

**A**

## STATE OF MYSORE

v.

**S. R. JAYARAM**

*August 23, 1967*

**B**

[K. N. WANCHOO, C.J., R. S. BACHAWAT, V. RAMASWAMI, G. K. MITTER AND K. S. HEGDE, JJ.]

*Civil Service—Recruitment by competitive examination—Indication by candidate as to which post he prefers—Candidate entitled to post because of his rank—State Government appointing him to another post—State Government's power under r. 9(2) of the Mysore Recruitment of Gazetted Probationers' Rules, 1959—If violative of Art. 14 of the Constitution.*

**C**

The Mysore Recruitment of Gazetted Probationers' Rules 1959, make provision for direct recruitment to several cadres in the State Services on the basis of the result of a competitive examination. Under the first part of r. 9(2), the candidates are required to indicate in their applications their preferences for the cadres they wished to join. After the examination, the list of successful candidates in order of merit is published, and, subject to certain reservations for Scheduled castes and tribes and Backward classes, the successful candidates have preferential claim in the order of merit to appointment in the cadres for which they indicated their preference. The latter part of r. 9(2), however, reserves to the Government the right of appointing to any particular cadre any candidate whom it considers more suitable for such cadre.

**D**

In the present case an open competitive examination was held for recruitment to the posts of Assistant Commissioners in the Mysore Administrative Service and of Assistant Controllers in the Mysore State Accounts Service. Though both are Class I cadres the post of Assistant Commissioner had better prospects. There were 20 vacancies in the posts of Assistant Commissioners. The respondent indicated his preference for the post of Assistant Commissioner. Though his rank was fourth, the Public Service Commission recommended that he and some others should be appointed as Assistant Controllers while those who ranked after the respondent were recommended for appointment as Assistant Commissioners. The State Government accepted the recommendation.

**E**

The respondent thereupon filed a writ petition in the High Court asking for an order directing the State to appoint him as Assistant Commissioner. The High Court held that the Government had under the latter part of r. 9(2) the power to decide to which post or cadre the respondent should be appointed, but that the Government should itself make up its mind without consulting the Public Service Commission, and directed the Government to decide accordingly.

The State appealed to this Court

**H**

*Held:* The latter part of r. 9(2) was violative of Arts. 14 and 16(1) of the Constitution and therefore the State Government had no power to withhold the post of Assistant Commissioner from the respondent who had a right to be appointed to that post having regard to his rank in order of merit. The High Court should, therefore, have directed the Government to appoint the respondent to the post. [354B-C]

The Rules are silent on the question as to how the Government was to find out the suitability of a candidate for a particular cadre, nor do the Rules give the Public Service Commission the power to test the suitability of a candidate for a particular cadre or to recommend that he is more suitable for it. Further, there is no provision in the Rules under which the Government can test the suitability of a candidate for any cadre after the result of the examination is published. Therefore, the latter part of r. 9(2) gives the Government an arbitrary power of ignoring the just claims of successful candidates for recruitment to offices under the State, and thus, subverts the basic objectives of ensuring equality of opportunity in the matter of employment by open competition. [352H; 353B-C; 354A-B]

**CIVIL APPELLATE JURISDICTION:** Civil Appeal No. 283 of 1966.

Appeal by special leave from the judgment and order dated March 13, 1963 of the Mysore High Court in Writ Petition No. 1440 of 1962.

*B. R. L. Iyengar, R. N. Sachthey* for *R. H. Dhebar*, for the appellant.

The respondent appeared *in person*.

The Judgment of the Court was delivered by

**Bachawat, J.** This appeal raises a question of the validity of the latter part of r. 9(2) of the Mysore Recruitment of Gazetted Probationers' Rules, 1959 framed by Governor of Mysore in exercise of his powers under the proviso to Art. 309 of the Constitution. The Rules came into force on September 11, 1959. Rule 3 requires that for a period of five years, two-thirds of the number of vacancies as determined by the Government arising in the cadres in the State Civil Services specified in the schedule shall be filled by recruitment of candidates selected under the Rules. The schedule lists two Class I and twelve Class II cadres. The two Class I cadres are those of (1) Assistant Commissioners in the Mysore Administrative Service and (2) Assistant Controllers in the Mysore State Accounts Service. Both cadres are in the pay scale of Rs. 300—25—500—50—30—700. Rule 4 provides that the recruitments shall be made on the basis of the results of written and *viva voce* examinations conducted annually by the Public Service Commission. Rules 5, 6 and 7 prescribe the age limit, the academic qualifications of candidates and the minimum pass marks. Rules 8 and 9 are in these terms:

"8. *List of successful candidates in the examination.*—

The names of candidates successful in the examination shall be published in the Mysore Gazette, by the Commission in the order of merit.

9. *Appointment of Probationers.*—(1) Subject to the rules regarding reservation of posts for backward classes contained in Government Orders Nos. GAD 26 ORR

**A** 59, dated the 13th May 1959, and No. GAD 32 ORR 59, dated the 18th July 1959, and the provisions of sub rule (2), the candidates successful in the examination whose names are published under rule 8 shall be appointed as Probationers to Class I posts in the order of merit, and thereafter to Class II posts in the order of merit.

**B** (2) While calling for applications, the candidates will be asked to indicate their preferences as to the cadres they wish to join. The Government, however, reserves the right of appointing to any particular cadre, any candidate whom it considers to be more suitable for such cadre."

**C** By a notification dated September 26, 1959, the Public Service Commission invited applications for admission to a competitive examination for the recruitment of Class I Probationers to 20 posts in the Mysore Administrative Service and 2 posts in the Mysore State Accounts Service. The number of posts were liable to alteration. 15 per cent of the posts was reserved for Scheduled Castes and 3 per cent was reserved for Scheduled Tribes. In his

**D** application for admission to the examination, the respondent indicated his preference for appointment as Probationary Assistant Commissioner. He was an eligible candidate and was allowed to appear at the examination. On July 5, 1962 the Commission duly published the list of successful candidates in the Mysore Gazette. In this list the respondent ranked fourth in the order of merit. It appears that the Commission sent a separate recommendation to the Government stating that they had selected the 20 candidates ranking 1 to 3, 5 to 8, 10 to 14, 16 to 19, 21, 22, 25 and 26 for appointment as Assistant Commissioners and the seven candidates ranking 4, 9, 15, 20, 23, 24 and 27 for appointment as Assistant Controllers. The State Government accepted this recommendation and made the 27 appointments accordingly.

**E** The respondent was appointed as Assistant Controller by an order dated October 20, 1962. The respondent was not appointed as Assistant Commissioner though he had indicated his preference for that post.

**F** Aggrieved by this order, the respondent filed a writ petition in the Mysore High Court asking for an order directing the State of Mysore to appoint him as Assistant Commissioner and for consequential reliefs. Before the High Court, it was common ground that the two Class I posts, the post of Assistant Commissioner in the Mysore Administrative Service had better prospects and was more attractive. More promotional posts including posts in the I.A.S. cadre were open to Assistant Commissioners. Their next promotional post was that of Deputy Commissioner in the pay scale of Rs. 900—40—1100—50—1300. For an Assistant Controller in the Mysore State Accounts Service the next promotional job was that of a Deputy Controller in the pay scale of L/S5SCI—9(a)

Rs. 600—40—1000. The High Court held that (1) under r. 9(2) the Government had the power to decide to which post or cadre a successful candidate should be appointed, (2) for making the selection the Government had to apply its own mind, (3) the Public Service Commission had no power to make the selection nor it need be consulted on this question under Art. 320(3) of the Constitution and (4) as the Government made the selection without applying its own mind on the recommendation of the Commission, the order dated October 20, 1962 was invalid. Accordingly, the High Court by its order dated March 13, 1963 issued a writ of *mandamus* directing the Government to decide to which post or cadre the respondent should be appointed. From this order, the State of Mysore appeals to this Court by special leave.

In this appeal, the State of Mysore challenges the correctness of the findings that (1) the Government did not apply its own mind in making the selection and (2) the Public Service Commission need not be consulted as to the suitability of the candidate for such selection under Art. 320(3) of the Constitution. The State of Mysore naturally supports the finding that the Government had the power under r. 9(2) to select to which post or cadre a successful candidate should be appointed. But the more fundamental question is whether that portion of r. 9(2) which vests in the Government this power of selection is valid. The contention of the respondent is that this portion of the Rule is violative of Arts. 14 and 16 of the Constitution.

The Rules make provision for the direct recruitment to several cadres in the State Services on the basis of the result of a competitive examination. The examination is held annually. It is open to all eligible candidates. The result of the examination is announced and the list of successful candidates in the order of merit is published. Subject to the reservations for Scheduled Castes, Scheduled Tribes and Backward Classes, the successful candidates are entitled to be appointed as probationers to Class I posts in the order of merit and thereafter to Class II posts in the order of merit. If there are vacancies in a number of Class I or Class II cadres, r. 9(2) comes into play. The candidates are required to indicate in their applications their preferences for the cadres they wish to join. Had there been nothing more in r. 9(2), the successful candidates would have the preferential claim in the order of merit to appointment in the cadres for which they indicated their preferences. Thus, if there are 20 vacancies in cadre 'A' and 7 vacancies in cadre 'B', a successful candidate ranking fourth in order of merit would be appointed as a matter of course to cadre 'A' for which he indicated his preference.

But the latter part of r. 9(2) reserves to the Government the right of appointing to any particular cadre any candidate whom it considers more suitable for such cadre. The Rules are silent on the question as to how the Government is to find out the

- A** suitability of a candidate for a particular cadre. A single competitive examination is held to test the suitability of candidates for several cadres. Those who succeed in the examination are found suitable for all the cadres and their list in order of merit is published under r. 8. No separate examination is held to test the suitability of the candidate for any particular cadre. The list of successful candidates published under r. 8 does not indicate that any candidate is more suitable for cadre 'A' rather than for cadre 'B'. The Rules do not give the Public Service Commission the power to test the suitability of a candidate for a particular cadre or to recommend that he is more suitable for it. Nor is there any provision in the Rules under which the Government can test the suitability of a candidate for any cadre after the result of the examination is published. The result is that the recommendation of the Public Service Commission is not a relevant material nor is there any other material on the basis of which the Government can find that a candidate is more suitable for a particular cadre. It follows that under the latter part of r. 9(2) it is open to the Government to say at its sweet will that a candidate is more suitable for a particular cadre and to deprive him of his opportunity to join the cadre for which he indicated his preference. Take the present case. An open competitive examination was held for recruitment to the posts of Assistant Commissioners in the Mysore Administrative Service and Assistant Controllers in the Mysore State Accounts Service. Though both are Class I posts, the post of Assistant Commissioner has better prospects. But for the latter part of r. 9(2) the successful candidates would have the preferential claim for appointment as probationers to the posts of Assistant Commissioners in order of merit and thereafter to the posts of Assistant Controllers in the order of merit. As a matter of fact, there were 20 vacancies in the posts of Assistant Commissioners. The respondent ranked fourth in the order of merit. He indicated his preference for the post of Assistant Commissioner and had a preferential claim for appointment to that post. The candidates ranking 1st, 2nd, 3rd and 5th were appointed as Assistant Commissioners. The respondent though ranking fourth in order of merit was singled out and was debarred from the post of Assistant Commissioner. It is because of the arbitrary power under the latter part of r. 9(2) that the Government could make this unjust discrimination.
- G**

The principle of recruitment by open competition aims at ensuring equality of opportunity in the matter of employment and obtaining the services of the most meritorious candidates. Rules 1 to 8, 9(1) and the first part of r. 9(2) seek to achieve this aim.

- H** The latter part of r. 9(2) subverts and destroys the basic objectives of the preceding rules. It vests in the Government an arbitrary power of patronage. Though r. 9(1) requires the appointment of successful candidates to Class I posts in the order of merit

and thereafter to Class II posts in the order of merit, r. 9(1) is subject to r. 9(2), and under the cover of r. 9(2) the Government can even arrogate to itself the power of assigning a Class I post to a less meritorious and a Class II post to a more meritorious candidate. We hold that the latter part of r. 9(2) gives the Government an arbitrary power of ignoring the just claims of successful candidates for recruitment to offices under the State. It is violative of Arts. 14 and 16(1) of the Constitution and must be struck down.

Having regard to his rank in order of merit, the respondent had the right to be appointed to the post of Assistant Commissioner. As the offending part of r. 9(2) is invalid, the State Government had no power to withhold the post from him. The High Court should, therefore, have directed the Government to appoint him to that post.

In the result, we strike down the following part of r. 9(2) of the Mysore Recruitment of Gazetted Probationers' Rules, 1959: "The Government, however, reserves the right of appointing to any particular cadre, any candidate whom it considers to be more suitable for such cadre". The order passed by the High Court directing the Government to decide to which post or cadre the respondent should be appointed under r. 9(2) is set aside. We direct the State of Mysore to appoint the respondent to the post of Assistant Commissioner in the Mysore Administrative Service. For the purpose of seniority, the respondent will be treated as appointed on October 20, 1962 according to his rank in the order of merit. Subject to the directions aforesaid, the appeal is dismissed with costs.

V.P.S.

*Appeal dismissed.*