

(1997) 04 AP CK 0033

In the Andhra Pradesh High Court

Case No : Writ Petition No's. 1664 and 5105 of 1995

A. Pydikonda

APPELLANT

Vs

Chief Mechanical Engineer, Vishakhapatnam Port Trust

RESPONDENT

Date of Decision : 19-04-1997

Acts Referred:

Constitution of India, 1950 — Article 335

Citation : (1998) 1 ALD 91

Hon'ble Judges : B.S.A. Swamy, J

Bench : Single Bench

Advocate : Mr. N. Ramesh Kumar, for the Appellant; Mr. K. Srinivasa Murthy, for the Respondent

Judgement

1. These two writ petitions are inter-connected and they relate to the appointment of one Appala Raju as Asst. Foreman (General) in the Visakhapatnam Port Trust, Visakhapatnam, and they can be disposed of by a common judgment.

2. A Pydikonda, the petitioner in both the writ petitions was working as Asst. Foreman (General) on adhoc basis from 05-01-1994 and the Selection Committee constituted by the respondents for the purpose of filling up the vacancy on regular basis by promotion interviewed the petitioner and another on 14-06-1994. But, without publishing the results of the interview held on 14-06-1994, the respondents constituted another selection committee by its proceedings dated 24-11-1994 and called about five persons for interview including the petitioner, who appeared for the interview on 14-06-1994 at 2:30 p.m. on 28-01-1995. The petitioner having appeared for the interview and having suspected that the respondents are likely to appoint some other person filed the Writ Petition No. 1664/95 seeking a direction to the respondents to declare the results of the interview held on 14-06-1994 for appointment to the post of Asst. Foreman (General) on 01-02-1995 and the same was admitted by this Court on the same day. Subsequently, the 1st respondent promoted the 2nd

respondent from Chargehand (machinist) and appointed him as Asst. Foreman (General) duly reverting the petitioner who was holding the post of Asst. Foreman (General) on adhoc basis to the post of chargehand (Welder) in its order No.CME/EC/ORS/388, dated 14-03-1995. Questioning the said appointment Mr.. Pydikonda, filed the 2nd Writ Petition No.5105/95.

3. For the purpose of adjudicating the dispute the parties are referred in this judgment as arrayed in Writ Petition No.5105/95.

4. The main grievance of the petitioner in these two writ petitions is that though he is the senior most employee in the category of Chargehand and he stands at serial No.1 among the Chargehands eligible for promotion to the post of Asst. Foreman. The 2nd respondent i.e., Mr. Appala Raju, who was promoted to the post of Chargehand three years later and who is not qualified at the time of first selection was appointed to the post and the same is violative of Article 14 of the Constitution of India. It is also his contention that the respondents, with a view to promote Mr. Appala Raju, did not publish the results of the first selection (interview) dated 14-06-1994 and conducted fresh selections for the second time by constituting another selection committee. The action of the respondents in constituting 2nd selection committee and in considering the claims -of Mr. Appala Raju, who is not qualified to hold the post at the time when the vacancy has arisen is nothing but arbitrary exercise of power and it is intended to confer under favour of Mr. Appala Raju.

5. The respondents in their counter stated that the petitioner was promoted to the post of Asst. Foreman (General) with effect from 05-01-1994 at 7th point of 40 point roster on adhoc basis pending dereservation orders to carry forward Scheduled Tribe vacancy at 4th point and after obtaining order by dereservation, the Staff Selection Commission constituted to fill up the vacancy on regular basis could not come to unanimity. While two members of the Committee found the other candidate Mr. Bennaiah suitable, the third member observed that the petitioner who is having four years experience should be promoted as Asst. Foreman. From their counter it is seen that while Mr. Bennaiah got 53 marks out of 100, the petitioner got 50 marks and it is also their case that the total length of service of both the candidates were taken into consideration and for every year of service 1/2 mark was awarded. Out of the two candidates while Mr. Bennaiah got total experience of about 28 years, the petitioner got only about 24 years of service as on the date of selection. They also admitted that the post of Asst. Foreman (General) (Class-III) is a selection post.

6. Further, it is their case that subsequently, at the instance of the 1st petitioner the selection committee met on 15-11-1994 and instead of re-considering the earlier recommendations the Committee decided to request the Chairman for constituting another committee to hold selection afresh. Accordingly, a fresh selection committee was constituted on 24-11 -1994 and interviewed five persons including the petitioner and the 2nd respondent on 28-01-1995 and as per the recommendation of the selection committee the 2nd respondent was

appointed as Asst. Foreman (General). They have also categorically stated in Para-7 of their counter affidavit that when promotion is by way of selection, merit will only be the criterion and no other circumstance can be taken into consideration.

7. During the course of the arguments, it came to light that the selections were more based on total length of service of the candidates than the merit as contended by the respondents in their counter. They came up with an additional counter dated 15-12-1995. This counter was filed obviously to take advantage of the judgment of the Supreme Court in Union of India and others etc. Vs. Virpal Singh Chauhan etc., . In the additional counter it is stated that the 4th vacancy which is earmarked for Scheduled Tribe candidate was thrown open and it was treated as a general vacancy as no Scheduled Tribe candidate was available. Rebutting the contention of the petitioner that when the Scheduled Tribe candidate is not available, the post has to be filled up with Scheduled Caste candidates, the respondents stated as follows :

"The question of promoting an SC candidate in the absence of ST does not arise. If an ST or SC depending on the vacancy is not available it is carried forward and it is converted into general category."

8. Curiously, in the additional affidavit the respondents stated that the first selection committee was given a go bye at the instance of the petitioner and a second selection committee was constituted on 28-01-1995. It is also their case that by the date of subsequent selection more number of candidates became eligible and all of them were called for interview. They also stated that 30 marks were allotted for seniority and 1/2 mark for each year of service. As the petitioner has put in less number of years of service than others he was given only 12 1/2 marks while others were given more marks on that account.

9. From the above pleadings the following facts emerge for consideration of this Court:

1. 4th point of the 40 point roster reserved for ST candidate is sought to be filled up by dereserving the vacancy with a candidate belonging to general category and that vacancy has in fact, arisen on 05-01-1994, when the petitioner was promoted and appointed in that post on adhoc basis.

2. The post of Asst. Foreman (General) (Class-111) is a selection post and when the post is to be filled up by promotion, merit will be the only criterion and no other circumstances can be taken into consideration.

3. It is also now in record that in the process of selection, the selection committee awarded 112 mark for each year of service from the date of entry of the candidate into service of the respondent Port.

4. On the date of first selection i.e., 14-06-1994 only two candidates arc eligible for appointment to the post in question. But, by the time of subsequent selection three more candidates acquired qualifications and their cases were also

considered for appointment by promotion. Ultimately, second respondent, who could acquire qualification by the time of second selection was given appointment on the basis of the total length of service as revealed from the proceedings of the selection committee.

10. Having found prima facie that the procedure followed by the respondent Port is not in accordance with law, this Court raised certain questions to be answered by the respondents and directed the respondents to file written replies to the questionnaire. Along with the answers the respondents also produced the roster book maintained by the respondent Port.

11. These two writ petitions are in my list for almost a year to get the required information from the respondents and ultimately, arguments were concluded on 06-03-1997.

12. Having gone through the pleadings and the material available on record, I am of the opinion that the appointment of the 2nd respondent is liable to be set aside on many a ground.

13. Firstly, the vacancy has arisen in the year 1994 i.e., 05-01-1994. At any rate the selection committee was constituted for the first time on 14-06-1994 by which time only the petitioner and one Mr. Bennaiah were alone eligible for appointment to the post of Asst. Foreman (General) by promotion. It is well settled principle that the claims of the eligible candidates as on the date of the vacancy are alone has to be considered, even if the post is sought to be filled up at a later date due to administrative exigencies i.e., on 05-01-1994 or at the worse when the authorities have taken decision to fill up the vacancy i.e., 14-06-1994.

14. In the instant case, the vacancy has arisen for the first time on 05 -01 -1994 due to retirement of one P. Narayana Rao who was working on adhoc basis under new VR scheme. In fact, the petitioner was promoted on adhoc basis and he was acting in that capacity Without any complaint from any quarter. Admittedly, Mr. Bennaiah, was promoted as a Chargehand (Class-III) feeder post, two years later than . the petitioner and he was not considered for adhoc appointment.

15. Subsequently when the departmental promotion committee was constituted and conducted interviews on 14-06-1994, he was also interviewed for the said post. As far as others are concerned, the respondents themselves in the additional counter admitted that by the time of subsequent selections more number of candidates became eligible and they were called for interview. Question No.7 raised by this Court and the answer given by the respondents are hereunder:

"Q.7. Can a selection be extended or enlarged to more than two persons who are eligible to be promoted when the vacancy has arisen on the ground that (a) there is no unanimity and (b) more number of candidates acquired eligibility at a later time?

(A) Initially when selection was conducted in June, 1994, 2 candidates were only eligible for being considered to and of the justification for conducting second selection was mentioned in answer to question No.5 above. When second selection was sought to be conducted in January, 1995 three more employees became eligible for being called for selection, and since the second selection conducted in January, 1995 is a fresh selection, the three candidates who became eligible as on the date of the said fresh selection were also called for selection."

16. Obviously, the reasoning given by the respondents runs counter to the judgment of the Supreme Court referred above (1995 (5) SLR 400). The very action of the selection committee in recommending re-constitution of the selection committee as there is no unanimity of opinion among them is vitiated and is not in accordance with law as decisions will always be taken by majority when there is no unanimity. Even assuming that the second selection committee can be constituted, only the candidates who are eligible for appointment as on the date of vacancy or atleast on the date on which the first selection committee constituted are alone eligible for consideration and the selection committee gravely erred in inviting other candidates also for interview. Such an action is obviously bad.

17. Admittedly, the second respondent who acquired the required qualification by the time of second selection cannot be considered for appointment as Asst. Foreman in a vacancy that has arisen on 05 -01 -1994.

18. Under Rule 13(I) of Visakhapatnam Port Employees (Recruitment, Seniority and Promotion) Recruitments, 1964, the order issued by the Central Government from time to time for the reservation of appointments or posts under the Central Government in favour of SC and STs shall apply mutatis mutandis to all appointments covered by these regulations and to which direct recruitment or promotion is made.

19. The Brochure on reservation for SC and ST in services issued by department of Personnel and A.R.O.M.No. I/9/74-Estt(SCT) dated 29th April, 1975, came up for consideration before the Hon"ble Supreme Court in AIR 1997 465 (SC) . Paragraph No.8 of the Brochure deals with exchange of reservation between SC and ST, which is extracted as hereunder:

"8. Chapter 11 of the Brochure deals with carrying forward of reservations and exchange of reservation between Scheduled Castes and Scheduled Tribes, paragraph 11.1 states as follows:

""11.1 Carry forward of reservations. If sufficient number of Scheduled Castes and Scheduled Tribes candidates fit for appointment against reserved vacancies are not available, such vacancies can be dereserved after following the prescribed 10 and such reserved vacancies can be filled by candidates of other communities. After such dereservation, reservations are carried forward to subsequent three recruitment years xxxxx.

Note (1) :--Recruitment year shall mean a "Calendar year" limit for carry forward of reserved vacancies shall mean the year in which recruitment is actually made.

Note (2) :--xxxxx ."

Paragraph 11.2 is as follows :

11.2 Exchange of reservation between Scheduled Castes and Scheduled Tribes. While vacancies reserved for Scheduled Castes and Scheduled Tribes may continue to be treated as reserved for the respective community only. Scheduled Tribes candidates may also be considered for appointment against a vacancy reserved for Scheduled Castes candidates and vice versa where such a vacancy could not be filled by a Scheduled Caste or Scheduled Tribe candidate even in the third year to which the reservation is carried forward. The normal provision is that the exchange is permissible only for the reservations which have been carried forward to third and subsequent year of recruitment x x x."

(9) In the light of the above instructions their Lordships of the Supreme Court held that there is considerable merit in the contention of the petitioner that 1985 was the third recruitment year for the reservation meant for a Scheduled Tribe candidate and in that year the reservation could have been exchanged for a Scheduled Caste candidate, especially in view of the definition of "recruitment year" in Note(I) to paragraph 11.1. The benefit of such exchange was not given to the petitioner because of the erroneous view taken by the High Court that the post was not exchangeable in 1985. xxxxx."

From the above, it is evident that in the third recruitment year if a ST candidate for appointment is not available in that year, the reservation could have been exchanged for an SC candidate. Admittedly, this brochure on reservation is applicable for the appointments to be made in the respondent Port. Instead of filling up the vacancy earmarked for ST candidate with an SC candidate the respondents got the post dereserved and treated it as a general vacancy which is obviously illegal. The respondents without looking into the brochure simply stated as follows :

"The question of promoting an SC candidate in the absence of ST docs not arise, if an ST or SC depending on the vacancy is not available it is carried forward and it is converted into general category."

From the above it is evident that the procedure followed by the respondent Port runs counter to the policy of the Central Government and the same cannot be countenanced. In that event the petitioner who happened to be the SC candidate should have been appointed to the said post. On this ground also the orders of the respondents are vitiated.

20. Thirdly, a look at the proceedings of the selection committee will amply prove that the petitioner secured equal number of marks in professional ability and capacity to do particular job as well as personality address and leadership.

21. At this stage 1 would like to make a reference to Article 335 of the Constitution of India:

"The claim of the members of the Scheduled Castes and the Scheduled Tribes shall be taken into consideration, consistently with the maintenance of efficiency of administration, in the making of appointments to services and posts in connection with the affairs of the Union or of a State."

22. In this case the petitioner has not only possessed the required efficiency but was also officiating in the said post since 05-01-1994 without any complaint from any quarter. Hence, he is entitled for preference over others. To a specific question raised by the Court, the respondents referred to a judgment of the Supreme Court in *Indra Sawhney and Others Vs. Union of India (UOI)*, extensively, forgetting the fact that the issue involved in that writ petition is with regard to other backward classes but not with regard to SC and STs. On this ground also the order of the first respondent appointing the second respondent is vitiated.

23. Nextly, the whole controversy in this case has arisen because of the action of the respondents in taking total length of service and in awarding marks for the length of service, forgetting the fact that appointment to the post of Asst. Foreman (General) is by way of selection and seniority will be taken into consideration where merit and ability are approximately equal. But, the question to be adjudicated in this writ petition is whether the seniority in the feeder category has to be taken into consideration or the total length of service has to be taken into consideration, more so when the post has to be filled up from various feeder categories. Admittedly, in the instant case the post of Asst. Foreman (General) has to be filled from the feeder category of Chargehand Class-III in various trades like welders, fitters, machinists etc.

24. Rule 1 I(a) of the service rules deals with fixation of the seniority of the employees and the inter se seniority of persons substantively appointed in a grade or post shall be regulated by the order which they are so appointed. Under 1 I(d) it is stated that persons appointed against the promotion quota of vacancies shall be ranked inter se according to the orders which they are approved for promotion by the Departmental Promotion Committee.

25. From this rule it is evident that the seniority in the feeder category alone has to be taken into consideration but, not the total length of service. If that is taken into consideration, the petitioner has put in more number of years of service in the feeder category. But, the selection committee adopted a novel procedure in assessing the merit and ability by taking the total length of service of the candidates. The selection committee earmarked 20 marks for record of service and another 30 marks for seniority in columns 3 and 4 of the chart where marks were given. It is useful to refer to questions 1 to 3 of the questionnaire given by the Court.

"Q1. Which rule or regulation allows the selection committee to take overall

seniority while fixing up the seniority in a selection post ?

Ans: x x x x. while adjudicating the merit of an employee, due regard shall be given to his seniority also.'''

26. At the same time, the respondents did not specify what is meant by seniority here.

Question No.2 and its answer is as follows:

Q2. Which rule of regulation empowers the selection committee to allot 1/2 mark for each completed year of service ?

Ans: The selection committee after considering the candidates in the selection will allot marks in the following manner:

VISAKHAPATNAM PORT TRUST MECHANICAL DEPARTMENT

Rs. 1385 - 2545 held on

Marks Sheet for Selection to the Post of.....at 15:00 hrs.

Name Designation Record of 7 service Marks: 20 Seniority Marks: 30
Professional ability and capacity to do the the particular job Marks: 30
Personality address and leadership Marks: 20 Total Marks: 100

(1) (2) (3) (4) (5) (6) (7)

27. Again they observed silence how they were awarding 1/2 mark per every year of service, more so when it is a selection post.

"Q3. What is record of service ?

A: The entire service rendered by an employee in the board is his record of service till the date of selection." .,

28. But, from the table it is seen that 20 marks were earmarked for record of service and 30 marks for seniority in all 50 marks though no distinction can be made between record of service and seniority even as per their o\\vii answers.

29. From the answers given to question Nos. 1, 2 and 3 at the worst it can be presumed that the respondent Port intends to take the entire service rendered by the employee into consideration and they went on awarding marks under two heads for seniority. With the result, though the petitioner was found no less meritorious than others, because of the wrong procedure followed by the respondents he was denied the promotion.

30. A similar question arose for consideration before the Hon''ble Supreme Court in Dr. N.D. Mitra and another Vs. Union of India and others, , in case of promotion to the post of Director General from the feeder posts of Sr. Dy. Director General and Dy. Director General, who are eligible to be considered to

the post and held as follows :

"The feeder post for promotion to the post of Deputy Director General in each discipline is the post of Director in the said discipline. For example, the feeder post for Deputy Director General (Geology) is the Director (Geology). Similar is the case with other disciplines. The normal rule for fixing seniority in a cadre is the length of service. In the absence of any statutory rules or executive instructions to the contrary, inter se seniority amongst the Deputy Director Generals has to be fixed on the basis of continuous length in the said post. The hierarchy of the six distinct separate disciplines comes to an end with the post of Deputy Director General. Thereafter the post of Senior Deputy Director General is common to all the disciplines. The Deputy Director General, working in all the six disciplines are entitled to be considered for promotion to the post of Senior Deputy Director General and as such it is necessary to maintain their inter se seniority.""

From this it is seen that while filling up a higher post in the hierarchy by promotion the length of service in the feeder category alone has to be taken into consideration. If that has been taken into consideration, admittedly, the petitioner is the senior most in the feeder category of Chargehand and he would have got more number of marks than others. Hence, the action of the respondents in taking the total length of service for the purpose of promotion to the post of Asst. Foreman (General) from the date of entry into service cannot be countenanced.

31. There remains two judgments on which the respondents wants to rely in support of their action in taking the entire length of service into consideration. They are Union of India v. V.P. Chowhan (supra) and Ajit Singh Januja and others Vs. State of Punjab and others, .

32. In these two cases, their Lordships of the Supreme Court were dealing with fixation of inter se seniority between SC/ST who got accelerated promotion in the backlog vacancy and the general candidate who is promoted later to that category and held as follows:

"Even if a SC/ST candidate is promoted earlier by virtue of rule of reservation/roster than senior general candidate and the senior general candidate is promoted later to the said higher grade, the general candidate regains the seniority over such earlier promotion of the SC/ST candidate."

So far as the rule of reservation is considered, it has been made applicable to Railway service by orders issued by the Railway Board from time to time pursuant to and hi obedience to the policy decisions of the Ministry of Home Affairs, x x x x x. We do not think it necessary to refer to them in this judgment since we are concerned herein not with the validity of the rule of reservation but with its nature and its effect upon the question of seniority."

33. Hence, from this it is seen that the" principle laid down in the decision of the

Supreme Court is intended to fix inter se seniority among the SC/ST who were promoted earlier in a backlog vacancy who are juniors in that category and a general candidate at a later point of time and the said judgment cannot be pressed into service to consider the total length of service for effecting the very promotion itself.

34. Further, even assuming for a moment that the appointing authority is entitled to take the total length of service while effecting" promotions the judgment was made applicable prospectively from 10th February, 1995 i.e., from the date of judgment in R.K. Sabharwal and others Vs. State of Punjab and others, wherein it was held that the roster reserved points should be implemented in the form of running account from year to year and such roster will be operative only till all the roster points in the cadre are filled and the quota prescribed is achieved and not thereafter.

35. Whereas in the instant case, the vacancy has arisen on 05-01-1994 and the first selection has taken place on 14-06-1994. Hence, this judgment is not applicable on that ground also. Further, though the petitioner belongs to SC category and got some accelerated promotions, he was considered for appointment by promotion to the post of Chargehand Class-III the feeder category in a general vacancy at the 9th point of the roster as is evident from the roster maintained by the respondents. When once the petitioner secured promotion as a general candidate in the feeder post Regulation 11 (a) and (d) operates as injunction for taking the total length of the service of the petitioner into consideration for the purpose of promotion.

36. Lastly, the action of the respondents in constituting a fresh selection committee on the ground that there is no unanimity among the members of the selection committee cannot be approved as no where it is stated that the decision of the selection committee should be unanimous and the well recognised principle is that any committee can take decision by majority. Hence, on the ground that there is no unanimity, the respondents cannot reconstitute the very selection committee itself and also consider the claims of the candidates who are not eligible for appointment as on the date when the vacancy has arisen as held by me supra.

37. For all the above reasons, both the writ petitions are allowed and the appointment of the second respondent is set aside. Consequently, the respondents are directed to promote the petitioner as Asst. Foreman (General) as the merit and ability of both the petitioners and Mr . Bennaiah are approximately equal in the first selection as per the marks awarded by the selection committee and in the second selection also he was found no less meritorious than others including the second respondent except for the fact that the 2nd respondent was awarded more marks by adopting a wrong procedure of awarding marks for the total length of service in the process of selection which is unknown while filling up a selection post.

38. With above directions both the writ petitions are allowed with costs. Advocate fee Rs.2,500/- in each of the writ petitions.