

**SAMARASINGHE**  
v.  
**THE BANK OF CEYLON LTD.**

**SUPREME COURT****WEERARATNE, J., SHARVANANDA, J. AND WIMALARATNE, J.****S. C. APPLICATION NO: 95/80****OCTOBER 30TH 1980.**

*Fundamental rights - Constitution, Article 12(1) - Equality of opportunity - Onus of proof - Promotion scheme in Bank - Whether discriminatory.*

The 1st. Respondent Bank had a category of officers who were designated Assistant Managers. When vacancies arose in the cadre of Assistant Managers, they were filled by promotion from the grade of Sub-Managers in the Bank's service. The Sub-Managers grade comprised persons who (a) were promoted within the Bank from the grade of clerk, and (b) those appointed directly from outside. The petitioner's complaint was that whilst a person who had become Sub-Manager by promotion (ie. category (a)) was eligible to apply and be considered for promotion as Assistant Manager after approximately six years service, a person who had been recruited as Sub-Manager directly from outside (ie. category (b)) although a University graduate with seven to eight years service in the Bank was debarred from being promoted to the post of Assistant Manager unless he had passed the Institute of Banker's Examination (London) Part I or its equivalent. The petitioner claimed that this distinction in the Bank's Scheme of Promotion was invidious in that it discriminated between equals, ie. persons belonging to the one and the same cadre of Sub-Managers, and infringed his Constitutional right to equality of treatment under Article 12(1). The Bank contended that the distinction was reasonable and in the interests of efficiency.

**Held :**

- (i) Where a petitioner seeks to strike-down a rule made by the relevant authority as discriminatory on the ground that it offends Article 12(1) of the Constitution, the burden is on him to plead and prove the infirmity by cogent and convincing evidence.
- (ii) Although employees may be integrated into one class, ie. Sub-Managers, the employees can in the matter of promotion be classified again into two different classes on the basis of any intelligible differential, as for example educational qualifications, which has a nexus with the object of classification, namely, efficiency in the post to which promotion is to be made. Accordingly, the differential made by the Bank in promotion from the grade of Sub-Manager to Assistant Manager was not unconstitutional.

**Cases referred to :**

- (1) *State of Jammu and Kashmir v. T. N. Koshla*, (1974) A.I.R. Vol. 61 Supreme Court, 1.
- (2) *State of Uttar Pradesh v. Kartar Singh*, (1964) Vol. 6 S.C.R. 679.
- (3) *Roshan Lal v. Union* (1968) Vol. 1 S.C.R. 185.

**APPLICATION** Under Article 126 of the Constitution.*K. Shanmugalingam with Harischandre Mendis and Nimal de Silva for petitioner.*

*K.N. Choksy with K.Kanag-Iswaran, Lakshman de Alwis and Miss A. Dharmaseeli*  
for 1st respondent.

*Cur. adv. vult.*

December 10, 1980.

**WEERARATNE, J.**

The Petitioner in this application prays that this Court grants him leave to proceed with his application under Section 126(2) of the Constitution, and determine that the requirement of the respondent Bank, that direct graduate recruits to the posts of staff assistants Class I (sub-Managers Grade 3 Class III) should pass the Banking Examination, to be appointed as Assistant managers (Grade 3, Class III), is discriminatory against the petitioner.

The petitioner having passed the G.C.E. (Ordinary Level) Examination joined the Respondent Bank in 1970 as a senior clerk and whilst working in the Bank graduated from the University of Sri Lanka in 1973, having passed the Bachelor of Arts Degree in the Sinhala medium. In 1975 he was appointed Staff Assistant Class I, and placed on three years probation, with the condition that his confirmation was dependent *inter-alia* upon his completing Part I of the Institute of Bankers' Examination (London) or the Intermediate Examination of Bankers' Training Institute (Ceylon). This condition however was deleted by the Board of Directors on 16.11.77 and instead the period of probation was increased by one year. The petitioner was thereafter confirmed in his post of Staff Assistant which was designated Sub-Manager. By PIA, he was notified that his promotion however to the next senior grade was to be dependent on his passing Part I of the Institute of Bankers' Examination (London) or its local equivalent. The relevant Circular (P2A) dealt with "Confirmation in Service - Grade of Sub-Manager (Direct Recruits)".

The Petitioner states that sometime in 1980 applications for the grade of assistant managers were called for from among the staff assistants Class I (or sub-managers) (Grade 3, Class III) who had passed the Job Test. The petitioner regarded himself as qualified and applied for the post, having passed the relevant Job Test. However by letter (P4) dated 11.8.1980 he was informed that his application was rejected on the ground that he had not passed Part I of the Institute of Bankers' Examination (or its local equivalent). In this connection it would be recollected that having regard to the contents of Circular (P2A) it was made clear to him that from the post of sub-manager his promotion to the next higher grade will be dependent on his passing Part I of the Institute of Bankers' (London) or its local equivalent. The petitioner's complaint

is that whilst promoted staff assistants (or sub-managers) who are not graduates are entitled to apply and be interviewed for the said post after about 6 years service, a graduate direct recruit, as for instance a staff assistant Class I (or sub-manager) with over 7 or 8 years service, is debarred from being considered for the said post of Assistant Manager without the requisite pass in the prescribed examination Part I of the Institute of Bankers' Examination (London) or its equivalent.

In the light of what has been set out above the Petitioner states that the Respondent Bank had infringed on his fundamental rights of equality under Article 12(1) of the Constitution. It may be mentioned that the petitioner did not pursue his averment in the petition that the Article 12(2) was also infringed.

Counsel for the petitioner in making his submissions stated that there were two classes of bank officers who held posts of staff assistants Grade I (or sub-managers), namely the direct recruits of which the petitioner was a member, and those who were promoted. Admittedly they were both doing the same type of work. Counsel submitted that they both flow into the same stream, and posed the question whether in this state of the matter there would be any discrimination against one class for promotion. It would be remembered that the petitioner did not have the special qualification referred to earlier since he had not passed Part I of the Institute of Bankers' Examination (London) or its local equivalent.

His Counsel submitted that the Bank cannot stipulate special conditions for a particular class. The petitioner's excuse for not passing the stipulated examination in Banking is that from the date of his appointment as a staff assistant Class I in 1975 he had been posted in remote areas far from Colombo where no facilities to follow any classes were available for the examination. In this connection the Assistant General Manager (staff) of the Bank, in his counter affidavit (paragraph 5) stated that of the five years of the petitioner's service in the staff grade with the Bank he had spent three years in stations of his choice in close proximity to Colombo.

The Assistant Manager has appended to his affidavit a list (1R1) of direct recruits to the Grade of sub-manager who have qualified in A.I.B. Part I, while serving in outstation branches. Of these 16 who joined with the Petitioner on the same day and who were serving in outstation branches have passed the relevant examination. He further avers (in paragraph 5a) that classes for the said

examination are conducted by correspondence courses as well. This has not been controverted by the petitioner in his second affidavit.

The sub-managers grade comprises persons who have been :-

- (a) promoted within the Bank from grade of clerk; and
- (b) appointed directly from outside.

The latter i.e. (b) are required to have a University Degree in order to qualify for appointment.

The former i.e. (a) are required to have specified examination qualifications, or in the absence of such qualifications, are chosen on the basis of "special merit and adequate experience."

Circular No. 74/77 (P2) and the addendum (P2A), contains the scheme of promotion to the various grades in the Bank. These circulars were approved by the Board of Directors of the Bank upon recommendations made by the Deputy General Manager. A breakdown of this scheme is set out hereunder in order to bring out the differences between promotees and direct recruits, so as to show that although they are all by name sub-managers and doing the same work, yet there are differences between them which the Bank is entitled to take into consideration in drawing from the grade of sub-managers for promotion to the grade of assistant managers.

**Promotees:**

A clerk in order to rise from the clerical grade to the post of sub-manager must first become a supervisor. In order to become a supervisor he must satisfy the requirements set out in para 2 of the Scheme of Promotion (P2).

They are as follows:

- (a) A minimum of 5 years service in the grade of clerk or assistant cashier or stenographer and Part I of the Institute of Bankers' Examination:

**OR**

- (b) in the absence of Part I, he must possess "Special Merit and adequate experience."

Once appointed a supervisor, he is on probation for a period of one year (Clause 2-3). Thereafter, in order to be promoted from Supervisor to the grade of sub-manager, he must satisfy the following further requirements laid down in the Scheme of Promotion (Clause 3):

- (a) Minimum 3 years service in the grade of confirmed supervisor, and Part I and also two subjects of Part I of the Institute of Bankers' Examination.

OR

- (b) In the absence of examination qualifications, he must possess "Special Merit and adequate experience."

Thus to rise from grade of clerk to sub-manager, he requires to have a minimum of nine years of banking experience (i.e. five years as a clerk, one year on probation as a supervisor, and three years confirmed service as a supervisor). In addition he must have Part I and two subjects of Part II of the Institute of Bankers' Examination (*vide* Class 3-1 (b) of P2).

In the absence of the examination qualification he can rise to the post sub-manager only upon satisfying the requirement of "Special Merit and Adequate Experience." (Category II contained in clause 3-1 of P2 is not relevant to the present dispute and has not been called in question by the Petitioner).

#### **Direct Recruits:**

These officers join the Bank's service at the level of sub-managers. They are appointed direct because they are graduates. They need not have any banking experience, but it is clear from the first paragraph of P2(a) that in order to be confirmed in the grade of sub-manager they will be subject to a probationary period of three years and will be required to pass Part I of the Institute of Bankers' Examination (London) or the local equivalent.

This requirement for confirmation as a sub-manager of Part I of the Institute of Bankers' Examination or the local equivalent was to make-up for the lack of experience.

In his affidavit, the petitioner as referred to earlier states, that upon representations being made, the Board decided to waive the requirement of Part I or its local equivalent for confirmation as sub-manager, but the probationary period was extended from three to

four years. This is contained in paragraph 2 of P2(a). But P2(a) however stipulates that their promotion to the next higher grade will be dependent on their passing Part I of the Institute of Bankers' Examination or its local equivalent.

The sub-managers Grade accordingly, consists of persons having three different sets of qualifications:

- (a) Promotees from clerk to supervisor to sub-manager having the minimum nine years experience referred to above, and Part I and two subjects of Part II of the Institute of Bankers' examination.
- (b) Promotees from clerk to supervisor or sub-manager having the 9 years experience and special merit (in lieu of Banking examinations.)
- (c) Direct recruits who are graduates.

They are not equal. The direct recruits do not have the years of experience the promotees have; nor do they have the Part I and two subjects of Part II of the Institute of Bankers' Examination. The direct recruits are confirmed as sub-managers after four years. They do not have to even pass Part I. They are thus not equals. Thus the cadre of sub-managers is made up of three categories, each being different from the others.

The argument for the petitioner is that promotees who have been appointed sub-managers on the basis of "special merit" do not possess the banking examination, and thus there is discrimination when such officers are considered eligible for promotions as assistant managers, whilst direct recruits are required to have this in view of P2(a). It is only these persons who are accepted as having "special merit" who can reach the rank of assistant managers without the banking examination. But attention was drawn to clause 5-2 of P2, according to which they will lose 10 marks in the criteria for selection to the grade of assistant managers by reason of examination qualification.

The scheme of promotion therefore has checks and balances and combines both academic qualifications and experience.

In paragraph 10 of the Bank's counter affidavit the term "special merit" and "adequate experience" was stated to have been formulated after discussions with the Bank Employees Union pursuant to an Industrial Court Award I D16 arising out of a

dispute in regard to promotions in the grades of supervisors and sub-managers which provided that:

"The General Manager may in his unchallengeable and absolute discretion promote any person who has not passed the departmental examinations as a supervisor or as a sub-accountant, (new sub-manager), in the case of "exceptional merit" was subsequently awarded with the concurrence of the Bank Employees Union to "special merit and adequate experience."

The counter affidavit avers that the petitioner was a member of the Staff Officers' Association up to the 15th July, 1979. "Special merit and adequate experience" has been accepted as a criterion by the Bank Employees' Union and the Staff Officers Association and neither of these bodies have disputed this.

Learned Counsel for the Respondent Bank submitted that the scheme (P2, P2a) approved by the Board of Directors does not amount to discrimination amongst equals, although the sub-managers consisting of promotees and direct recruits did the same work, since they were not considered equals.

The direct recruits would not be equal for the reason that the clerk had more years of banking experience and his merit was tested twice before, unlike the direct recruit. Clerks have to pass the efficiency bar test with banking as a subject. The clerk must have passed Part I of the Institute of Bankers (London) or the Ceylon equivalent of that examination before he became a sub-manager. Further he has to pass Efficiency Bar examinations every year before he can be a supervisor (P2b). The direct recruit graduate is told that before he is appointed assistant manager he must have passed Part I or at least the Ceylon equivalent of the Institute of Bankers (London). Counsel submitted that consequently the promotees (i.e. bank clerks etc.) are particularly qualified, to be assistant managers from sub-managers.

In the case of *The State of Jammu and Kashmir v. T.N. Kosha*<sup>(1)</sup> a bench of five judges considered the question whether if persons drawn from different sources are integrated into one class they could be classified for purposes of promotion on the basis of their educational qualifications. Shortly stated the facts of this case are that there was a cadre known as Assistant Engineers. This cadre was made up of engineers who were degree holders or diploma holders. When it came to promotion to the rank of Executive Engineer, only

degree holders were considered eligible. The Supreme Court held that this was not discrimination; it was permissible classification, since the object was to achieve administrative efficiency and to have competent officers in the higher rungs of the service, the scheme passed the test of the equal protection clause. Dealing with the arguments advanced in this case the Attorney-General who appeared for the appellants contended that it was always open to the Government to classify its employees so long as the classification is reasonable and has nexus with the object thereof, that a classification cannot be held to infringe the equality clause unless it is actually and palpably arbitrary; that if there are different sources of recruitment, the employees so recruited can either be allowed different conditions of service and so continue to belong to different classes, or the Government may integrate them into one class; that once the employees are integrated into one class the employees can in the matter of promotion, be classified again into two different classes on the basis of any intelligible differential as for example, educational qualifications, which has a nexus with the object of classification, namely efficiency in the post of promotion.

It would be appropriate to refer particularly to the submissions of Mr. Gupta one of the several Counsel who appeared for some of the respondents since the stand taken by him has been precisely the position taken by Counsel for the petitioner in the matter before us. Mr. Gupta contended that once there is a class of equals no discrimination can be made among them on any ground whatsoever, and that accordingly if chances of promotion are accorded to a few within a class of equals, there is an inherent vice attaching to the classification and no question of the reasonableness of the new yard-stick can possibly arise. In the leading judgment of the case Chandrachud, J. stated that, "the respondents have assailed the classification in the clearest terms but their challenge is purely doctrinaire . . . Classification is primarily for the legislature or for the statutory authority charged with the duty of framing the terms and conditions of service; and if looked at from the standpoint of the authority making it, the classification is found to rest on a reasonable basis, it has to be upheld."

The judgment emphasized the well-known rule that when a party seeks to strike down a rule made by a competent authority as discriminatory for the reason that it offends Article 14 (which corresponds to Article 12(1) of our Constitution) the burden is on him to plead and prove the infirmity. That, the respondent does by disclosing the facts upon which he could sustain the plea of discrimination with cogent and convincing evidence, for "there is



**a presumption that every factor which is relevant or material has been taken into account in formulating the classifications" *State of Uttar Pradesh v. Kartar Singhe*<sup>(2)</sup>. The Judgement goes on to state that: "it is no part of the appellant's burden to justify the classification or to establish its constitutionality . . . a classification founded on variant educational qualifications, is for the purposes of promotion to the post of an executive engineer, to say the least not unjust on the face of it and the onus therefore cannot shift from where it originally lay."**

Chandrachud, J. in summing up the discussion on classification states that - "Judicial scrutiny can therefore extend only to the consideration whether the classification rests on a reasonable basis and whether it bears a nexus with the object in view. It cannot extend to embarking upon a nice or mathematical evaluation of the basis of classification, for where such an inquiry is permissible it would be open to the Courts to substitute their own judgment for that of the legislature or rule-making authority on the need to classify on the desirability of achieving a particular object".

Counsel for the Petitioner strongly relied on *Roshan Lal's* case<sup>(3)</sup>. In this connection Chandrachud, J. states that all that *Roshan Lal's* case lays down, "is that direct recruits and promotees lose their birth marks on fusion into a common stream of service and they cannot be thereafter treated differently by reference to the consideration that they were recruited from different sources . . . . *Roshan Lal's* case, is no authority for the proposition that if direct recruits and promotees are integrated into one class, they cannot be classified for the purposes of promotion on a basis other than the one that they were drawn from different sources".

In the present matter the petitioner has not displaced the burden which is upon him to set out facts required to support the plea of discrimination. He has not placed any cogent and convincing evidence to establish discrimination. Counsel for the petitioner inquired, "What is the banking experience of a stenographer or clerk to qualify as supervisors?"

The answer to his query is that they cannot rise from the clerical to the supervisory grade without satisfying the requirement of clause 2 of P2 (that is, 5 years service and Part I of the Institute Examination or the Ceylon equivalent of it). Counsel for the respondent Bank submitted in this connection that it is not likely that they will be considered under the "special merit" provision for

promotion as Supervisors. They will therefore have to qualify under clause 2 1(a) and obtain Part I before they get promoted.

The five Judges in the Indian Supreme Court case cited above, having considered all the relevant previous authorities, unanimously held that though persons appointed directly and by promotion were integrated into a common class of Assistant Engineers on the basis of educational qualifications, they could validly be classified for promotion to the cadre of Executive Engineers on the basis of education qualification without violating Articles 14 and 16 of the Constitution of India.

On an examination of the material placed before us and the submissions made by learned Counsel, we are satisfied that the respondent Bank has not violated Article 12(1) of the Constitution.

It may be mentioned that the preliminary objection set out by the first respondent that, "the first Respondent is not an organ of the Government, nor does it exercise the executive or administrative power of the State," was not gone into and hence no opinion is expressed on the validity of that objection.

The application of the petitioner is for the above reasons dismissed without costs.

**SHARVANANDA, J.** — I agree.

**WIMALARATNE, J.** — I agree.

*Application dismissed without costs.*