

DON KARUNARATNE
v.
THE MONETARY BOARD OF THE CENTRAL BANK
OF SRI LANKA AND OTHERS

SUPREME COURT
BANDARANAYAKE, J.,
KULATUNGA, J. AND WADUGODAPITIYA, J.
SC APPLICATION NO. 144/91
JUNE 17, 1992.

Fundamental Rights – Change of scheme of promotion – Discrimination – Article 12 (1) of the Constitution.

Held :

The present employees of the Central Bank (including the petitioner) have no vested right to preclude the Bank from altering the scheme of promotion if it were necessary to do so in the interest of the service. Such alteration is legitimate subject to the qualification that it should not infringe Article 12 (1).

The fact that officers had in the past been promoted without a written test as proposed under the new scheme will not constitute discrimination.

The allegation that the proposed written test is unreasonable in that it is likely to place the petitioner and other officers in his position at a disadvantage vis-à-vis graduate officers who are eligible for promotion under the existing scheme along with the petitioner and other officers on the basis of a prescribed period of service and a good record of work and conduct, must be established upon sufficient material failing which, the charge of discrimination will fail.

Cases referred to :

1. *Perera v. University Grants Commission* 1 FRD 103.
2. *Gunaratne et al v. Sri Lanka Telecom* SC Application No. 70/92 SC Minutes 24.8.92.

APPLICATION for infringement of fundamental rights under Article 12 (1) of the Constitution.

Ran Banda Seneviratne for petitioner.

A. R. Wickremanayake S.C. for 1st and 2nd respondents.

3rd respondent absent and unrepresented.

Cur. adv. vult.

September 25, 1992.

KULATUNGA, J.

The petitioner, who is a non-staff class grade III clerk of the Central Bank of Sri Lanka (The " Bank ") complains that the amendment dated 30.11.90 (P5) to the scheme of recruitment for promotion to non-staff class grade IV (Staff Assistant) in the Bank's service (which was sought to be implemented in November 1991) is violative of his rights under Articles 12 (1), 12 (2) and 14 (g) of the Constitution. P5 states that in future promotions will be based on the record of work and seniority (as previously) as well as on the performance at a written examination which would attract 50% of the total marks, as follows :-

- | | |
|---|-----------------|
| 1. General Aptitude (non-quantitative) | 20 marks |
| 2. Sri Lanka's Economy | 15 marks |
| 3. Language (Sinhala/Tamil/English at officer's choice) | <u>15 marks</u> |
| | 50 marks |

It is the position of the petitioner that the proposed scheme for promotion should be applied only to the new entrants and that it would otherwise be violative of his rights under Articles 12 (1) and 12 (2) of the Constitution in that -

- (a) It would place old entrants like the petitioner who had joined the Bank as far back as 1963 at a disadvantage considering that others who were similarly circumstanced as the petitioner have already been promoted under the existing scheme and have since risen to the Staff grade ;
- (b) the petitioner and others who joined the service on the basis of the minimum qualification of G.C.E. (O. Level) with 5 credits cannot compete with their fellow officers who are graduates ;
- (c) the requirement of a written test is only a colourable exercise designed to deny promotions to the old hands like the petitioner who are members of the Central Bank Employees' Union which is not considered pro-government. The petitioner states that he is the General Secretary of the said Union.

The petitioner also invokes Article 14 (g), possibly on the ground that in the circumstances set out at (b) and (c) above the impugned scheme constitutes a total denial of his right to promotion amounting to a deprivation of the freedom to engage in his occupation.

The petitioner has joined as parties to this application – The Monetary Board of the Bank (the 1st respondent), The Director of Establishments of the Bank (the 2nd respondent) and Mrs. D. C. A. Dias (the 3rd respondent). The petitioner states that he joined the Bank as a non-staff class grade II Clerk on 15.08.63 (P1) and that the 3rd respondent too joined the Bank in the same capacity about the same time. The 1st and the 2nd respondents admit this fact. The petitioner adds that the 3rd respondent has been promoted to non-staff class Grade IV on 05.09.91 (P7) despite the fact that she had been discontinued from service upon a vacation of post notice (in 1980) and had been later reappointed ; and that her appointment on promotion has been back dated by two years. The petitioner alleges that she has been afforded favoured treatment and was exempted from the impugned test because she is the Secretary of the Seva Vanitha Unit in the Central Bank which enjoys government patronage.

The 2nd respondent states that under the scheme that existed (upto the time of the impugned revision) (exhibit 'X') promotions were effected on the basis of merit and seniority ; that the proposed written test is but a means of evaluating merit, and hence the fundamental basis of promotion has not been changed or altered ; that non-staff class Grade IV being a middle level supervisory grade, such a test for promotion to that grade is necessary and rational and as such it is not discriminatory. The 2nd respondent denies the allegation that the said test has been imposed as a device for denying the petitioner's promotion on account of his membership of the Trade Union to which he belongs.

In defence of the promotion of the 3rd respondent (which occurred prior to the period when the proposed written test was to become effective), the 2nd respondent states that although the petitioner and the 3rd respondent joined the Bank's service at the same time, the 3rd respondent was able to obtain her promotion to non-staff class Grade III in 1971, after a period of 7 years which is the minimum period of service required in Grade II for promotion ; but the petitioner

was found suitable for promotion to non-staff class Grade III only in 1974, after 11 years' of service in Grade II ; that the 3rd respondent was eligible for promotion to non-staff class Grade IV from 1980 having completed the requisite period of service in Grade III but she lost the opportunity of such promotion by reason of the termination of her service upon a vacation of post notice when she overstayed her period of leave abroad ; that on an appeal made by her, the Monetary Board re-employed her as a new recruit (in 1983) and placed her on the initial salary of non-staff class Grade III without the benefit of her past service, except for the purpose of pension ; and that in view of this she could not be promoted to Grade IV until she became eligible for it in the normal course.

However, in 1989 on an appeal by the 3rd respondent, the Monetary Board decided to restore her seniority and place her on the salary point which she drew at the time she was served with a vacation of post notice ; whereupon she became eligible for promotion to staff class Grade IV with effect from 1983, on the basis of seniority and the requisite marks for promotion. The 2nd respondent further states that since 1983 the 3rd respondent consistently had higher marks than the last promotee from 1983 onwards. However, she could not be promoted only for the reason that she had been re-employed as a new recruit in 1983 ; and even though upon the Board decision in 1989 she qualified for promotion with effect from 1983, she was given her promotion only with effect from 01.01.89. The 2nd respondent denies the allegation that she was promoted because of her position as the Secretary of the Seva Vanitha Unit in the Bank.

In considering the allegation made by the petitioner in respect of the 3rd respondent, the following matters are also relevant :-

- (a) The Board decision in 1989 amounted to a withdrawal of the vacation of post notice served on her in 1980 whereupon she became eligible for promotion on the basis of a reinstatement without any break in service.
- (b) Although the petitioner alleges that she was exempted from the proposed written test, she was promoted on 05.09.91 before the date from which the said test was to become effective i.e. November 1991 ; and her appointment itself was

made effective from 1989, which is a date anterior to the promulgation of the revised scheme for promotion. There was thus no exemption of the 3rd respondent from the impugned test.

(c) In his petition, the petitioner states that he seeks no relief against the 3rd respondent and does not (expressly or impliedly) pray for a declaration that the 3rd respondent's promotion to non-staff class Grade IV was invalid.

My conclusion is that on the basis of the above material, the allegation touching the 3rd respondent's promotion fails.

During the hearing of this application, the learned Counsel for the petitioner informed us that he is not contending that the 3rd respondent's appointment is invalid and that the petitioner's only complaint is that he himself had not been promoted under the existing scheme, without a written test. The relief prayed for by him is a declaration that the revised scheme for promotion introduced by P5 and the consequent steps (which I shall presently refer to) are invalid as being violative of his rights under Articles 12 (1), 12 (2) and 14 (g) of the Constitution. The petitioner is thus claiming the right to be considered for promotion under the existing scheme, without having to sit for the proposed written test.

Assuming that the petitioner has the right to promotion under the existing scheme, the 2nd respondent avers that even under the said scheme the petitioner has failed to attain the requisite standard for promotion and that consequently, several of his juniors have obtained promotions over him. In his counter affidavit, the petitioner does not specifically deny the said averment but only makes a general denial of the averments contained in the 2nd respondent's affidavit " which are inconsistent" with the petitioners averments contained in his original affidavit and adds that the averments in the 2nd respondent's affidavit are bold statements and bare assertions that are not supported by any documentary evidence. I see no difficulty which would have precluded the petitioner from specifically denying the averment that his performance does not merit his promotion and that on that basis officers junior to him have been promoted over him. In the circumstances, the petitioner is not entitled to demand strict proof of the facts alleged against him and the burden has not shifted to the 2nd respondent to establish such facts by documentary evidence.

I am, therefore, constrained to accept the 2nd respondent's version that the petitioner is not suitable for promotion even under the existing scheme. As such, there has been no discrimination by the Bank in failing to promote the petitioner to Grade IV under the scheme.

However, the main issue we have to determine is that (even if the petitioner is presently not suitable for promotion) whether the impugned scheme is *per se* violative of his fundamental rights and hence void. This Court has the power in appropriate cases to determine that a scheme for selection of persons for purposes such as admission to the University or promotion to a higher post is void. In such cases, aggrieved persons may challenge such scheme as soon as it is made and without having to await its actual implementation. *Perera v. University Grants Commission* ⁽¹⁾ *Gunaratne et al v. Sri Lanka Telecom* ⁽²⁾. I propose to consider this issue under Article 12 (1) of the Constitution. The petitioner has failed to establish the alleged infringement of Article 12 (2). All that this Court has before it in that regard is a suggestion that the impugned scheme has been imposed with the object of denying the petitioner and the old entrants like him the prospects of promotion, in view of their membership of the Trade Union to which they belong as the said Union is not considered pro-government. However, there is no evidence to support this suggestion. The petitioner has also failed to establish the alleged infringement of Article 14 (g) because even if it were to be assumed that the impugned scheme is violative of Article 12 (1), the material before us does not warrant a finding that the said scheme amounts to a total denial of the petitioners freedom to engage in his occupation in the Bank.

The petitioner has produced marked 'X' the existing scheme of promotion in the Bank which had been promulgated in 1973 and submits that the impugned scheme should apply only to the new entrants. I do not agree that the present employees of the Bank including the petitioner have any such vested right to preclude the Bank from altering the scheme of promotion if it were necessary to do so in the interest of the service. Such alteration is legitimate subject, however, to the qualification that it should not infringe Article 12 (1). However, the main grievance of the petitioner as appears in the protests addressed by his Union to the Governor of the Bank on 10.12.90 (P6), 25.09.91 (P6a) and 01.10.91 (P6b) is that the old entrants are unable to compete with their colleagues who

are graduates, if all of them have to sit for the proposed test. They demand that the employees in non-staff class Grade III who have served in that grade for 15 years or such employees having a total period of 25 years' service in the Bank be promoted to non-staff class Grade IV without being subjected to the proposed test. The petitioner adds that several of the employees who had joined the service as non-staff class Grade III officers have since risen to the staff rank having received promotions under the existing scheme; and that this fact constitutes additional evidence of discrimination.

In view of my finding that the petitioner has no vested right to promotion under the existing scheme and that the Bank is entitled to revise the scheme of promotion, the fact that officers had in the past been promoted without a written test will not constitute evidence of discrimination. However, the petitioner's grievance *vis-a-vis* graduates require careful consideration in the light of the evidence placed before us.

The scheme of promotion marked (' X ' is quite complex but it is beyond doubt that promotion in the Bank's service is based more on the existence of positive merit than mere seniority. The service is divided broadly into three classes (a) minor employees class ; (b) non-staff class ; and (c) staff class, each of which consists of four grades. Promotion from a lower to a higher grade within a class or promotion from one class to the next higher class results in an increase in the scale of salary payable to an officer. Minor employees class consists of Labourers, Peons, Drivers, Telephone Operators, Binders, Duplicating Machine Operators, Cycle Orderlies and Currency Attenders. Within this class, promotion to Grade II is based on " a very good record of work and conduct " ; the criteria for promotion to Grade III are " an excellent record of service " and 4 years, service in Grade II; and the criteria for promotion from Grade III to the Supervisory Peons' Grade are " a very good record " of not less than 10 years' service in Grade III ; and in all cases of promotion, a good record of attendance, punctuality and conduct will be insisted upon.

Minor employees are promoted to non-staff class Grade I on the satisfaction of different criteria in particular cases. The following situations are noteworthy :-

(a) A minor employee with 8 years' service in the Bank is eligible for promotion to non-staff class Grade I (Assistant Cashier) after sitting for an examination for promotion in that capacity.

(b) Other minor employees are eligible for promotion to non-staff class Grade I upon passing a test approved by the Board and subject to service and other requirements prescribed by the Board e.g. the qualification of a pass in the S.S.C. or G.C.E (O' Level) plus not less than 5 years' good service in the minor employees class.

(c) Senior minor employees functioning as Telephone Operators, Binders or Duplicating Machine Operators with " a very good " record of 5 years' service in respect of work, conduct, attendance and punctuality are eligible to be regraded as officers of non-staff class Grade I.

(d) Senior minor employees functioning as Peons, Cycle Orderlies and Currency Attenders who are under 50 years of age are eligible to be regraded as officers of non-staff class Grade I on passing a written examination.

The following criteria for promotions within the non-staff class grade are noteworthy :-

- (a) For promotion from Grade I to Grade II, 4, 6 or 8 years' of excellent service in Grade I is required. Officers with the S.S.C. or equivalent qualifications require 4 years, those with the J.S.C. or the 7th standard require 6 years' whilst those with no such qualifications require 8 years' of such service, for promotion.
- (b) For promotion from Grade II to Grade III, officers who have reached the salary point of Rs. 445 should have a " very good " record of service, officers who have reached the salary point of Rs. 433 should have a " near excellent " record of service and those who have reached the salary point of Rs. 421 should have " an excellent " record of service. In addition to such criteria, stenographers are required to pass the Government Lower Grade Stenographers' Examination (or an equivalent test held by the Bank, if the Government examination is not held).

- (c) For promotion from Grade III to Grade IV (Staff Assistants), officers should have –
- (i) 8 years' very good service in Grade III ; or
 - (ii) 6 years' excellent service in Grade III ; or
 - (iii) 4 years' very good service with a special degree in subjects of special value to the Bank, or A.I.B. (London) Parts I and II or the Final examination of the Bankers' Training Institute, Ceylon.

The above material clearly shows that –

(a) it is not possible to generalise upon the criteria for promotion in the Bank which is what the petitioner attempts to do when he states in his affidavit that under the scheme ' X ' " the promotions were *automatic* provided the person had served the necessary period and that his service record was good ". The criteria are various and include different levels of performance or appropriate academic qualifications ;

(b) there is no evidence of the procedure adopted by the Bank for assessing merit and clasifying an officer's service as being good, very good, near excellent or excellent. The petitioner makes no complaint against this, which indicates that the Bank has hitherto been making a fair assessment of merit for purposes of promotion on the basis of personal records ;

(c) in addition to the usual criteria, for promotion, officers are required in appropriate situations to pass tests or recognised examinations ;

(d) a graduate with a special degree in subjects of special value to the Bank becomes eligible for promotion from non-staff class Grade III to Grade IV sooner than the petitioner who has only a pass in the G.C.E. (O' Level) examination.

In this background I shall consider the petitioner's complaint that the proposed written test is unreasonable in that it is likely to place the petitioner and other officers in his position at a disadvantage *vis-a-vis* graduate officers who are eligible for promotion under the existing scheme along with the petitioner and other officers on the basis of a prescribed period of service and a good record of work and conduct.

The proposed test can be declared void on the ground of discrimination only if it is unreasonable between these two categories of officers presently serving in non-staff class Grade III. The following matters are relevant to a determination of this question :-

1. It has to be assumed that all these officers have risen to Grade III on the basis of existing criteria including the requisite level of competence. If so, they are equal (merit-wise) and the petitioner is, therefore, not inferior to a graduate in that regard.

2. In principle, a written test is a fair procedure for assessing merit, which is required for the performance of the functions in Grade IV. The 2nd respondent states that such an examination is necessary for promotion to that grade which is a middle level supervisory grade. The proposed test itself carries only 50% of the total marks necessary for promotion.

3. The written examination was approved in 1990 and consists of three subjects namely General Aptitude, Sri Lanka's Economy and Language. By a circular letter dated 20.08.91 (P5a) the 2nd respondent gave notice of the holding of the said examination in the early part of November 1991. P5a adds that the syllabus of the examination and specimen question papers in General Aptitude and Sri Lanka's Economy are available in the Establishments Department and requests all officers who are interested in obtaining them to collect them from that Department. There is no evidence that the petitioner or his Trade Union cared to collect the available documents. Instead, the petitioner in his capacity as the General Secretary of the Union addressed the letter dated 25.09.91 (P6a) to the Governor of the Bank and protested against the written examination and further demanded the right to promotion without such examination.

4. By his circular dated 24.09.91 (P5b) the 2nd respondent informed all officers that the proposed examination will be held in November 1991 and called for applications from the eligible officers. By their letter dated 01.10.91 (P6b) addressed to the Governor, a number of officers in non-staff class Grade III again protested against the said examination and repeated their demand that they be promoted to non-staff class Grade IV without being subjected to such examination.

5. On 07.10.91 the petitioner filed this application. In granting leave to proceed on 26.11.91, this Court directed the 1st and the 2nd respondents to desist from giving effect to the revised scheme of promotion (P5). The petitioner has failed to produce before this Court the syllabus of the impugned examination or the specimen question papers referred to above to enable this Court to consider his complaint that he cannot compete with graduates if he were to sit for the said examination. The petitioner had every opportunity to produce these documents ; and he has tendered no explanation for his failure to do so. As such the petitioner has failed to establish the charge of discrimination.

For the foregoing reasons, I hold that the petitioner has failed to establish that his rights under Article 12 (1) of the Constitution have been infringed. Accordingly, I dismiss this application with costs, payable to the 1st respondent.

BANDARANAYAKE, J. – I agree.

WADUGODAPITIYA, J. – I agree.

Application dismissed.
