

IN THE HIGH COURT OF JUDICATURE AT MADRAS

Dated: 08.02.2017

Coram

The Hon'ble Mr.Justice NOOTY. RAMAMOHANA RAO
and

The Hon'ble Mr.Justice S.M.SUBRAMANIAM

W.P.No.12346 of 2016

1. S.Padmavathy
2. S.Maheswari
3. Y.Leema Rose
4. Y.Jebamathy Angel ... Petitioners

Versus

1. The Registrar General,
High Court,
Madras 600 104.
2. The District Judge,
Kanyakumari District,
Nagercoil. ... Respondents

Writ Petition filed under Article 226 of the Constitution of India, seeking for the issuance of a Writ of Certiorarified Mandamus to call for the records on the file of the 1st respondent in order ROC.No.190/2015/C1, dated 16.02.2016 and quash the same as illegal, incompetent and wholly without justification and further direct the respondents to promote the petitioners as Steno-typist Grade-I /Executive Assistant.

For Petitioners... Mr.V.Raghavachari

For Respondents.. Mr.S.Haja Mohideen Gisthi

ORDER

(Order of the Court was made by NOOTY.RAMAMOHANA RAO, J)

The Writ Petitioners before us, who are working as Steno-typist Grade-III in various courts in Kanyakumari District, sought for a writ for quashing the proceedings dated 16.02.2016, issued on the Administrative side by this Court.

2. The case of the writ petitioners is that they were working as Steno-typist Grade-III in the Judicial Ministerial Service of Kanyakumari District. Sometime during July 2013, the learned District and Sessions Judge of Kanyakumari District at Nagercoil, appears to have instructed the Steno-typists Grade-III standing at Serial Nos. 1 to 14 in the seniority list, to give their consent for working as Steno-typist Grade II in the District Court or otherwise to submit a letter of relinquishment. Accordingly, it appears, 13 of those Steno-typists Grade-III, excepting the second petitioner herein, appear to have tendered their letters of relinquishment of promotion to Steno-typist Grade II, on 30.07.2013. The second petitioner appears to have given a similar relinquishment letter on 07.08.2013. However, the learned District and Sessions Judge passed an order on 05.08.2013 accepting the relinquishment of the rights of the petitioners and declared that the petitioners are not liable to be considered for promotion to the post of Steno-typist Grade II. It further appears that the learned District and Sessions Judge has recorded on 04.11.2013 in his proceedings ROC No.174/2013-A that the 14 Steno-typists Grade III mentioned therein are permitted to relinquish their right for further promotion for three years with effect from 07.08.2013. The petitioners have preferred an appeal on the Administrative side of the High Court on 27.01.2015 against that order and that appeal has been rejected by the High Court on 17.02.2016. Hence, the present writ petition is instituted.

3. Heard Sri.V.Raghavachari, learned counsel for the writ Petitioners and Sri. S.Haja Mohideen Gisthi, learned counsel for the Respondents.

4. Sri. V.Raghavachari, learned counsel for the petitioners would urge that right to be considered for promotion would accrue only when a vacancy occurs and the question of 14 people in the seniority list appearing before the District and Sessions Judge, Kanyakumari on a single day and accepting to be considered for promotion against one single post of Steno-typist Grade-II or in the alternative relinquish their right to get so promoted would not arise, in normal circumstances. Learned counsel would submit that if the promotion post is a selection post, the zone of consideration is liable to be fixed in a reasonable proportion of 1:3 or at best 1:5, but certainly not 1:14 and hence the question of recording that the first 14 persons in the seniority list have relinquished at one go their right to be considered for promotion is certainly erroneous.

5. Before we answer the question posed in this writ petition, we consider it appropriate to notice the Special Rules Governing Tamil Nadu Judicial Ministerial Service, after supersession of the earlier set of Rules published through G.O.No.2742 Public (Services), dated 30.09.1953. New Rules were brought into force on and from 1.1.1955. These Rules are holding the field ever since then by undergoing suitable amendments/modifications. Rule 2 of these Rules defined various expressions mentioned in the Rules. Rule 2 defines the expression "Approved Candidate" in the following words:- "Approved Candidate" means a candidate whose name appears in an authoritative list of candidates approved for appointment to this service or any class or category thereof. Clause (13) defines the expression "Recruited direct" in the following words:- "A candidate is said to be "recruited direct" to the service, class, category or post when, in case his first appointment thereto has to be made in consultation with the Commission, on the date of its notification inviting applications for the recruitment, and in any other case, at the time of his first appointment thereto, if he is not in the service of the Government of India or the Government of a State:" while Clause (14) defines the expression "Recruited by transfer". Rule 4 defines the composition of the cadre as meaning the permanent cadre of each class, category and grade as determined by the State Government. Rule 5 deals with the constitution of the service. Class-IV thereof comprises of various posts available in mufassal courts. The post of Stenotypists are including at category 5 of the said Class-IV. Rule 8 dealt with promotion. It has declared various posts in various classes and categories promotion to which post shall be made on grounds of merit and ability, seniority being considered only where merit and ability are approximately equal, rendering the posts so included as selection posts. Thus implying the rest of the posts not included specifically under the ambit of Rule 8 are liable to be treated as non-selection posts. In general terms, selection posts are required to be filled in following the principle of merit-cum-suitability and seniority being considered as relevant only when the merit and ability of the competing candidates was found to be approximately equal. Non-selection posts are required to be filled in following the principle of merit-cum-seniority or seniority-cum-suitability, subject to the rejection of unfit only. In other words promotion to non-selection posts is essential depending upon the seniority of the candidate and his eligibility for securing such promotion and only in the event of such a senior candidate is declared as unfit for promotion, promotion to a non-selection post cannot be denied otherwise, to a senior employee.

6. Rule 11 has provided for Revision of orders of promotion to selection posts conferring powers upon such authority which can entertain an appeal against an order of dismissal passed on a full member of the service, class, category or grade, as the case may be, to entertain any revision against the order of promotion granted to a particular member of the service. That is how the High Court on the Administrative side came to entertain the appeal preferred by the writ petitioners which was rejected through the impugned order.

7. What emerges from a conspectus of the prevailing fact situation coupled with legal regime is, that the post of Steno-typist Grade II is treated and considered as selection post. No controversy or dispute is raised in that respect at the Bar and hence we have to proceed on the premises that promotion to the post of Steno-typist Grade II is to be carried out on a selection basis. When once promotion to a selection post is to be undertaken, it is required upon the appointing authority to confine the area of consideration to a specified zone. The said zone of consideration would normally be three times or at best five times the number of vacancies which are sought to be filled in. If one vacancy is sought to be filled in by way of promotion, the zone of consideration could be confined to three senior most eligible candidates or five of such candidates at best. When we bear this principle in mind, it is more than clear to us that the question of inviting 14 Steno-typists Grade III at one go requiring them to exercise their willingness for consideration for promotion as Steno-typist Grade II or to exercise relinquishment of such a right should not, normally, have arisen unless there are three posts of Steno-typist Grade II which are sought to be filled in by way of promotion, the question of as many as 14 candidates in the descending order of seniority being called upon to exercise their right would not have arisen.

8. In this context we are also take note of Rule 49 which dealt with relinquishment of rights by members. Rule 49 reads as under:-

"49. Relinquishment of rights by members:- (1) Any person, may in writing, relinquish any right or privilege to which he may be entitled under these rules, if in the opinion of the appointing authority, such relinquishment is not opposed to public interest and nothing contained in these rules shall be deemed to require the recognition of any right or privilege to the extent to which it has been so relinquished.

(2) Relinquishment of right or privilege for a temporary period shall be accepted if it is made for a period of not less than three years subject to the condition that after the expiry of the said period, the claim of the right or privilege relinquished will be with reference to the state of affairs that exist on the date of expiry of period of relinquishment and without restoration of original seniority. If relinquishment of right or privilege is made permanently and is accepted, subsequent claim of the relinquished rights or privileges shall not be entertained."

9. Rule 49 talks of the relinquishment of any right or privilege by a member of the service and any such relinquishment for a temporary period shall be accepted if it is made for a period of not less than three years. Thus, two situations have been contemplated by Rule 49. In sub-Rule (1) the relinquishment of any right or privilege is provided for and the same may be permitted if in the opinion of the appointing authority such relinquishment is not opposed to public interest. Whereas sub-Rule (2) of Rule 49 contemplated relinquishment of a right or privilege for a temporary period and if such temporary period is of a duration which is less than three years the same is not liable to be accepted by the competent authority. Thus, implying that a temporary relinquishment can be acceded to if the same is for a period of three years or more.

10. In the above backdrop, we need to notice as to the nature of right an employee would possess. Article 14 of our Constitution provides for equality before law by granting an injunction against the State by setting forth not to deny any person equality before law and equal protection of laws. Article 16(1) has positively conferred a right to equality of opportunity for all citizens in matters relating to employment or appointment to any office under the State. Thus, while both Articles 14 and 16(1) confer fundamental rights but in their content and context they might operate in two different areas. While Article 16(1) holds a right for equal opportunities to public employment, Article 14 only ensures fairness in action and application of all relevant principles equally to all similarly situated persons. It is very well recognized principle of law that there is no fundamental right of promotion held out by Article 16(1) of the Constitution, but what the said Article holds out is an assured right of consideration for such promotion. Thus, right to be considered for promotion came to be recognized as a fundamental right. What is to be noted is the right to be considered for such promotion being a fundamental right, such a fundamental right cannot be relinquished

voluntarily by a citizen in this country. Fortunately, in our country there is no principle, which recognizes the right of relinquishment of a fundamental right by a citizen.

11. When a question arose as to whether a fundamental right guaranteed by Part III of our Constitution can be relinquished or waived by a citizen, the Supreme Court has very rightly laid down the relevant principles on the subject in the following manner in *Behram Khurshid Pesikaka v. State of Bombay* (AIR 1955 SC 123) and also in *Basheshar Nath vs. Commissioner of Income-tax, Delhi and Rajasthan* (AIR 1959 SC 149). The Constitution Bench in *Basheshar Nath*, speaking through Chief Justice S.R.Das, has revisited the principle settled in *Khurshid Pesikaka* in the following words:-

"(10) The last argument advanced by the learned Attorney General is that if there had been a breach of the assessee's fundamental right by subjecting him to a discriminatory procedure laid down in the Investigation Act, the assessee, by voluntarily entering into a settlement, must be taken to have waived such breach and cannot now be permitted to set up his fundamental right. Immediately two questions arise for consideration, namely, (1) whether the assessee could waive the breach of the fundamental right in question and (2) whether in the facts and circumstances of this case he had actually done so.

(11) Re. (1): In *Behram Khurshid Pesikaka v. State of Bombay* 1953 SCR 589 and 1955 (1) SCR 613 there was a general discussion whether a fundamental right could be waived. At page 638 Venkatarama Aiyar, J., observed:-

" The question is, what is the legal effect of a statute being declared unconstitutional. The answer to it depends on two considerations firstly does the constitutional prohibition which has been infringed affect the competence of the Legislature to enact the law or does it merely operate as a check on the exercise of a power which is- within its competence; and secondly, if it is merely a check, whether it is enacted for the benefit of individuals or whether it is imposed for the benefit of the general public on grounds of public policy. If the statute is beyond the competence of the Legislature, as for example, when a State enacts a law which is within the exclusive competence of the Union, it would be a nullity. That would also be the position when a limitation

is imposed on the legislative power in the interests of the public, as, for instance, the provisions in Chapter XIII of the Constitution relating to inter-State trade and commerce. But when the law is within the competence of the Legislature and the unconstitutionality arises by reason of its repugnancy to provisions enacted for the benefit of individuals, it is not a nullity but is merely unenforceable. Such an unconstitutionality can be waived and in that case the law becomes enforceable. In America this principle is well settled. (Vide Cooley on Constitutional Limitations, Volume 1, pages 368 to 371 ; Willis on Constitutional Law at pages 524, 531, 542 and 558 ; Rottschaefer on Constitutional Law at pages 28 and 29-30)."

After referring to three decisions of the American Supreme Court which are also now relied on by the learned Attorney General, the learned Judge concluded as follows:-

"The position must be the same under our Constitution when a law contravenes a prescription intended for the benefit of individuals. The rights guaranteed under Art. 19 (1) (f) are enacted for the benefit of owners of properties and when a law is found to infringe that provision, it is open to any person whose rights have been infringed to waive it and when there is waiver there is no legal impediment to the enforcement of the law. It would be otherwise if the statute was a nullity; in which case it can neither be waived nor enforced. If then the law is merely unenforceable and can take effect when waived it cannot be treated as non and as effaced out of the statute book. It is scarcely necessary to add that the question of waiver is relevant to the present controversy not as bearing on any issue of fact arising for determination in this case but as showing the nature of the right declared under Art. 19 (1) (f) and the effect in law of a statute contravening it."

When the case came up before the court on review Mahajan, C. J., with the concurrence of Mukherjea, Vivian Bose, and Ghulam Hassan, JJ., said at page 653:-

" In our opinion, the doctrine of waiver enunciated by some American Judges in construing the American Constitution cannot be introduced in

our Constitution without a fuller discussion of the matter. No inference in deciding the case should have been raised on the basis of such a theory. The learned Attorney General when questioned about the doctrine did not seem to be very enthusiastic about it. Without finally expressing an opinion on this question we are not for the moment convinced that this theory has any relevancy in construing the fundamental rights conferred by Part III of our Constitution. We think that the rights described as fundamental rights are a necessary consequence of the declaration in the preamble that the people of India have solemnly resolved to constitute India into a sovereign democratic republic and to secure to all its citizens justice, social, economic and political; liberty of thought, expression belief, faith and worship; equality of status and of opportunity. These fundamental rights have not been put in the Constitution merely for individual benefit, though ultimately they come into operation in considering individual rights. They have been put there as a matter of public policy and the doctrine of waiver can have no application to provisions of law which have been enacted as a matter of constitutional policy. Reference to some of the Articles, inter alia, Arts. 15 (1), 20, 21, makes the proposition quite plain. A citizen cannot get discrimination by telling the State "You can discriminate", or get convicted by waiving the protection given under Arts. 20 and 21."

On that occasion one of us preferred not to express any opinion on this subject and said at page 670:-

" In coming to the conclusion that I have, I have in a large measure found myself in agreement with the views of Venkatarama Aiyar, J., on that part of the case. I, however, desire to guard myself against being understood to agree with the rest of the observations to be found in his judgment, particularly those relating to waiver of unconstitutionality, the fundamental rights being a mere check on legislative power or the effect of the declaration under Art. 13(1) being "relatively void ".On those topics I prefer to express no opinion on this occasion."

It will, however, be noticed that the observations of the learned judges made in that case did not

relate to the waiver of a breach of the fundamental right under Art. 14.

(12) The fundamental right, the breach whereof is complained of by the assessee, is founded on Art. 14 of the Constitution. The problem, therefore, before us is whether a breach of the fundamental right flowing from Art. 14 can be waived. For disposing of this appeal it is not necessary for us to consider whether any of the other fundamental rights enshrined in Part III of our Constitution can or cannot be waived. We take the view that this court should not make any pronouncement on any question which is not strictly necessary for the disposal of the particular case before it. We, therefore, confine our attention to Art. 14 and proceed to discuss the question on that footing.

(13) Article 14 runs as follows:-

" The State shall not deny to any person equality before the law or the equal protection of the laws within the territory of India."

It is the first of the five Articles grouped together under the heading " Right to Equality". -The underlying object of this Article is undoubtedly to secure to all persons, citizen or non-citizens, the equality of status and of opportunity referred to in the glorious preamble of our Constitution. It combines the English doctrine of the rule of law and the equal protection T. clause of the 14th Amendment to the American Federal Constitution which enjoins that no State shall deny to any person within its jurisdiction the equal protection of the laws". There can, therefore, be no doubt or dispute that this Article is founded on a sound public policy recognised and valued in all civilised States. Coming then to the language of the Article it must be noted, first and foremost that this Article is, in form, an admonition addressed to the State and does not directly purport to confer any right on any person as some of the other Articles, e.g., Art. 19, do. The obligation thus imposed on the State, no doubt, enures for the benefit of all persons, for, as a necessary result of the operation of this Article, they all enjoy equality before the law. That is, however, the indirect, though necessary and inevitable, result of the mandate. The command of the Article is directed to

the State and the reality of the obligation thus imposed on the State is the measure of the fundamental right which every person within the territory of India is to enjoy. The next thing to notice is that the benefit of this Article is not limited to citizens, but is available to any person within the territory of India. In the third place it is to be observed that, by virtue of Art. 12, "the State" which is, by Art. 14, forbidden to discriminate between persons includes the Government and Parliament of India and the Government and the legislature of each of the States and all local or other authorities within the territory of India or under the control of the Government of India. Article 14, therefore, is an injunction to both the legislative as well as the executive organs of the State and the other subordinate authorities. As regards the legislative organ of the State, the fundamental right is further consolidated and protected by the provisions of Art. 13. Clause (1) of that Article provides that all laws in force in the territories of India immediately before the commencement of the Constitution, in so far as they are inconsistent with the provisions of Part III shall, to the extent of the inconsistency be void. Likewise cl. (2) of this Article prohibits the State from making any law which takes away or abridges the rights conferred by the same Part and follows it up by saying that any law made in contravention of this clause shall, to the extent of the contravention, be void. It will be observed that- so far as this Article is concerned, there is no relaxation of the restriction imposed by it such as there are in some of the other Articles, e.g., Art. 19, cls. (2) to (6). Our right to equality before the law is thus completely and without any exception secured from all legislative discrimination. It is not necessary, for the purpose of this appeal to consider whether an executive order is a "law" within the meaning of Art. 13, for even without the aid of Art. 13 our right to the equal protection of the law is protected against the vagaries, if any, of the executive Government also. In this connection the observations of Lord Atkin in *Eshugbayi Eleko v. Officer Administering the Government of Nigeria* L.R. (1931) A.C.662 are apposite. Said his Lordship at page 670 that in accordance with British jurisprudence no member of the executive can

interfere with the liberty or property of a British subject except when he can support the legality of his act before a court of justice. That apart, the very language of Art. 14 of the Constitution expressly directs that "the State", which by Art. 12 includes the executive organ, shall not deny to any person equality before the law or the equal protection of the law. Thus Art. 14 protects us from both legislative and executive tyranny by way of discrimination.

(14) Such being the true intent and effect of Art. 14 the question arises, can a breach of the obligation imposed on the State be waived by any person? In the face of such an unequivocal admonition administered by the Constitution, which is the supreme law of the land, is it open to the State to disobey the constitutional mandate merely because 'a person tells the State that it may do so? If the Constitution asks the State as to why the State did not carry out its behest, will it be any answer for the State to make that "true, you directed me not to deny any person equality before the law, but this person said that I could do so, for he had no objection to my doing it." I do not think the State will be in any better position than the positions in which Adam found himself when God asked him as to why he had eaten the forbidden fruit and the State's above answer will be as futile as was that of Adam who pleaded that the woman had tempted him and so he ate the forbidden fruit. It seems to us absolutely clear, on the language of Art. 14 that it is a command issued by the Constitution to the State as a matter of public policy with a view to implement its object of ensuring the equality of status and opportunity which every welfare State, such as India, is by her Constitution expected to do and no person can, by any act or conduct, relieve the State of the solemn obligation imposed on it by the Constitution. Whatever breach of other fundamental right a person or a citizen may or may not waive, he cannot certainly give up or waive a breach of the fundamental right that is indirectly conferred on him by this constitutional mandate directed to the State."

(Emphasis is played by me)

12. Justice N.H. Bhagwati while concurring with the opinion of the learned Chief Justice, in paragraph 29 has set out the principle as under:-

"The rights conferred on citizens may be thus classified: (i) statutory rights; (ii) constitutional rights; and (iii) fundamental rights. One need not consider the statutory rights in this context but the constitutional rights are those created and conferred by the Constitution. They may or may not be waived by a citizen, as stated in the text books and the decisions of the Supreme Court of the United States of America above referred to. But when the rights conferred are put on a high pedestal and are given the status of fundamental rights, which though embodied in the Constitution itself are in express terms distinguished from the other constitutional rights (e.g., fundamental rights which are enshrined in Part III of the Constitution and are enacted as immune from any legislation inconsistent with or derogatory thereto and other constitutional rights which are enacted in other provisions, for instance in Arts. 265 and 286 and in Part XIII of the Constitution), they are absolutely inviolable save as expressly enacted in the Constitution and cannot be waived by a citizen. The Constitution adopted by our founding fathers is sacrosanct and it is not permissible to tinker with those fundamental rights by any ratiocination or analogy of the decisions of the Supreme Court of the United States of America. The only manner in which that can be done is by appropriate amendment of the Constitution and in no other manner whatever."

13. Justice K. Subba Rao, (as the learned Chief Justice then was) while concurring with the opinion rendered in the above case by the Chief Justice has held as under:

"I have carefully scrutinized the Articles in Part III of the Constitution of India, and they do not, in my view, disclose any such anomaly or create unnecessary hardship to the people for whose benefit the rights are created. Article, 14 embodies the famous principle of equality before the law and equal protection of the laws, and Arts. 15 to 18 and Art. 29(2) relate to particular applications of the rule. The principle underlying these Articles is the mainspring of our democratic form of government and it guarantees to its citizens equal protection in respect of both substantive and procedural laws. If the doctrine of waiver is engrafted to the said fundamental principles, it will mean that a citizen can agree

to be discriminated.' When one realizes the unequal positions occupied by the State and the private citizen, particularly in India where illiteracy is rampant, it is easy to visualize that in a conflict between the State and a citizen, the latter may, by fear of force or hope of preferment, give up his right. It is said that in such a case coercion or influence can be established in a Court of law, but in practice it will be well nigh impossible to do so. The same reasoning will apply to Arts. 15 and 16. Art. 17 illustrates the evil repercussion of the doctrine of waiver in its impact on the fundamental rights. That Article in express terms forbids untouchability; obviously, a person cannot ask the State to treat him as an untouchable. Article 19 reads:-

"(1) All citizens shall have the right-

- (a) to freedom of speech and expression;
- (b) to assemble peaceably and without arms;
- (c) to form associations or unions;
- (d) to move freely throughout the territory of India ;
- (e) to reside and settle in any part of the territory of India;
- (f) to acquire, hold and dispose of property ; and
- (g) to practice any profession, or to carry on any occupation, trade or business."

The right to freedom is the essential attribute of a citizen under democratic form of government. The freedoms mentioned in Art. 19 are subject to certain restrictions mentioned in cls. (2) to (6) of that Article. So far as the freedoms narrated in sub-cl. (a) to (g) of Cl. (1) of Art. 19 are concerned, I cannot visualise any contingency where a citizen would be -in a worse position than he was if he could not exercise the right of waiver. In regard to freedom to acquire, hold and dispose of property, a plausible argument may be advanced, namely, that a citizen should have a right to waive his right to acquire, hold and dispose of property ; for, otherwise he might be compelled to acquire and hold his property, even if he intended to give it up. There is an underlying fallacy in this argument. The Article does not compel a citizen to acquire, hold and dispose of property just as it does not compel a person to do any of the acts covered by the other freedoms. If he does not want to reside in any part of the territory of India or to make a speech or to practise any profession, he is at liberty not to do any of these

things. So too, a person may not acquire the property at all or practise any profession but if he seeks to acquire property or practise any profession, he cannot be told that he has waived his right at an earlier stage to acquire property or practise the profession. A freedom to do a particular act involves the freedom not to do that act. There is an essential distinction between the non-exercise of a right and the exercise of a right subject to the doctrine of waiver. So understood, even in the case of the right covered by sub-cl.(f) of cl. (1), there cannot be any occasion when a citizen would be worse off than when he had no fundamental rights under the Article."

(Emphasis is all mine)

14. Therefore, we are of the clear opinion that right to be considered for promotion being a fundamental right emanating both from Article 14 and Article 16(1) cannot be permitted to be waived at all. We are also of the opinion that when the zone of consideration is fixed, it merely implied to confine area of consideration to a realistic arena instead of spreading the canvass too wide to consider all those who have acquired eligibility, for instance if the eligibility to be considered is either academic or a minimum length of service or combination of both, there could be a large number of employees who may have satisfied of the eligibility criteria and it may not be realistic or practicable to consider the cases and claims of all such persons. It will not be also easy or manageable to undertake any such exercise either. Therefore, factors of convenience and expediency dictated and demanded that the canvass be not spread so wide. As a result, a zone of consideration for selection posts has been drawn which would amount to a realistic implementation of the rights so guaranteed by Part III of our Constitution. In confining the arena of consideration to the limited number of three or five senior most employees, it would not result in denial of any fundamental rights to the rest of those people who fall outside its limit. They are only made to wait for their turn to mature. Therefore, even on this ground we are of the opinion that calling for all the 14 persons in the seniority list who are otherwise eligible, to express their willingness or otherwise to be considered for promotion against one single post is a wholly impermissible exercise indulged in by the learned District and Sessions Judge, Kanyakumari, at Nagercoil.

15. We, feel, that Rule 49 will have applicability when a person gives up his promotion. In other words he does not wish to accept promotion order in his favour. That was the reason why two separate contingencies were contemplated and provided for in Clauses (1) and (2) of Rule 49. Sub-clause (1) talks of giving

up/waiving the promotion on a permanent basis while clause (2) talks of giving up/waiving the promotion for a temporary period of duration of not less than three years. The Rule making Authority is, therefore, conscious that for certain compelling and valid reasons an employee can waive his own promotion. It is not very difficult for us to imagine that there could be some compelling circumstances which can prevent an employee from accepting promotion and then shoulder higher responsibilities. The factors such as the health condition of the employee concerned or any other family member requiring greater attention to be paid to their peculiar needs and requirements also can compel an employee to forgo promotion. Similarly, one might not be willing to take up promotion for a shorter period. To illustrate this, we can easily think of the educational requirements of the children of the employee, at that stage, compelling him not to accept promotion and defer it for a duration of not less than three years. Therefore, Rule 49 will have applicability only for the purpose of forgoing/waiving the promotion but not for consideration of promotion altogether.

16. At the same time, if a person has forgone/waived his promotion for a temporary duration of not less than three years but accepts such a promotion later on what would be the effect of such temporary waiver also needs to be addressed by us. The answer to such a question can be furnished by relying upon the principles enunciated by the Supreme Court in *Union of India vs. Virpal Singh Chauhan* [(1995) (6) SCC 684] as well as *Ajit Singh Januja and others vs. State of Punjab and others* [(1996) (2) SCC 715]. In *Ajit Singh Januja* the relevant principle has been carved out in paragraph 9 in the following words:

"9. Once the quota is full and roster has stopped for members of the Scheduled Castes and Backward Classes in respect of whom reservation has been made and roster has been prescribed then their case for promotion to still higher grade against general category Posts have to be considered not treating them as members of the Scheduled Castes or Backward Classes "on any crutch". They cannot be promoted only on basis of their 'accelerated seniority' against the general category posts. In *R.K. Sabharwal's* case it was said that the candidates belonging to Scheduled Castes who compete on their own merit along with general category candidates then they are not to be counted within the percentage of reservation made for such candidates in the service, because they have competed with the general category candidates on their own merit. The same principle which has been enunciated by the Constitution Bench in the aforesaid case shall be applicable

whenever a member of Scheduled Castes or Backward Classes has got accelerated promotion to a higher grade and is to be considered for further promotion to still higher grade against general category posts. The accelerated promotions are to be made only against the posts reserved or roster prescribed. There is no question of that benefit being available when a member of Scheduled Castes or Backward Classes claims promotion against general category posts in the higher grade. It need hardly be pointed out that such candidates who are members of the Scheduled Castes or Backward Classes and have got promotion on basis of reservation and application of roster before their seniors in the lower grade belonging to general category, in this process have not superseded them, because there was no inter se comparison of merit between them. As such when such seniors who belong to general category, are promoted later it cannot be said that they have been superseded by such members of Scheduled Castes or Backward Class who have been promoted earlier. While considering them for further promotion against general category posts if the only fact that they have been promoted earlier being members of Scheduled Castes or Backward Class is taken into consideration, then it shall violate the equality clause and be against the view expressed not only in the case of R.K. Sabharwal (supra) by the Constitution Bench, but also by the 9 Judges Bench in the case of Indra Sawhney (supra) where it has been held that in any cadre reservation should not exceed beyond 50%. The 50% posts already being reserved against which promotions have been made then any promotion against general category posts taking into consideration that they are members of the Scheduled Castes or Backward Classes, shall amount to exceeding the limit fixed in the case of Indra Sawhney (supra) "

17. When clarification applications were moved in Ajit Singh, those applications were considered by a Constitution Bench of the Supreme Court and through their judgment rendered on 16.09.1999 in Ajit Singh and Others (II) vs. State of Punjab and others [(1999) 7 SCC 209], the Supreme Court has approved and once again when Review Applications were moved the same were dismissed by the Constitution Bench by the judgment rendered on 08.12.1999 in AJit Singh and others-III vs. State of Punjab [(2000 (1) SCC 430)]. Therefore, even in a case where the actual

right of promotion has been waived by a candidate for a temporary duration of not less than three years, when once such candidate gets promoted to the next higher post, at the end of waiver period, he catches up in the seniority over the earlier fortuitous promotion gained by the individual concerned. Such catching up of seniority, however, need not result in pay parity between him and the earlier promotee. It would only enable him to reclaim his seniority provided the earlier promotee has not left the category/rank to which he was promoted. Illustratively put if a Lower Division Clerk waives his right to be promoted as Upper Division Clerk or Senior Clerk for a duration of three years, and consequently his junior gets promoted as Upper Division Clerk or Senior Clerk as the case may be, and if the senior gets promoted after three years duration as Upper Division Clerk or Senior Clerk, in that category, upon his promotion, he reclaims his seniority over his earlier promoted junior. If in the meantime the earlier promoted junior has already left the post of Upper Division Clerk or Senior Clerk, by earning a further promotion, he cannot complain anything more.

18. Accordingly, we hold that the impugned order is not sustainable and hence we set aside the same and the Respondents will take the follow up action suitably. Accordingly, the writ petition stands allowed.

Sd/-
Assistant Registrar(CS III)

//True Copy//

Sub Assistant Registrar

gr.

Copy to:

1. The Registrar General,
High Court,
Madras 600 104.

2. The District Judge,
Kanyakumari District,
Nagercoil.

+1cc to Mr.Haja Mohideen Gisthi, Advocate Sr.8033

W.P.No.12346 of 2016

gj ii][co]
srg 17/04/2017