafter made various representations, including the one made finally, to the President, which was turned down as per the letter, dated 29-12-1962. The petitioner filed an earlier petition which was withdrawn and the present petition was filed on 26-6-63, as the petitioner failed to get any relief from the departmental authority. The petitioner challenged the order on the ground that the petitioner had a right to be promoted as per his seniority with effect from 1-10-51 and the authorities had ignored the mandatory provisions of Rule 7(2) and of the proviso, and bad wrongly taken into account his alleged record, going behind the previous declaration which was made under Rules 3 and 4 giving him a quasi-permanent status. The petitioner, therefore, challenged the order as it amounted virtually to an order of punishment passed in contravention of Article 311 and as the order was otherwise illegal, being in violation of the mandatory provisions of the Rules.

[2] The case of the authorities in their affidavit is that the list of seniority which was issued on 15-11-54 was only a provisional list. Since the question of seniority of the temporary Ex-State staff was not decided, posts equal to their number were kept reserved, and even for the petitioner accordingly a post was kept reserved from

1-10-51. However, when the petitioner's case was first considered for confirmation on 11-12-1958 he was not found fit for confirmation by the then Collector of Baroda on the basis of his record of service till that date. Accordingly, the post reserved from 1-10-51 for the petitioner was utilised for confirmation of another officer. The petitioner's case for confirmation was reviewed on 7-11-1959 and as he was found fit for confirmation, he was confirmed with effect from 3-3-56 in a post released by the Collector, Central Excise. The authorities have further stated that the declaration of quasi-permanency could not confer any right on the petitioner to claim a permanent appointment to any post. The authorities also denied that any procedural instructions were issued by the President as contemplated in Rule 7(1) and, therefore, no question arose of putting into effect the second operative part of Rule 7(2) Since no instructions were issued providing for reservation posts of quasi-permanent employees, the list referred to in Rule 7(2) was not prepared in consultation with the Departmental Promotion Committee. It was also stated that the names shown in the establishment order No. 171/55 were not according to the list prepared under Rule 7(2), but the names were arranged in the seniority list of officers coming for confirmation in the grade. Reservation of posts mentioned in the said order for certain officers was in respect of the former State employees for whom posts were kept reserved because their question of seniority had not till then been decided. Reservation was for a particular category of staff viz. former State staff, and the posts were reserved not on merits of any particular officer but because they belonged to the category of the former state staff persons. It is the case of the authorities that the petitioner was rightly confirmed in accordence with his turn as per seniority list from 3rd March 1956 in a post available from that date.

[3] At the hearing Mr. K. S. Nanavati raised the following points: -

(1) That the authorities had acted without jurisdiction in going behind the declaration issued under Rr. 3 and 4 giving quasi-permanent status to the petitioner and even though the petitioner has a right to be confirmed from 1-10-51, the authorities have acted arbitrarily and malafide in confirming him only from 3-3-56.

(2) That the impugned order of the authorities violates mandatory requirements of R. 7(2) and the proviso.

(3) That the order of the authority ignoring the previous declaration and

confirming him only from 3-3-56 denies the petitioner his earlier permanent appointment and results in reduction of his rank and is, therefore, hit both by Art. 16 and Art. 311 of the Constitution.

[4] Mr G T. Nanavati, learned Assistant Government Pleader, however, contended at the very outset that in the matters of confirmation, the petitioner had no justiciable right and in such discretionary administrative matters, no such writ petition would be legally competent.

[5] Before going into the relevant contentions it would be appropriate at this stage to consider the scheme of the relevant Rules. The preamble of the Rules states that the Central Civil Services (Temporary Service) Rules 1949 were promulgated in order to regulate tenure and service conditions of services of temporary Government servants. A number of problems had arisen as a result of the employment for long periods of temporary persons side by side with permanent Government servants with duties and responsibilities similar in character e.g. problem of uncertainty about the period of retention in employment, disabilities in respect of leave terms and absence of provisions regarding retirement benefits. These conditions led to discontent among temporary employees which affected efficiency Moreover, it was essential in the interest alike of efficiency and the maintenance of discipline, that those temporary employees who would not ordinarily have been recruited to permanent service or who had not earned by their record of efficient work and satifactory conduct the privilege of treatment as permanent employees, should be clearly distinguished from others who could be justifiably given parity of treat ment with permanent employees. It was also considered necessary that appointing authorities should have sufficient hold over their employees so as to secure that inefficient and disloyal elements could be weeded out without much difficulty. Rule 1(2) applied these rules to all persons who hold a civil post under the Government of India and who are under the rule making control of the President. Rule 2(a) defines 'Government service' to mean temporary service under the Government of India. Rule 2(b) defines 'quasi-permanent service' to mean temporary service commencing from the date on which a declaration issued under rule 3 takes effect and consisting of periods of duty and leave other than extra-ordinary leave after that date. Rule 2(c) defines 'specified post' to mean the particular post or the particular grade of posts within a cadre, in respect of which a Government servant is declared to be quasi-permanent under rule 3. Rule 2(d) define 'temporary service' to mean officiating and substantive service In a temporary post and officiating service in a permanent post

under the Goverment of India. Under rule 3 a Government servant shall be deemed to be in quasi-permanent service :-

(i) If he hat been in continuous Government service for more than three years, and

(ii) if the appointing authority, being satisfied as to his suitability in respect of age, qualifications, work and character for employment in a quasi-permanent capacity, has issued a declaration to that effect that in accordance with such instructions as the President may issue from time to time. Rule 4 provides that a declaration issued under rule 3 shall specify the particular post or the particular grade of posts within the cadre, in respect of which, it is issued, and the date from which It takes effect. Rule 5 provides for termination of the services of a Government who is not declared quasi-

permanent by one month's notice unless otherwise agreed to by the Government servant and by the Government. Rule 6(1) provides that the service of a Government servant in a quasi-permanent service shall be liable to termination -(i) in the same circumstances and in the same manner as a Government servant

in permanent service, or (ii) when the appointing authority concerned has certified that a reduction has occurred in the number of posts available for Government servants not in permanent service. Provided that the service of a Government servant in quasi-permanent service shall not be liable to termination under clause (ii) so long as any post of the same grade and under the same appointing authority as the specified post held by him continues to be held by a Government servant not in permanent or quasi-permanent service. The second proviso, which is material, enacts as under :-

"Provided further that as among Government servants in quasi-permanent service whoso specified posts are of the same grades and under the same appointing authority, termination of service consequent on reduction of posts shall ordinarily take place in order of juniority in the list referred in rule 7."

Thereafter comes the material rule 7 which deals with the prospect of permanency of such quasi-permanent employee in the grade in which he is quasi-permanent. The said rule reads as under: -

"7(1) Subject to the provisions of this rule, a Government servant in respect of whom a declaration has been issued under rule 3, shall be eligible for a permanent appointment on the occurrence of a vacancy in the specified posts which may be reserved for being filled from among persons in quasi-permanent service, in accordance with such instructions as may he issued by the President in this behalf from time to time.

Explanation :- No such declaration shall confer upon any person a right to claim a permanent appointment to any post.

(2) Every appointing authority shall, from time to time, after consultation with the appropriate Departmental Promotions Committee, prepare a list in order of prece dence, of persons in quasi-permanent service who are eligible for a permanent appointment. In preparing such a list, the appointing authority shall consider both the seniority and the merit of the Government servants concerned. All permanent appointments which are reserved under sub-rule (1) under the control of any such appointing authority shall be made in accordance with such lists;

Provided that the Government may order that permanent appointment to any grade or post may be made purely in order of seniority."

Thereafter rules 8, 9 and 10 give quasi-permanent employees same benefits in the matters of pay and allowances, leave, disciplinary matters, and the terminal benefits in respect of gratuity and certain additional benefits in the matter of counting service for pension, with which we are not concerned.

[6] The material controversy arises in the present case on the interpretation of Rule 7. Under Rules 3 and 4 a temporary servant gets quasi-permanent status, when a declaration is issued in Rule 3, from the date specified therein under Rule 4. This

declaration is issued only in case of those temporary servants who are in Government service for more than 3 years, if the appointing authority is satisfied as to their suitability in respect of age, qualifications, work and character for being employed in a quasi-permanent capacity. Rule 7 deals with the prospect of permanency of such quasi-permanent employees in the grade in which they are quasi-permanent and it provides for permanent absorption of suitable candidates into Government service The Explanation itself indicates that no such declaration of quasi-permanent status conferred upon any such person a right to claim any permanent appointment to any post. In view of this specific Explanation, it is not open to Mr. K. S. Nanavati to contend that the petitioner had any right to claim any permanent appoint-ment, merely because a declaration was issued under Rule 3 conferring quasi-permanent status on him by the competent authority. Rule 7 talks of the eligibility of such quasi-permanent servant for being confirmed in a permanent vacancy in the specified post and this gives him prospect of permanency. The matter is, therefore, not ordinarily one of right as such but a privilege. Rule 7(1) in terms provides that such quasi-permanent servants for whom a declaration is issued under Rule 3 shall be eligible for the permanent appointment on the occurrence of a vacancy in the specified post, but this is subject to the provisions of the entire Rule. Rule 7(1) also contemplates that any specified post may be reserved in accordance with the directions of the President. In that event, these reserved posts must be filled from among the persons in quasi-permanent service in accordance with such instructions. Therefore, when there is a reservation, the posts have to be filled in as per such instructions from those persons. Rule 7(2) deals with the procedure in accordance with which those eligible quasi-permanent servants would be considered for permanent appointment. The appointing authority has first to consult the appropriate Departmental Promotion Committee. After such consultation with the expert committee a list would be prepared in order of precedence of these eligible quasi-permanent servants. While preparing this list under Rule 7(2) the appointing authority has to consider both the seniority and the merit of the concerned Government servants. Therefore, the preparation of the list of laying down the order of precedence has to be on consideration of seniority and merit of the concerned servants and only after consultation with the appropriate Departmental Promotion Committee. These safeguards are advisedly introduced for satisfactory solution of these problems of confirmation by considering inter se merits and seniority of the concerned Government servants, so that there is no heart-burning. The learned Assistant Government pleader argued that the whole procedure of consultation of the Departmental Promotion Committee is merely directory and is not mandatory. It is true that mere use of the

expression 'shall' or 'may' may not be conclusive, and the language of the rule has to be interpreted in its entire context keeping in mind the object of this rule. The object of the rule is to solve satisfactorily this vexed question of confirmation. The rule has laid fetters on the discretion of the appointing authority on this vexed question by making it obligatory on him to consult appropriate Departmental Promotions Committee which can give expert advice in this connection for evaluating the rival merits of the concerned candidates. That is why rule making authority has not only prescribed the relevant seniority-cum-merit test which has to be applied but it has provided for a list being prepared after applying such test on an uniform basis and after first consulting the Departmental Promotions Committee in this connection. This list lays down the order of precedence of all these quasi-permanent servants who are eligible for permanent appointments. This list must be held to be a mandatory list in view of the reasonable safeguard which is envisaged by not leaving these employees to the mercy or at the discretion of the appointing autho-lity to be dealt with in isolation. Not only consultation with the expert committee is envisaged as a condition precedent but a proper list is to be worked out, so that all the employees can be similarly treated in respect of the norms as to their merit which are to be laid down, and in respect of the principles of seniority to be applied in preparation of the whole list laying down the order of precedence for confirmation. Thus, the salutory object behind this rule of avoiding heartburning would be completely frustrated, if we were to hold this entire elaborate provision of confirmation for consultation with the Departmental Promotions Committee as merely directory. The learned Assistant Government Pleader relied upon the decision the Division Bench consisting of Baxi and myself, in Kalubhai v. State, VI G.L.R. 451, where in the context of sec. 9(2) of the Gujarat Panchayats Act, 1961, the provision regarding prior consultation was held to be directory. My learned brother Bakshi J. had in that decision, speaking for the Division Bench, pointed out that when the provisions of a statute relate to the performance of a public duty and the case is such that to hold null and void acts done in neglect of such duty would work serious general inconvenience or injustice to persons who have no control over those entrusted with the duty, and at the same time, would not promote the main object of the Legislature, it has been the practice to hold such provisions to be directory, and the neglect of them though punishable, would not affect the validity of the acts done Each case will have to be decided on its own merits having regard to the subject matter and the importance of the provision and its relation to the object intended to be secured by the enactment. Not only the actual words used, but also the scheme of the enactment in the context of the particular provision under consideration, the intended benefit of the provision and the material danger by its contravention have got to be seen. The learned Assistant

Government Pleader missed the main qualifying clause which has been laid down that the rule would be held directory in such cases only if it would work serious general inconvenience or injustice to persons who have no control over those entrusted with the duty, and at the same time, would not promote the main object of the Legislature. In the present case if we look to the entire scheme of this rule and the salutory object sought to be achieved, the purpose of this rule would be frustrated and the cases of confirmation would be decided on individual discretion and not on any general principle if these mandatory safeguards were ignored. The learned Assistant Government Pleader also argued that in cases of these ex-State employees a provisional seniority list was only prepared and no final list of seniority was settled and it was not possible to prepare a list under Rule 7(2) till the seniority question was finally decided. In the scheme of the rules the list plays a very Important part. As I have already mentioned, even if the question of retrenchment arises under rule 6(1). the second proviso enacts that the retrenchment has to take place in the order of juniority in the list referred to Rule 7. It is this list which determines the order of precedence in confirmation of these quasi-permanent employees. The list, therefore, must be maintained if these employees are not be discriminated, as important rights of these quasi-permanent employees depend on this statutory list. If the State Government for all these years did not prepare such a list, it would not be open to them to plead that because of their neglect, this important safeguard in Rule 7(2) or in Rule 6(1) second proviso should be treated as only directory.

[7] When we have to examine the protection furnished by any statutory service rules to a Government Servant, we must always bear in mind the great impact of Article 16 of the Constitution which enshrines the guarantee of equality to a Government servant. Article 16 is only a particular application of the general guarantee in Article 14 as it secures equal protection to the Government servants in matters of employment by avoiding all heart-burning and invidious discrimination which would jeopardise the entire efficiency of our services which run the administration of our country. We must also keep in mind in this context the observations of the learned Chief Justice S. R. Das in Baseshvar v. The Income-tax Commissioner, A.I.R. 1959 S. C. 149 (158). that Article 14 combines the English doctrine of the rule of law and the equal protection clause of the 14th Amendment to the American Federal Constitution which enjoins that no State shall "deny to any person within its jurisdiction the equal protection of the laws." In view of the operation of the rule of law there is implicit absence of arbitrary exercise of State power in service matters and the State has to act on the basis of appropriate service rules or appropriate principles and its orders would always be subject to judicial review. No

administrative order or Government action to the detriment of any person can claim complete immunity from the control by law as such concept would be wholly repugnant to this basic constitutional concept of the rule of law in our country. Whether such judicial review should be by way of certiorari or mandamus is an entirely different question. If important rights of a Government servant are to be decided or penal orders are to be passed against him or when the order involves serious civil consequences, there may be even duty to act judicially while passing such administrative orders in view of the nature of the function or the power exercised and the rights affected thereby. Such orders must be passed in accordance with the principles of natural Justice as it was held by the Supreme Court in Binapani Devi's case, A.I.R. 1967 S.C. 1369. Such a decision is amenable to review by a writ of certiorari. In other cases when there is no question of rights or important penal consequences but the question is of protection, of some lesser interest or when a question of a privilege is involved, like the one in this case of confirmation or promotion, even then, equal protection clause under Article 16 would enable the Court to protect the Government servant. The right privilege distinction would, therefore, hardly be relevant in the context of Article 16 in finding out whether the administrative order is subject to judicial review, because even in matters of privileges or such lesser interests, a Government servant has due protection against arbitrary State action. The State must justify its own order against the concerned Government servant by some appropriate rule or principle showing rational purpose for the action which relates to the function the State performs in passing such an order to the detriment of a Government servant. Therefore, even though there may be no duty to act judicially, the State must act even in such matters of denying a privilege, as for example, of confirmation or of promotion, on the basis of the relevant statutory rules or on such appropriate principles. In this context of confirmation or promotion after determining suitability or eligibility of a person for such confirmation or promotion, the nature of the function and the interest affected may not impose a duty to act judicially in accordance with strict principles of natural justice. Even so, such an administrative order based on subjective satisfaction of the State or the competent authorities would always be subject to judicial review by a writ of mandamus, if the order is malafide, ultra vires the relevant rules or perverse or on extraneous or irrelevant consideration. This position is now well-settled after some of the recent decisions of the Supreme Court. In Union of India v. Anglo Afghan Agency, A.I.R. 1968 S.C. 718, the Supreme Court considered the question of import quota licences under the Export Promotion Scheme which was assumed to be not a statutory scheme but only an executive scheme. At page 723 the Supreme Court refused to accept the contention that the executive necessity released the Government from honouring its solemn promises relying on which citizens have

acted to their detriment. Under our Constitutional set up, no person may be deprived of his right or liberty except in due course of and by authority of law. If a member of the executive seeks to deprive a citizen of his right or liberty otherwise than in exercise of power derived from the law-common or statute-the Courts will be competent to, and indeed would be bound to, protect the rights of the aggrieved citizen At page 725 the Supreme Court observed that according to the various decisions the Court was competent to grant relief in appropriate cases, if contrary to the scheme, the authority declined to grant a licence or import certificate or the authority acted arbitrarily. Therefore, even assuming that the provisions relating to the issue of Trade Notices offering inducement to the prospective exporters were in character executive, the Union Government and its officers were, in view of the authorities of the Supreme Court, not entitled at their mere whim to ignore the promises made by the Government. The Supreme Court refused to hold that the Textile Commissioner was the sole Judge of the quantum of import licences to be granted to an exporter, and that the Courts were powerless to grant relief if the promised import licence was not given to an exporter who had acted to his prejudice relying upon the representation. To concede to departmental authorities that power would be to strike at the very root of the rule of law. Therefore, even in matters of privileges like licences or quotas the Supreme Court has invoked this basic concept of rule of law prevailing in the country. In the State of Mysore v. Syed Mahmood, A. I. R. 1968 S. C. 1113, even in matters of promotions which were discretionary, the Supreme Court held that if the State Government promoted juniors without considering the case of seniors as per rules, the High Court could issue a writ to the State Government compelling it to perform its duty and to consider whether having regard to their seniority and fitness, they should have been promoted on the relevant dates when officers junior to them were promoted. The High Court was corrected only on the ground that it was wrong in issuing a writ directing the State Government to promote them with retrospactive effect as such writs could not be issued without giving the State Government an opportunity in the first instance to consider fitness for promotion of the concerned Government servants. Similarly, in S. K. Gosh v. Union of India, A. I. R. 1968 S. C. 1385, the Supreme Court again invoked Article 16 in such a promotion matter under the relevant rules. The Directors of Postal Services' posts were to be filled by selection and not by promotion. The Supreme Court found that once a person was selected, the revision of inter-se seniority would be wholly arbitrary. The revision of seniority in the grade of Directors of Postal Services was, therefore, held not to be based on any rule or appropriate principle applicable to determination of seniority in that grade. The order being arbitrary and as it affected civil rights in respect of future

promotion, the order was quashed by in terms invoking equal protection clause under Article 16. At page 1389 the Supreme Court observed that the order was not based on any rule or appropriate principle applicable to determination of seniority in the grade and must, therefore, be held to be totally arbitrary. Such an arbitrary order which affected the civil rights of the petitioners in respect of future promotion must, therefore, be struck down as violating Article 16 of the Constitution. In view of these decisions, it is well settled that even in matters of privileges in view of Article 14 or 16, which has introduced the concept of rule of law in our country, the State cannot act arbitrarily. The State must show some appropriate statutory rule or principle showing rational purpose for its action which relates to the function the State performs in passing any such order to the detriment of the citizen or the Government servant concerned. In such matters even though there may be no duty to act judicially, the order can be reviewed by a suitable writ by keeping the State within the bounds of the rule of law in view of this settled legal position. The contention of the learned Asstt. Government Pleader that such an order of confirmation cannot be reviewed by this Court cannot, therefore, be accepted as it would be repugnant to the entire concept of the rule of law introduced by Article 16, in service matters, in particular. I have already mentioned, in view of the Explanation, the declaration of quasi-permanent status conferred ordinarily no right of confirmation but even on the footing that it is a privilege, the State has to decide this question of the prospect of permanency of quasi-permanent servants in accordance with the mandatory requirements of Roles, particularly Rule 7(2).

[8] In that view of the matter, this order must fail on the undisputed facts as the authorities have not observed the mandatory requirements of Rule 7(2). The authorities have admitted that no list has been prepared as envisaged by Rule 7(2). The explanation given by the authority for not preparing the list is that the question of seniority was not finalised of the Ex-state employees who were absorbed In the State service. Mere neglect in discharging statutory duties would not justify the authorities in ignoring this mandatory provision of Rule 7(2).

[9] The other ground urged by Mr. G. T. Nanavati that the list is to be prepared only in those cases where there is reservation under Rule 7(1) under the Instructions of the President, is wholly misconceived. If there is reservation under Rule 7(1) the confirmation has to be done in accor dance with the list, and the question is not one of mere eligibility for being considered for confirmation. The petitioner has no doubt contended that these posts were reserved, and in fact, in the affidavit the authorities have admitted that these 26 posts were in the same departmental order No. 171/55

reserved for these employees, whose cases were kept pendingfor consideration whether they should be made permanent from 1-10-57. Merely because instructions are not issued by the President, it cannot mean that there was no reservation. Whatever that fact may be over which the authorities have raised some dispute, the position remains undisputed at least to the extent that no list has been prepared under Rule 7(2). Therefore, the authorities have violated the mandatory provisions of Rule 7(2) in not proceeding to confirm the petitioner on the basis of theappropriate statutory rule. Mr. G. T. Nanavati argued that no prejudice has resulted to the petitioner as all the relevant considerations were made by the authorities by considering his seniority and merit, and the con fidential record has been disclosed in their affidavits showing unsatisfactory record of the petitioner. No question of prejudice arises if the authorities do not comply with the mandatory requirements. There would be no substantial compliance of this rule even if the petitioner's case was decided on its individual marits. The scheme of Rule 7(2) is to obtain prior advice of the Departmental Promotions Committee and to prepare a general list by applying the same relevant factors of seniority and merits to all the concerned servants. If, therefore, the petitioner alone were picked out by applying some other norms which were not applied to others, he would be discriminated. Therefore, the appointing authority must perform its statutory function as required by Rule 7(2) and if it is not done, the matter must go back to it.

[10] Mr. K. S. Nanavati had also vehemently relied upon the proviso to Rule 7(2). Mr. K. S. Nanavati produced with his further affidavit at the time of hearing the Annexure 2. It is an order of the Government dated 17th December 1952. The concluding portion of that order runs as under :-

> "I am to add that no reservation of vacancies for quasi-permanent employees is necessary. They should be confirmed according to their seniority in the grade subject to the condition that bo employee who is not eligible for quasi-permanent appointment should be confirmed so long as quasi-permanent employees are available for confirmation as stated in para 2(a) of this Ministry's latter C. No. 33(2) Ad. IT049 dated 28th November 1951. In other words, purely temporary employee who is not eligible for quasi-permanent appointment should not be confirmed so long as quasi-permanent employees are available for confirmation as stated in para 2(a) of this Ministry's latter C. No. 33(2)-Ad-IT/49 dated 28th November 1931.

When this order was not made a part of the petition, it would not be proper to

base the present decision on this order as the State would not have an opportunity to meet this case. As the order is ultimately quashed for breach of the mandatory provision of Rule 7(2), when the matter goes back to the authority, the authority must keep in mind the proviso to Rule 7(2) and decide the case only on the basis of seniority If the order has been passed by the Government that permanent appointment to any grade or post should be made purely on the order of seniority.

[11] Mr. Mr. K. S. Nanavati is also justified in his grievance that the authority was wrong in being influenced by the earlier order alleged to have been passed in 1958 as stated in the affidavit of the authority under which the petitioner was superseded. That order having not been passed in accordance with Rule 7(2), but by considering only individual merit of the petitioner and in the absence of the mandatory list envisaged by Rule 7(2), the authority could not take into account this void order. K. S. Nanavati also pointed out from the reply of the authority, dated 1-2-60 at Annexure 'E' that the authority even proceeded on the footing that the petitioner was given quasi-permanent status wrongly as he was positively unfit even at that stage. If this consideration has been borne in mind by the appointing authority, it is also an extraneous consideration for it is not open to the appointing authority to go behind this statutory declaration made under the relevant Rules 3 and 4, which leads to a presumption in favour of quasi-permanent employee, who is so declared after the appointing authority was duly satisfied as to his suitablity in respect of his age, work and character for employment in quasi-permanent capacity.

[12] Therefore, on the short ground that the appointing authority has not carried out the mandatory provisions of Rule 7(2) and it has been influanced by irrelevant considerations, the present petition must be allowed. I, therefore, quash the impugned order.

[13] The question which now arises is as to the further relief which must be granted. As I have already pointed out, this is not a question on which a writ of certiorari can be issued as the authority is not bound to act judicially. The order has to be passed only under Article 226 and so, this Court cannot pass an order of confirmation of the petitioner with back effect from 1st October 1951, as thereby this Court would be committing the same error which was committed by the Mysore High Court and which was corrected in the aforesaid decision of Syed Mahmood, (A.I.R. 1968 S.C. 1113). The writ would be one of mandamus only by directing the appointing authority to consider

the case of confirmation of the petitioner in the vacancy which was reserved for him on 1st October 1951 as per mandatory requirement of Rule 7(2) after excluding from consideration irrelevant aspects pointed out above, viz. the earlier order passed by the authority dated 11th December 1958 superseding the petitioner, and the observation made by the Collector in respect of the declaration having been wrongly issued under Rule 3 of giving a quasi-permanent status to the petitioner. Rule is accordingly made absolute with costs.

Petition allowed.

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