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Andhra Pradesh High Court

Case No: Writ Petition No. 10788 of 2001 and Writ Appeal No. 797 of 2002

R. Lova Raju — APPELLANT

Vs

The Chairman, Visakhapatnam Port Trust and Others — RESPONDENT

Date of Decision: June 4, 2002

Acts Referred:

- Constitution of India, 1950 - Article 14, 16, 19, 21

Hon'ble Judges: S.R.K. Prasad, J; S.R. Nayak, J

Bench: Division Bench

Advocate: J. Venugopala Rao, for the Appellant; A.A.G., for the Respondent

Judgement

@JUDGMENTTAG-ORDER

S.R. Nayak, J.
A short but an important question that arises for decision in this writ petition is whether an applicant for the post of Assistant Executive Engineer (Electrical Maintenance) (Class I) by way of promotion should possess three years experience in the case of Degree holders and six years experience in the case of Diploma holders only in the feeder cadre of Assistant Engineer (Electrical) or whether three years or six years experience, as the case may be, in any responsible capacity in a large electrical establishment, is sufficient.

2. The background facts of the case be noticed first. Sri R. Lova Raju, the petitioner, entered the service of the Visakhapatnam Port Trust - the respondent herein and he worked in Class III posts of Draughtsman "C", Draughtsman "B" and Foreman (Electrical Maintenance) from 8.12.1981 to 20.8.1999 and in recognition of his services, he was promoted to the Class II post of Assistant Engineer (Electrical Maintenance) with effect from 21.08.1999 and he was placed under probation for a period of two years. When the matter stood thus, two posts of Assistant Executive Engineer (Electrical Maintenance) (Class-I) became vacant in Mechanical Engineering Department, VPT by 30.11.2000, due

to rolling back of the age of superannuation of port employees from 60 years to 58 years. As per the recruitment rules, the following qualifications and experience are prescribed for selection of Assistant Executive Engineer (Elect. Maint.).

a) Qualifications : A degree/diploma in Electrical Engineering from a recognised institution or equivalent.

b) Experience : About 3 years experience in the case of Degree holders and 6 years experience in the case of Diploma holders in a large electrical establishment in a responsible capacity.

c) Method of Recruitment : By promotion from A.E. (Electrical) of Electrical Maintenance section of Inner Harbour failing which by direct recruitment.

d) Age : 35 years and below. Age relaxation to the extent of 5 (five) years in respect of SC/ST candidates, 3 (three) years in respect of OBC candidates and 5 (five) years in respect of Government servants including VPT and DLB employees in the event of direct recruitment.

3. According to the respondents, when two vacancies of Assistant Executive Engineer (Electrical Maintenance) (Class I) arose in the Department by 30.11.2000, an exercise was made to find out whether any eligible candidates were available in the line of promotion from the lower post of Assistant Engineer (Electrical). The department, it seems, considered the case of the petitioner and four others serving in the feeder cadre of Assistant Engineer (Electrical) to find out whether they are suitable for promotion. According to the department, ultimately, they found that none of them were suitable for promotion to the post of Assistant Executive Engineer (Electrical Maintenance) (Class I) for one or the other reason. The petitioner was disqualified from consideration, according to the department, on the ground that he was still under probation in the cadre of Assistant Engineer. In that view of the matter, the department took steps to fill up the two vacancies in the post of Assistant Executive Engineer (Electrical Maintenance)(Class I) by direct recruitment as provided under the Recruitment Rules and issued Employment Notice 5/2000 dated 8.12.2000 and the same was published in the Edition of "THE HINDU" dated 20.12.2000 calling for applications from eligible candidates to fill up two posts of Assistant Executive Engineers by direct recruitment. The petitioner having come to know about the advertisement/employment notice, made a representation on 6.1.2001 to the Manager (Operations), Visakhapatnam Port Trust to consider his candidature for appointment to the post by way of promotion. The request of the petitioner was refused. The alternative request of the petitioner to consider his case for appointment to the post Assistant Executive Engineer, Electrical Class I by direct recruitment was also refused on the ground that the petitioner was still under probation at the relevant point of time. Under those circumstances, the petitioner filed W.P.No.10788 of 2001 praying for the following relief :

"For the reasons stated in the accompanying affidavit the petitioner herein prays that the Honourable Court may be pleased to issue a Writ or order, or direction, particularly one in the nature of Writ of Mandamus to declare the examination held on 3.6.2001 for the direct candidates for the post of Assistant Executive Engineer, Electrical Class-I as notified without sending the petitioner"s application is null and void and opposed to Articles 14, 16, 19 and 21 of the Constitution of India and also opposed to principles of natural justice and also opposed to Service Regulations of Visakhapatnam Port Trust in the interest of justice and fairplay."

4. The writ petition was opposed by the respondents by filing counter affidavits. The writ petition was opposed among other grounds mainly on the ground that the petitioner, as on the relevant date, lacked three years experience for the post of Assistant Executive Engineer (Electrical Maintenance) (Class I) and, therefore, he was ineligible to be considered for appointment to the post. Further, the department, opposing his appointment to the post of Assistant Executive Engineer by way of direct recruitment, has contended that the petitioner was born on 1.7.1951 and he was 49 years and 5 months old by the cut-off date i.e., 8.12.2000 whereas as per the eligibility criteria for appointment to the post of Assistant Executive Engineer, a candidate for the post should be not more than 40 years old in the case of BCs and, therefore, he was also ineligible to be considered for appointment to the post by way of direct recruitment. The petitioner filed reply affidavit to the counter filed by the Port Trust.

5. In the writ petition, the learned single Judge in WPMP No.13413 of 2001 issued a direction on 6.6.2001 to the respondents to keep one post of Asst. Executive Engineer, Electrical/Maintenance Class I unfilled until further orders. The respondents on appearance filed WVMP No.1788 of 2001 seeking vacation of the said interim order dated 6.6.2001. The learned single Judge by his order dated 26.3.2002 allowed WVMP No.1788 of 2001 and vacated the interim order dated 6.6.2001. The petitioner being aggrieved by the above order of the learned single Judge dated 26.3.2002 preferred Writ Appeal No.797 of 2002. When that Writ Appeal was listed before us on 23.4.2002, we thought that it was appropriate to hear and dispose of the main writ petition itself and accordingly we directed the Registry to post the writ petition along with writ appeal after obtaining necessary orders from the Hon"ble the Chief Justice. Accordingly, as per the direction of the Hon"ble the Chief Justice, writ petition and writ appeal are listed before us for hearing. With the consent of the learned counsel appearing for the petitioner-appellant and the learned Additional Advocate General appearing for the respondents, we have heard the writ petition and the writ appeal finally and they are being disposed of by this common judgment.

6. Sri J. Venugopal Rao, learned counsel appearing for the petitioner-appellant would contend that the action of the department in disqualifying the petitioner for appointment to the post of Assistant Executive Engineer (Electrical Maintenance) (Class I) by way of promotion on the ground that on the cut-off date he did not have three years experience in the feeder cadre of Assistant Engineer (Electrical) is totally arbitrary and unsustainable.

The learned counsel would contend that the petitioner on the cut-off date had the experience of nearly 19 years in responsible capacities. The learned counsel would also point out that the petitioner is a first class degree holder in the discipline concerned and he had fulfilled all the qualifications prescribed under the Recruitment Rules as on the relevant data. The learned counsel would contend that since the petitioner was fully qualified for appointment to the post of Assistant Executive Engineer (Electrical Maintenance) (Class I) by way of promotion, there was no justification for the department to go for direct recruitment, and in terms of Recruitment Rules, the department can resort to direct recruitment only if the department is not in a position to find suitable candidates from the feeder cadre of Assistant Engineer (Electrical) and not otherwise. The learned counsel would also contend that the department is guilty of practising invidious discrimination violating Article 14 postulates. Elaborating this contention, the learned counsel would contend that there are many instances where similarly circumstanced officials in the feeder cadre of Assistant Engineer (Electrical) were appointed to the post of Assistant Executive Engineer (Electrical Maintenance) (Class I), both by way of promotion as well as by way of direct recruitment. The learned counsel would also press into service the doctrine of legitimate expectation placing reliance on the judgment in U.P Awas Evam Vikas Parishad Vs. Gyan Devi (Dead) by L.Rs. and another, etc. etc., .

7. The learned Additional Advocate General, on the other hand, would contend that as on the cut-off date, the petitioner did not have three years experience in the feeder cadre of Assistant Engineer (Electrical) and in fact, as on the cut-off date, the petitioner was on probation in the feeder cadre and, therefore, he was ex facie ineligible for being considered for promotion to the post of Assistant Executive Engineer (Electrical Maintenance) (Class I). The learned Additional Advocate General would contend that though the recruitment rules dealing with experience speak about experience in a "responsible capacity" in a large electrical establishment, since the post of Assistant Executive Engineer (Electrical Maintenance) is a Class I post and the channel of promotion to it is from the post of Assistant Engineer (Electrical), the person aspiring for promotion to the post of Assistant Executive Engineer (Electrical Maintenance) should possess a minimum of three years experience in the feeder cadre of Assistant Engineer (Electrical) and not in any other cadre or capacity. The learned Additional Advocate General would maintain that the experience of the petitioner de hors the post of Assistant Engineer (Electrical) cannot be counted towards three years experience prescribed under the recruitment rules. The learned Additional Advocate General, placing reliance on the judgments in Ashok Kumar Sharma and Others Vs. Chander Shekhar and Another, , M. Chandrasekhar Vs. APSRTC, Hyderabad and Others, , Dr. B.R. Bapuji Vs. Registrar, University of Hyd. and others, would contend that a candidate seeking promotion should possess the prescribed qualification as on the cut-off date and if he does not possess such qualifications, he is ineligible for consideration and that subsequent acquisition of the qualifications would not make him eligible for appointment. The learned Additional Advocate General meeting the contention of the learned counsel for the petitioner that the petitioner had worked on officiating basis in the post of Assistant Executive Engineer

(Electrical Maintenance) (Class I) and, therefore, looking from that angle also, he should have been promoted to the post, would contend that mere officiation in a post will not confer any vested right on the incumbent to seek appointment to that post and in that regard, the learned Additional Advocate General would place reliance on the judgments in Keshav Chandra Joshi and others etc. Vs. Union of India and others, , Smt. Sanjukta Pattanaik Vs. State of Orissa and others, , Sreedam Chandra Ghosh Vs. State of Assam and others, .

8. Although the learned counsel for the petitioner pressed into service, the doctrine of estoppel, the fact of petitioner officiating in the post of Assistant Executive Engineer (Electrical Maintenance) (Class I) and the petitioner acquiring three years experience in the feeder cadre of Assistant Engineer (Electrical) subsequent to the cut-off date in support of the claim of the petitioner, we do not find any merit in those contentions.

9. Doctrine of Promissory estoppel means that if Government or some other public body or its officials make a representation or a promise and an individual acts upon such promise and alters his position, Government or public body must make good that promise and shall not be allowed to fall back upon the formal defect in the contract. The doctrine of promissory estoppel does not belong to the law of contract or evidence but appertains to equity. Doctrine of promissory estoppel is available not merely as a plea in defence but also to found a cause of action. Since the doctrine of promissory estoppel is an equitable doctrine, it would be subject to limitations to which all equitable rights and obligations are subjected. Therefore, it would be open for the Government or public authority to show that the officer or agent who made the representation acted beyond the scope of his authority and the person who dealt with him is supposed to have notice of the limitation of the authority of a public servant with whom he is dealing. It is also open to the public authority or the government to prove that there were special considerations which necessitated his not being able to comply with his obligations under the doctrine of promissory estoppel, in the public interest. In the context of this case, it needs to be emphasised that the doctrine of promissory estoppel cannot be invoked to prevent the government from acting in discharge of its duty under the law, or where its application would involve the violation of a statute. In short, the doctrine of promissory estoppel cannot be invoked against a statutory provision or to support ultra vires act. We are at a loss to understand how the doctrine of promissory estoppel could be applied to the facts of this case to support the claim of the petitioner. In the first place, neither the respondent-department nor any of its officers have promised or made any representation to the petitioner that he would be appointed to the post of Assistant Executive Engineer (Electrical) (Class I). Secondly, even assuming that such a promise or representation was made to the petitioner by the department or its officers, even then, doctrine of promissory estoppel cannot be applied because application of the doctrine would result in breach of law. If the petitioner as on the cut-off date did not possess the prescribed eligibilities and, therefore, he is not entitled to be considered for appointment to the post of Assistant Executive Engineer (Electrical) (Class I), by applying the doctrine of promissory estoppel,

the Court cannot direct that the petitioner should be appointed to the post of Assistant Executive Engineer (Electrical) (Class I) in breach of the recruitment rules, because, it is well settled that doctrine of promissory estoppel cannot be invoked to support a ultra vires act.

10. It is well settled that mere officiation in a post will not confer any right in the incumbent to claim appointment to that post de hors the recruitment rules and without possessing the prescribed qualifications. In Smt. Sanjukta Pattanaik Vs. State of Orissa and others, , the petitioner therein was appointed as a clerk on June 1, 1974, against a vacancy. On August 9, 1990, she seemed to have been kept in-charge of teaching post in the school. It was her claim that pursuant thereto she was teaching as a teacher. Since no action was taken by the authorities to have her appointed as a teacher, she filed O.J.C.No.671 of 1991 on March 27, 1992 and pending disposal interim direction was granted. Pursuant thereto, she was appointed with provisional approval by the Director on August 4,1992. On a writ petition filed by the 5th respondent on April 15, 1993, alleging that she was not entitled to the post, the matter was directed to be reconsidered. The Director refused appeal by proceedings dated March 4, 1995, resulting in filing of one more writ petition in the Orissa High Court. That writ petition was dismissed by the Orissa High Court. Assailing the validity of that order before the Apex Court, it was contended that the High Court was not right in rejecting the claim of the petitioner, on the ground that all those cases which were pending consideration, required to be decided in accordance with the full bench judgment of the High Court in O.J.C.No.5361 of 1991 reported in 1995 LAB IC 468. It was also contended that since the petitioners claim was already considered and approval was given by the Director, it was not a pending case and she must, therefore, be appointed as a teacher. The Apex Court while rejecting that contention and dismissing the SLP held :

"(3) It is seen that appointment should be in accordance with the Rules to a post as defined under Rule 2(b) of the Orissa Education (Recruitment and Conditions of Service of Teachers and Members of the Staff of Aided Education Institutions) Rules, 1974. Since the petitioner was working in a clerical post, she is not entitled to be approved and the view taken by the Director is correct. Admittedly, she was appointed as a clerk. While working as clerk, the mere fact that she was kept in charge of the teaching post, does not confer any right to appointment to a post, because she was not initially appointed to a teaching post. The full bench, therefore, has rightly interpreted that the initial appointment should be to a teaching post and a clerk, though directed to discharge the duties as a teacher, cannot claim the post as a teacher. Consequently, the earlier division bench judgment of the High court was set aside. Resultant operation was that all those cases which had become final were directed not to be reopened and all those cases pending consideration either in writ petition or before the authorities were required to be dealt with in accordance with the Rules. Though the petitioner was provisionally given approval pursuant to the direction issued by the High court in the said writ petition, that would be only subject to the appointment and since no appointment could be made and was in fact

not made, the order could not be said to be in accordance with the Rules. The provisional approval granted by the Director cannot be construed to be a ratification of the petitioner''s appointment as teacher. The view of this court in Krishna Chandra Kama v. State of Orissa is consistent with the above view and is of no help to the petitioner. Under these circumstances, we do not find any illegality in the order passed by the High court warranting interference."

11. It is also well settled that the eligibility of a candidate for a post should be decided with reference to the relevant date prescribed by the employment notification, service rules or the date to receive the application, as the case may be, and the subsequent acquisition of the required qualification would not make him eligible for the post with retrospective effect. The Supreme Court in Ashok Kumar Sharma v. Chandra Shekhar (supra 2) held :

"The proposition that where applications are called for prescribing a particular date as the last date for filing the applications, the eligibility of the candidates shall have to be judged with reference to that date and that date alone, is a well-established one. A person who acquires the prescribed qualification subsequent to such prescribed date cannot be considered at all. An advertisement or notification issued/published calling for applications constitutes a representation to the public and the authority issuing it is bound by such representation. It cannot act contrary to it. One reason behind this proposition is that if it were known that persons who obtained the qualifications after the prescribed date but before the date of interview would be allowed to appear for the interview, other similarly placed persons could also have applied. Just because some of the persons had applied notwithstanding that they had not acquired the prescribed qualifications by the prescribed date, they could not have been treated on a preferential basis. Their applications ought to have been rejected at the inception itself. This proposition is indisputable and in fact was not doubted or disputed in the majority judgment. This is also the proposition affirmed in Rekha Chaturvedi v. University of Rajasthan."

12. To the same effect, the judgments of this Court in M. Chandrasekhar v. APSRTC, HYDERABAD and others (supra 3), Dr. B.R. Bapuji v. Registrar, University of Hyderabad (supra 4).

13. We also do not find any merit in the contention of the learned counsel for the petitioner based on the alleged invidious discrimination levelled against the respondent-Department. Even assuming that the respondent-Department, on previous occasions, had appointed certain ineligible candidates in the feeder cadre of Assistant Engineer (Electrical) to the post of Assistant Executive Engineer (Electrical Maintenance) (Class I), that circumstance would not justify the Court to issue Mandamus to the respondent-department to promote another ineligible person. The opinions of the Apex Court in State of Orissa Vs. Durga Charan Das, ; Coromandel Fertilizers Ltd. Vs. Union of India (UOI) and Others, ; Chandigarh Administration and another Vs. Jagjit Singh and another, and Gursharan Singh and others etc. Vs. New Delhi Municipal Committee and others, are the binding authorities to state that if an authority makes an order in violation

of a rule and confers a right on an ineligible person, that would not justify a claim by another ineligible person.

14. In our considered opinion, the only question that arises for our consideration and decision relates to the experience prescribed under the recruitment rules. The applicant for the post of Assistant Executive Engineer (Electrical Maintenance) (Class I), as per the recruitment rules, should possess three years experience in the case of degree holders and 6 years experience in the case of diploma holders in a large electrical establishment in a responsible capacity. The words "in a responsible capacity" are very significant. If the rule making authority has intended that an applicant for the post should possess three years experience only in the feeder cadre, then, there was no difficulty at all for the rule making authority to state so in clear terms. In that view of the matter, the phrase "in a responsible capacity" cannot be interpreted to mean "in the post of "Assistant Executive Engineer (Electrical)." Such an interpretation/ construction, in our considered opinion, would offend the clear, apparent intendment of the rule. It needs to be noticed that the three years experience is prescribed as an essential qualification not only to those candidates who could be appointed to that post of Assistant Executive Engineer (Electrical Maintenance)(Class I) by way of promotion, but also those candidates who seek appointment to the post by way of direct recruitment. A candidate to the post of Assistant Executive Engineer (Electrical Maintenance) (Class I) by way of direct recruitment possessing three years experience in the post of Assistant Engineer (Electrical) may not arise in the case of every applicant for the post because, it is nobody''s case that direct recruitment is open only to those in-service candidates serving in the cadre of Assistant Engineer (Electrical) in the respondent organisation. In other words, others who possess the prescribed qualifications as well as the three years experience in a responsible capacity in any large electrical establishment can also apply for the post by way of direct recruitment. It is the case of the petitioner that he has had 19 years of long service in responsible capacities in the department and, therefore, he fulfilled the prescribed experience as on the cut-off date. In that view of the matter, it becomes imperative for the department to first decide whether the petitioner did possess three years experience in responsible capacities or not as on the cut-off date. We hasten to add that it is not necessary that all 19 years of experience possessed by the petitioner should be in responsible capacities. What is relevant is that if the petitioner is found to have three years experience in responsible capacity or capacities out of his 19 years experience, then, he is entitled to be considered for promotion to the post of Assistant Executive Engineer (Electrical Maintenance) (Class I), of course, subject to he fulfilling the other prescribed eligibilities. Such an exercise is admittedly not done by the department in the instant case. The petitioner was disqualified from consideration straightaway only on the ground that he did not possess three years experience as on the cut-off date in the feeder cadre of Assistant Engineer (Electrical). The above reason given by the department not to consider the candidature of the petitioner for promotion to the post of Assistant Executive Engineer (Electrical Maintenance) (Class I) by way of promotion is not tenable. There is no controversy that the department can resort to direct

recruitment only if it does not find suitable candidates from among in-service candidates serving in the feeder cadre of Assistant Engineer (Electrical).

15. Since we propose to dispose of the writ petition itself finally, necessity of deciding the writ appeal which is directed against the interlocutory order on merits would not arise.

16. In the result and for the foregoing reasons we dispose of this writ petition and the writ appeal with the following directions:

(i) The respondents are directed first to decide whether the experience possessed by the petitioner fulfils the prescribed experience of three years in a responsible capacity or capacities within the meaning of that term in the light of this judgment.

(ii) If the respondent finds that the petitioner has three years experience in a responsible capacity or capacities, then, the respondents are directed to promote the petitioner to the post of Assistant Executive Engineer (Electrical Maintenance) (Class I) by way of promotion subject to the petitioner fulfilling the other prescribed eligibilities.

(iii) The above directions shall be carried out within a period of one month from the date of receipt of a copy of this order.

(iv) Further, the respondents are directed not to take any steps to fill up vacancy in one post of Assistant Executive Engineer (Electrical Maintenance) (Class I) till the above directions are complied with and unless they find that the petitioner is not entitled to be promoted to that post.

(v) Since the writ petition is disposed of, Writ Appeal No. 797 of 2002 shall stand disposed of as unnecessary.

(vi) There shall be no order as to costs.