

N. Venkateswara Rao vs Commissioner And Special Officer on 10 February, 1994

Equivalent citations: 1994 SCC (2) 610, JT 1994 (1) 526, AIRONLINE 1994 SC 680, AIRONLINE 1994 SC 418

Author: Kuldeep Singh

Bench: Kuldeep Singh, S.P Bharucha

PETITIONER:

N. VENKATESWARA RAO

Vs.

RESPONDENT:

COMMISSIONER AND SPECIAL OFFICER

DATE OF JUDGMENT 10/02/1994

BENCH:

KULDIP SINGH (J)

BENCH:

KULDIP SINGH (J)

BHARUCHA S.P. (J)

CITATION:

1994 SCC (2) 610 JT 1994 (1) 526

1994 SCALE (1) 548

ACT:

HEADNOTE:

JUDGMENT:

The Judgment of the Court was delivered by KULDIP SINGH, J.- The appellants and Respondents 3 to 5, in the appeal herein, joined service as Lower Division Clerks (LDCS) in the office of the Commissioner and Special Officer, Vijayawada Municipality, Vijayawada in the State of Andhra Pradesh. The Director of Municipal Administration, Government of Andhra Pradesh exercising the powers delegated to him under Section 73(3) of the Andhra Pradesh Municipal Act, 1965 (the Act) accorded sanction by his order dated August 6, 1977 for the conversion and upgradation of the ten

posts of LDCs to that of Upper Division Clerks (UDC) in the Municipality at Vijayawada. The Panel Committee of the Municipality prepared a panel on October 13, 1977 of LDCs for the purpose of promotion to the post of UDCS. The appellants were included in the said panel. Since Respondents 3 to 5 were not eligible their names were not included in the panel. Appellants 1 to 6 were promoted, by the order dated October 15, 1977, as UDCs against the newly created posts. Appellants 7 to 13 were also promoted as UDCs on October 17, 1977 against leave vacancies. It is thus obvious that appellants 1 to 6 were promoted against substantive vacancies whereas appellants 7 to 13 were promoted against the leave vacancies.

2. One S. Koti Suryaprakasa Rao Chowdary sent a representation to the Government, wherein it was stated that the Director of Municipal Administration had no jurisdiction to upgrade the posts of LDCs to UDCs by his order dated August 6, 1977. The Government by its memorandum dated January 24, 1978 called for the report of the Director in the following terms :

"The Director of Municipal Administration is requested to examine this point and submit a detailed report to the Government at a very early date. He is also requested not to give any directions in this regard, to the Commissioner of the Vijayawada Municipality until the Government gives permission for upgradation of the posts of Revenue Inspectors to Upper Division Cadre."

On receipt of the above said memorandum the Director downgraded the ten posts - earlier upgraded by him - and as a consequence reverted the appellants as LDCs by the order dated January 30, 1978. It seems that the matter remained under the consideration of the Government for quite some time and finally on December 18, 1978 the Government approved the order of the Director dated August 6, 1977 by which ten posts of LDCs were converted and upgraded to UDCS. Thereafter by the order dated December 20, 1978 the appellants were again promoted as UDCS. Respondents 3 to 5 challenged the order dated December 20, 1978 before the Andhra Pradesh Administrative Tribunal, inter alia, on the ground that on December 20, 1978 the respondents were eligible for promotion as UDCs but they were not considered. The Tribunal by its judgment dated April 9, 1984 allowed the petition and quashed the order dated December 20, 1978 promoting the appellants as UDCS. This appeal by way of special leave - is against the judgment of the Tribunal.

3. It is not disputed that promotion as UDCs from amongst the LDCs is made from a panel prepared by a committee constituted under Section 74 of the Act. Rule 21 of the Andhra Pradesh Municipal Employees Service Rules provides that "when candidates are required for employment in any post in a unit preference shall be given to persons discharged or reverted from such posts in the unit....."

4. The post of UDC under the Rules is a selection post and as such promotion to the said post is made on the basis of qualifications and merit. Seniority is taken into consideration only where the qualifications and merit are proximately equal. Every appointment under the Rules is subject to probation for a period of two years on duty within a continuous period of three years. It is further provided that a LDC who has rendered satisfactory service for a total period of not less than three years in the lower division is not required to undergo the probation in the post of UDC.

5.It would be useful to reproduce the operative part of the order dated December 20, 1978 which is as under:

"The Government in their orders cited have accorded sanction for upgrading of ten LDRI posts to that of UDRI posts. Therefore all the ten posts of LDRI are upgraded into that of UDRI posts for a period of one year with immediate effect.

(2) The following postings are made to the above upgraded RI posts.

(3) The following persons are in the panel of UDCs and are probationers awaiting for reappointment."

6.The main contention raised before the Tribunal on behalf of Respondents 3 to 5 was that none of the appellants were probationers awaiting for reappointment and as such the provisions of Rule 21 of the Rules were not applicable to them. The precise argument advanced before the Tribunal was that Respondents 3 to 5 being senior to the appellants in the cadre of LDCs and despite being eligible - were arbitrarily left out and the appellants were promoted without considering the cases of the respondents. The Tribunal accepted the contention, set aside the promotion of the appellants on the following reasoning :

"In this context the learned Advocate for Respondents 3 to 15 conceded that Rule 21 of the Municipal Employees Service Rules, has in the context of Rule 17 to which there is a reference in that rule, to be interpreted as applicable only to whom Rule 17 is applicable which includes permanent officers or servants who have not completed 30 years of service, approved probationers and probationers. It was on this basis that the learned Advocate had contended that probationers who had been discharged from a post for want of a vacancy, cannot be treated as being similarly situated as persons who had not been appointed to the post at all and as such could be given preferential treatment without violating Articles 14 and 16 of the Constitution.

In my opinion, before examining the validity of Rule 21 of the Municipal Employees Service Rules, it would first be necessary in this case to decide the question whether any of the Respondents 3 to 15 could really be treated as probationers awaiting reappointment. As pointed out by the learned Advocate for the petitioners none of these respondents had been specifically placed on probation and there is no such mention in the orders of their initial appointments. It is only subsequently in their fresh appointment order dated December 20, 1978 that these respondents have been described as probationers awaiting reappointment. Respondents 3 to 8 were appointed in the vacancies of the posts of LDC which were upgraded temporarily to that of UDC. Respondents 9 to 15 were appointed as UDCs only in temporary leave vacancies. In view of this I agree with the learned Advocate for the petitioners that there was no question of appointing any of them on probation and therefore these persons cannot be treated as probationers awaiting reappointment. Even the learned Advocate for Respondents 3 to 15 has conceded that Rule 21 could be considered to

be applicable generally to any persons who had been appointed earlier to higher posts, but to persons who had been so appointed on probation and who were either probationers or approved probationers in posts from which they had been earlier discharged or reverted for want of vacancy. Hence it has to be held that even in accordance with the interpretation of Rule 21 by the learned Advocate representing Respondents 3 to 15 those respondents are not entitled to get the benefit of concession given in that rule, since they cannot be considered to be probationers awaiting appointment. Consequently the appointment of Respondents 3 to 15 to the posts of UDCs on the ground of their alleged eligibility for preferential treatment on the basis of Rule 21 of A.P. Municipal Employees Service Rules, has to be held as vitiated and the impugned proceedings CI-22744/77, dated December 20, 1978 appointing them as UDCs have to be held as illegal. The impugned proceedings dated December 20, 1978 issued by Respondent 1 are therefore set aside."

7.Appellants I to 6 were promoted as UDCs by the order dated October 15, 1977 to the posts which were created by the order dated August 6, 1977 issued by the Director, Municipal Administration, Andhra Pradesh. The order did not mention that the posts were being created temporarily or for a limited period. Similarly, the order dated October 15, 1977 promoting appellants I to 6 did not mention that the said promotions were temporary or on ad hoc basis. The appointment order clearly mentioned that appellants 1 to 6 were placed in the panel for promotion as UDCs by the Panel Committee by its Resolution No. 17 dated October 13, 1977 and as such they were being promoted and appointed as UDCs against the upgraded posts. We have no hesitation in holding that the promotion of appellants 1 to 6 on October 15, 1977 was regular promotion in accordance with the Rules. Admittedly, Respondents 3 to 5, having not passed the requisite test, were not eligible to be considered for promotion in the year 1977. Since appellants I to 6 had already rendered satisfactory service in the lower division for more than three years they were not required to undergo the probation prescribed under the Rules. In any case their promotion being on regular basis they would be treated to be probationers for the purposes of Rule 21 read with Rule 17 of the Rules. Appellants I to 6 were reverted because the posts were downgraded by the Director. They were again promoted by the order dated December 20, 1978. Although Respondents 3 to 5 had become eligible to be considered for promotion in December 1978, they could not have been promoted' despite they being senior to the appellants - for two reasons. They had not been brought on promotion-panel by the Panel Committee under Section 74 of the Act and secondly, the appellants being "

probationers awaiting for reappointment" were entitled to preference under Rule 21 of the Rules. We are, therefore, of the view that the Tribunal fell into patent error in setting aside the promotion order dated October 20, 1978 to the extent it related to petitioners I to 6. The order of the Tribunal is thus liable to be set aside.

8.So far as appellants 7 to 13 are concerned they cannot be equated with appellants I to 6. These appellants were promoted against leave vacancies. They had no right to hold the posts. They cannot be considered to be probationers for the purpose of Rule 21. It is not disputed that appellants

7 to 13 were reverted from the posts of UDCs which they were holding against leave vacancies. They were not "probationers awaiting for reappointment" under the Rules. They could not be promoted again on December 20, 1978 without considering Respondents 3 to 5 who were admittedly senior to them. A fresh panel should have been drawn up by the Panel Committee by considering appellants 7 to 13, Respondents 3 to 5 and other eligible LDCs. We are, therefore, of the view that no fault can be found with the judgment of the Tribunal to the extent that Respondents 3 to 5 should have been considered for promotion along with appellants 7 to 13.

9. We allow the appeal, set aside the impugned judgment of the Tribunal and direct as under:

(i) The promotion of appellants 1 to 6 was rightly and legally made by the order dated December 20, 1978 and they shall rank senior to Respondents 3 to 5 in the cadre of UDCs.

(ii) Appellants 7 to 13 have been holding the posts of UDCs since their promotion under the interim orders of this Court. We, therefore, are not inclined to set aside the order of their promotion dated December 20, 1978. We, however, direct that Respondents 3 to 5 be considered for promotion to the post of UDC with effect from December 20, 1978 and if selected they be given deemed promotion from the said date. In that eventuality they shall rank senior to appellants 7 to 13 but junior to appellants 1 to 6. The appeal is disposed of in the above terms. No costs.