

GUNARATNE AND OTHERS
v.
SRI LANKA TELECOM AND OTHERS

SUPREME COURT.
FERNANDO, J., KULATUNGA, J. AND
WADUGODAPITIYA, J.
SC APPLICATION NO. 70/92.
15 JUNE, 1992.

Fundamental Rights – Scheme of Recruitment and Promotion – Favoured treatment to graduate clerks – Classification of graduate clerks – Discrimination – Article 12 (1) of the Constitution.

Upon the enactment of the Sri Lanka Telecommunications Act, No. 25 of 1991 the petitioners along with other officers who were in the service of the Telecommunications Department opted to become employees of the 1st respondent Corporation (Sri Lanka Telecom) under section 28 of the said Act. In terms of section 31 of the same Act they were entitled to terms and conditions not less favourable than those on which they had been employed in the Department of Telecommunications. On 03.01.1992 the Corporation adopted new schemes of recruitment to staff posts. The question for decision was whether the classification of the graduate clerks for preferential treatment in the new schemes was reasonable, the test of permissible classification being that it must be founded upon an intelligible differentia having a rational relation to the object sought to be achieved.

Held :

1. (a) If a scheme is *prima facie* non-discriminatory, it cannot be challenged *in limine* on the ground of possible discrimination in its application. In such a case, relief may be sought only upon the occurrence of discrimination.

(b) If however a scheme affecting promotions in an existing service is inherently discriminatory, as is alleged here, the right to relief accrues immediately upon the adoption of such scheme and prospective candidates for promotion under such scheme may apply for a declaration that such scheme is invalid on the ground that it constitutes an infringement or an imminent infringement of their rights under Article 12 (1).

2. (a) A variation of schemes of recruitment or preparation of a fresh scheme not violative of Article 12 (1) and dictated by the needs of the service, is permissible.

3. In the impugned schemes of recruitment –

(a) the express requirement of *special ability* and *merit* as a principle of promotion has been deleted.

(b) emphasis is placed on the requirement of a *specific period of service* with preferential treatment to graduate clerks.

(c) the new schemes whilst giving preferential treatment to graduate clerks, impose more stringent conditions on others by imposing a requisite period of service for promotion different from what is prescribed by the previous schemes.

(d) possession of a degree gives a clerk a preferential right to promotion without any consideration as to whether such degree is relevant to the duties of the higher post.

(e) the new schemes of recruitment have been prepared primarily with the object of alleviating the social grievances of under-employed graduates. In doing so the legitimate expectations of non-graduate clerks counting 20 to 30 years' of service have been disregarded.

(f) the new schemes are unreasonable because they are not based on criteria having a rational relation to the object sought to be achieved namely the efficient functioning of the Telecommunications Service.

(g) if it is desired to give preferential treatment to the graduate clerks in the interest of the service and for utilising their skills, the Corporation could do so on the basis of relevant qualifications, with reasonable notice to those affected and without prejudicing the legitimate expectations of clerks who are on the verge of promotion under the previous schemes.

APPLICATION for relief for infringement of fundamental rights.

R. K. W. Goonesekera with Peter Jayasekera, Suranjith Hewamanna and C. Swamadhipathy for the petitioners.

Asoka de Silva, D.S.G. with A. Jinasena, S.C. for the respondents.

Cur. adv. vult.

August 24, 1992.

KULATUNGA, J.

The petitioners are Clerks, Class 1 in the Clerical Service of "Sri Lanka Telecom" (the 1st respondent) which is a public corporation established on 06.02.90 by an Order under s. 2 of the State Industrial Corporations Act, No. 49/1957 (P7). All of them had originally joined the Clerical Service of the former Posts and Telecommunications Department. Thereafter, when the Telecommunications Department was established as a separate Department, they continued in the Clerical Service of that Department, and were governed by the

Minutes on the Telecommunications Clerical Service (P1) ; and upon the enactment of the Sri Lanka Telecommunications Act, No. 25 of 1991 they, with other officers, opted to become employees of the 1st respondent Corporation ("The Corporation") under s. 28 of the said Act. In terms of s. 31 thereof, they were entitled to terms and conditions not less favourable than those on which they had been employed in the Department of Telecommunications.

The petitioners complain that the revised schemes for recruitment to Staff Grade posts in the Corporation afford more favoured treatment to graduate clerks. They were granted leave to proceed in respect of Article 12 (1) of the Constitution. In their application the petitioners also sought relief against a decision to appoint 6 graduate clerks to the Staff Grade, acting outside the scheme of recruitment. However, the learned Deputy Solicitor-General for the respondents informed us that the said decision will not be implemented. As such, the relief claimed by the petitioners is now limited to a declaration that the aforesaid revised schemes for recruitment are violative of their rights under Article 12 (1) and consequential reliefs. In addition to the Corporation, the petitioners have joined as parties to this application, the 2nd, the 3rd and the 4th respondents, being the Managing Director and the General Manager (Human Resources Development) of the Corporation, and the Secretary, Ministry of Posts and Telecommunications, respectively.

Originally, entry into the Clerical Service was through the Central Clerical Examination held by the Department of Examinations for candidates, the requisite educational qualification being the Senior School Certificate or the General Certificate of Education (Ordinary Level). From 1968, recruitment was by interview of eligible candidates. Under the Service Minute P1 which continues to apply even after the establishment of the Corporation, the Clerical Service consists of Class II (with a cadre of 752) and Class I (with a cadre of 125). Initial recruitment is to segment B of Class II. Officers are promoted to segment A upon passing a qualifying examination after 4 years' of service. Their next promotion is to Class I on the basis of seniority and merit. A clerk in Class I is eligible upon selection by examination and interview to be appointed to the post of Examiner of Accounts which post forms an integral part of the Clerical Service. The cadre of Class I Clerks and Examiners of Accounts is 125.

Staff Posts in the Telecommunication Service and the cadre in each grade consist of –

- (a) Administrative Assistant (07)
- (b) Assistant Administrative Secretary/Assistant Superintendent (Commercial) being posts carrying the same salary scale, (24 and 15 respectively).
- (c) Administrative Secretary (04)
- (d) Commercial Superintendent (01)
- (e) Senior Administrative Secretary (01).

Until 1988, vacancies in the post of Administrative Assistant were filled by promoting Class I Clerks/Examiners of Accounts on the basis of seniority and merit. The promotion of Administrative Assistants to the post of Assistant Administrative Secretary/Assistant Superintendent (Commercial) was also on the basis of seniority and merit.

On 06.06.88 a new scheme of recruitment to the post of Assistant Administrative Secretary/Assistant Superintendent (Commercial) (P2) was adopted. Under the said scheme the following officers are eligible for promotion :

- (i) Administrative Assistants
- (ii) Class I Clerks with 6 years' service
- (iii) Examiners of Accounts with 6 years' combined service as Examiners and Class I Clerks.

Appointments are made after interview by a Selection Board, preference being given to merit over seniority.

On 01.12.88 a scheme of recruitment to the next higher staff grade viz. Administrative Secretary was adopted (P3) in terms of which an officer with 3 years' service as Assistant Administrative Secretary/Assistant Superintendent (Commercial) is eligible for promotion to that grade on the basis of seniority and merit. The selection for promotion is after interview by a Selection Board.

The above schemes of recruitment appear to have been generally acceptable to the majority of the officers in the Telecommunications Department. However, the graduate clerks were not satisfied with their promotional prospects under the said schemes. Acting on their representations the 5th respondent had (in June, 1990) directed the

Department to prepare draft amendments to the schemes of recruitment providing for preferential treatment to graduate clerks in the matter of promotion to staff posts. This was challenged in SC Application No. 25/90 by the Telecommunication Clerical Service Union and 3 non-graduate clerks (P4). The said application was withdrawn in November 1990 in view of the averments in the affidavit of the 5th respondent which indicated that the impugned proposals for amendments to the schemes of recruitment will not be implemented, particularly in view of the impending transfer of Telecommunication Services to the Corporation (P5 and P6).

On 03.01.90 the Corporation adopted the following new schemes of recruitment to staff posts :

Administrative Assistant (P11A)

According to this scheme, Class I Clerks with 6 years' service and Examiners of Accounts with 6 years' combined service as Examiner and Class I Clerk are eligible for promotion. However, where such officer is a graduate, only 2 years' service is required.

Assistant Administrative Secretary/Assistant Commercial Superintendent (P11B)

According to this scheme the following officers are eligible for promotion :

- (a) Administrative Assistants with 1 year's service or 8 years' combined service as Administrative Assistant and Class I Clerk.
- (b) Class I Clerks with 8 years' service and Examiners of Accounts with 8 years' combined service as Examiner and Class I Clerk. However, where any such officer is a graduate, only 4 years' service is required.

Administrative Secretary (P11C)

According to this scheme, Assistant Administrative Secretaries/ Assistant Commercial Superintendents with 3 years' combined service in the said grade and as Administrative Assistants are eligible for promotion.

Note : Appointment to each of the above grades will be by promotion of eligible officers on the recommendation of a Selection Board, after an interview.

The petitioners state that the preferential treatment sought to be given to graduate clerks by P11A and P11B has no rational basis and hence such treatment amounts to discrimination violative of Article 12 (1) of the Constitution. The 2nd respondent states that the object of the revised schemes is to provide for a better and more reasonable method of promotion and that the proposed new criteria for promotion are based "mainly on the efficiency of the officers to be promoted". He adds that in preparing these schemes the grievances of under-employed graduates in the public service were also taken into consideration.

According to 2R2 (minutes of a discussion held on 31.05.91 by the Minister of Posts & Telecommunications with the clerks in the Telecommunications Department) it would appear that a small minority of these clerks are graduates and they have formed an organisation (Graduates Organisation). They urged the Minister to revise the schemes of recruitment to enhance their promotional prospects. However, the Telecommunication Clerical Service Union opposed this request on the ground that it was unreasonable. Both in SC Application 25/90 and in these proceedings the petitioners have urged that most of the graduate clerks had obtained external degrees whilst in service and that it is unreasonable to give them preferential treatment for promotion based on such qualifications. Nevertheless, the evidence clearly shows that even after the conclusion of SC 25/90, the graduates had been campaigning for bettering their prospects and that in the end they succeeded in obtaining relief through the revised schemes of recruitment P11A and P11B.

This Court has to determine whether the classification of the graduate clerks for preferential treatment in the said schemes is reasonable, the test of permissible classification being that it must be founded upon an intelligible differentia having a rational relation to the object sought to be achieved. In their objections the respondents took up the position that this application must fail *in limine* in that (a) the impugned acts do not constitute "executive or administrative action" and (b) the petitioners have failed to reveal how

they would be affected if the revised schemes are adopted. The learned Deputy Solicitor-General did not press the first objection. As regards the second objection, he submitted that if a particular officer is affected by the new schemes, he must come forward and seek relief in which event, it is not sufficient to show that the new schemes will generally affect the members of his Union ; and that the petitioners have failed to establish how they would be affected by the said schemes.

The above submission is possibly attributable to the experience that Courts have often granted relief in respect of an impugned scheme of recruitment upon the application of a person who has been adversely affected by selections made under such scheme. Such relief is granted at the stage when the impugned scheme is implemented. If a scheme is *prima facie* non-discriminatory, it cannot be challenged *in limine* on the ground of possible discrimination in its application. In such a case, relief may be sought only upon the occurrence of discrimination. However, if a scheme, such as the one before us, affecting promotions in an existing service is inherently discriminatory, the right to relief accrues immediately upon the adoption of such scheme and prospective candidates for promotion under such scheme may apply for a declaration that such scheme is invalid on the ground that it constitutes an infringement or an imminent infringement of their rights under Article 12 (1). On this basis the petitioners are entitled to seek relief ; and the preliminary objection to their application fails.

Learned Counsel for the petitioners submitted that the impugned schemes have gone beyond the principle of seniority and merit as a basis of promotion when it concerns a graduate clerk ; and that this educational qualification applied for giving them preferential treatment has absolutely no bearing on the preparation of a fair scheme for promotion. He added that the petitioners along with other clerks, have risen to Class I after many years of service and that even if it is sought to amend the schemes for promotion for giving preferential treatment to graduate clerks, it must be done on the basis of relevant qualifications and with reasonable notice to enable those affected to acquire the necessary qualifications. In defence of the impugned schemes, the respondents have pointed out to the fact that after the conversion of the Telecommunications Department to a public Corporation, the existing cadre of posts has been increased as follows :

1. Assistant Administrative Secretary from 5 to 24 posts.
2. Assistant Superintendent (Commercial) from 3 to 15 posts.
3. Administrative Secretary from 3 to 4 posts.

The Deputy Solicitor-General submitted that in the circumstances, the provision for giving due consideration to educational qualifications in the interest of the service, is not unreasonable.

On the basis of their submissions the petitioners seek to obtain –

- (a) a declaration that the preferential treatment given to graduate clerks on the schemes of recruitment P11A and P11B is violative of Article 12 (1) of the Constitution ; and
- (b) a declaration that the petitioners are entitled to promotion in terms of the schemes of recruitment which were in force at the time they joined the Corporation.

Assuming that the petitioners are granted the first of these declarations, I am of the view that they are not entitled to the second declaration for the reason that it would still be open to the Corporation to prepare fresh schemes which would not be violative of Article 12 (1). The safeguard under s. 31 of Act No. 25 of 1991 that they are entitled to terms and conditions not less favourable than those on which they had been employed in the Department of Telecommunications ensure that the basic terms and conditions of their employment as clerks (e.g. as regards their status or emoluments) will not be reduced. That section does not preclude a variation of the schemes of recruitment to the higher posts. As evidenced by the schemes P2 and P3, such variations had in fact been effected even during their employment by the Department. Such variations which do not impugn on constitutional rights and are dictated by the needs of the service are permissible.

In considering whether the schemes P11A and P11B are reasonable, the following matters are relevant :

- (a) Paragraph 16 (5) of P1 (Clerical Service Minute) dealing with promotion to staff posts said –

"mere seniority unaccompanied by special ability to perform the duties of the higher appointment, will not be regarded as a ground of promotion".

P2 (scheme of recruitment to the post of Assistant Administrative Secretary/Assistant Superintendent (Commercial) provided that in making promotions to these grades preference will be given to merit over seniority.

P3 (scheme of recruitment to the post of Administrative Secretary) provided that promotions will be made on the basis of seniority and merit.

However, the schemes P11A and P11B have –

- (i) deleted the express requirement of *special ability and merit* as a principle of promotion ; and
 - (ii) emphasized the requirement of a *specific period of service* with preferential treatment to graduate clerks.
- (b) Under the previous scheme, clerical officers (whether graduates or not) were eligible for promotion to the post of Administrative Assistant on the principle of special ability and seniority, whenever vacancies occurred. After 6 years' of service, they were also eligible for direct promotion to the next higher grade (viz. Assistant Administrative Secretary/Assistant Superintendent (Commercial)). The new schemes require 6 years' of service before they can be promoted to the post of Administrative Assistant, (such period being reduced to 2 years for graduate clerks); and 8 years' service for promotion to the post of Assistant Administrative Secretary/Assistant Superintendent (Commercial), (such period being reduced to 4 years for graduate clerks). It would seem, therefore, that the new schemes, whilst giving preferential treatment to graduate clerks, impose more stringent conditions on others as to the requisite period of service for promotion than those provided by the previous schemes.
- (c) Possession of a degree gives a clerk a preferential right to promotion without any consideration as to whether such degree is relevant to the duties of the higher post. In this connection, it is significant that in 2R1, (the report of the Committee on

grievances of under-employed graduates in clerical service and allied grades in the public service, 1987) it was recommended that they may be considered for recruitment to certain posts in the public service *"provided their educational attainments relate to the relevant field in terms of the respective schemes of recruitment"*.

- (d) In the absence of evidence as to the number of graduate clerks in the Corporation, their grades and the period of service as against non-graduate clerks and other relevant matters, it is not possible to conclude that the new schemes will not be discriminatory by reason purely of the increase in the cadre of posts in the Corporation referred to above.
- (e) On the whole, it appears that the relevant Ministry and the Corporation have prepared the new schemes of recruitment primarily with the object of alleviating the social grievances of under-employed graduates. In doing so they have overlooked the legitimate expectations of non-graduate clerks such as the petitioners who have around 20-30 years' of service. What is more, the benefits under the new schemes have been made available not only to "under-employed graduates" (viz. graduates who have joined as clerks for want of better positions) but also to clerks who have obtained external degrees whilst in service.

In the result, I am satisfied that the classification of graduate clerks for preferential treatment under the impugned schemes is unreasonable because it is not based on criteria having a rational relation to the object sought to be achieved namely, the efficient functioning of the Telecommunications Service. If it is desired to give preferential treatment to them in the interest of the service and for utilising their skills, the Corporation may do so on the basis of relevant qualifications, with reasonable notice to those affected and without prejudicing the legitimate expectations of clerks who are on the verge of promotion under the previous schemes. The identification of relevant qualifications, the preparation of fresh schemes of recruitment and the period of notice to be given are matters for the Corporation to determine, after considering the total effect of such schemes on the officers who are presently in service and the needs of the Corporation. In the meantime, I see no difficulty in the way of the Corporation recognising, for the purpose of promotions, any special skills which

graduate clerks may have acquired by reason of their educational qualifications. This is possible under the existing schemes of recruitment which have been produced marked P1, P2 and P3.

For the foregoing reasons, I allow the application of the petitioners and grant them a declaration that the preferential treatment given to Graduate Clerks on the Schemes of Recruitment P11A and P11B is violative of Article 12 (1) of the Constitution, and hence void. I also grant them one set of costs which I fix at Rs. 5,500 (Rupees Five Thousand Five Hundred) payable by the 1st respondent.

FERNANDO, J. – I agree.

WADUGODAPITIYA, J. – I agree.

Relief granted.
