
(2019) 04 CAT CK 0032

In the Central Administrative Tribunal

Case No : Original Application No. 4320 Of 2012

B.S. Madhav Rao And ors

APPELLANT

Vs

UOI through

RESPONDENT

Date of Decision : 30-04-2019

Acts Referred:

Constitution Of India, 1950 — Article 16, 16(1), 16(4)

Citation : (2019) 04 CAT CK 0032

Hon'ble Judges : L. Narasimha Reddy, J;A. K. Bishnoi, J;Pradeep Kumar, J

Bench : Full Bench

Advocate : Nalin Kohli, Harvinder Oberoi, Dr. Ch. Shamsuddin Khan

Judgement

1. This OA is being heard by the Full Bench, on a reference being made by a Division Bench of this Tribunal through its order dated 18.12.2018 in this OA.

2. The facts in brief, are as under:-

The applicants were appointed as Statistical Group-B Officers in the Ministry of Statistics and Programme Implementation, by way of direct recruitment. Thereafter, they were promoted to the post of Assistant Director, between 2004 and 2011 in the Junior Time Scale (JTS) Level. The Rules for promotion to the post of JTS level were initially framed in the year 1961. According to Rule 8 thereof, 60% of the vacancies of JTS were to be filled through direct recruitment and the remaining 40%, by way of promotion, subject to selection. Such of the Group-A Officers who have put in 4 years regular service were eligible for promotion. The allocation between the direct recruits and the promotees was on the basis of vacancies that were available, whenever the recruitment is to take place.

3. The Rules were amended in the year 2005. The earlier vacancy-based allocation, between the direct recruits and the promotees, was transformed into the post-based one. In view of this development, the respondents sought clarification from DoP&T in the year 2010 as regards fixation of the number of

posts to be earmarked for direct recruitment, on the one hand, and promotion, on the other. Vide their letter dated 21.04.2010, the DoP&T clarified that the allocation shall be in accordance with rules that were in force for the concerned years during which the vacancies have arisen.

4. However, another clarification was sought four months thereafter. This time, the DoP&T has addressed a letter dated 31.08.2010 stating that the post based allocation contemplated under the amended rules shall apply to the vacancies that have occurred subsequent to 2005. Reference was made to the instructions issued by it in a Memorandum dated 02.07.1997. This was followed by OM dated 13.10.2011 issued by the DoP&T stating that the allocation between direct recruits and promotees for the vacancies referable to the years 1997 to 2005 at JTS level of the Indian Statistical Service shall be post based as contemplated under letter dated 02.07.1997. The applicants filed this OA challenging the said OM.

5. According to them, the Recruitment Rules were amended in the year 2005 in the wake of judgment of the Hon'ble Supreme Court in *R. K. Sabharwal v State of Punjab* [(1995) 2 SCC 745], which dealt with the method of implementation of reservation in favour of SC/ST, and the post based allocation which is typical to such reservation, was applied for the allocation between the direct recruits and promotees also, without any basis. It is also stated that even if the amendment can be said to be valid as regards the allocation between direct recruits and promotees, it can be only prospective in operation and that there was absolutely no basis for applying the principle underlying the amended rule, for the posts which arose prior to the date on which the rules were amended.

6. The respondents filed counter affidavit opposing the OA. According to them, the very purpose of amending the Recruitment Rules was to make the allocation between the direct recruits and promotees on post based pattern, in place of a vacancy based distribution, and that the rules that are in force when the appointments/promotions are effected would govern the situation. Other contentions were also urged by both the parties.

7. When the present OA was heard, the respondents relied upon an order dated 02.02.2006 passed by this Tribunal in OA No.3984/2011. In that OA, this very OM dated 13.10.2011 was challenged. The Tribunal dismissed the OA by taking the view that the method stipulated under the amended rule would govern the vacancies that arose from 1997 onwards. When the applicants therein relied upon the order in OA No.3984/2011, the learned Members of the Bench who heard this OA felt that the view taken therein is opposed to the law laid down by the Hon'ble Supreme Court in *State of Punjab & others v Dr. R. N. Bhatnagar and another* [(1999) 2 SCC 330]. The fact that a writ petition was filed against the order in OA No.3984/2011 was also taken note of. After discussing the matter at some length, and by taking note of the disadvantage suffered by the applicants on account of application of amended rules to the vacancies referable from 1997 to 2004, the Division Bench referred the matter to this Full Bench.

8. The arguments on behalf of the applicants are advanced by Shri Nalin Kohli and Ms. Harvinder Oberoi, learned counsel. Shri Kohli submits that basically the subject matter of the judgment of the Supreme Court in Sabharwal's case (supra) was the one for implementation of reservation, and that it has nothing to do with the allocation of vacancies between the direct recruits and the promotees, in the context of appointment to higher posts. He contends that the DoP&T has taken the correct view of the matter through its communication dated 21.04.2010 and instead of taking steps in accordance with the procedure indicated therein, the respondents sought further clarification with an ulterior motive vide their letter dated 30.07.2010. He submits that there was no basis for DoP&T to change its stand much less to refer to the instructions issued on 02.07.1997 which were in a different context altogether.

9. Learned counsel submits that the rules which were in force when the vacancies have arisen, would govern the allocation between the direct recruits and promotees, and the respondents are not justified in attempting to apply the amended rules with retrospective effect. As regards the objection for hearing the matter by a Full Bench at a time when a writ petition is pending against the order in OA No.3984/2011, learned counsel submits that the order was per incuriam inasmuch as it has been passed without taking note of a binding precedent rendered by the Hon^{ble} Supreme Court, and the Full Bench is very much competent to hear the OA.

10. Dr. Ch. Shamsuddin Khan, Learned Counsel for the respondents, on the other hand, submits that the very purpose of amending the rules was to replace the concept of vacancy based allocation between direct recruits and promotees with a post based one, and whatever vacancies existed as on the date of the amendment, are required to be dealt with by the said provision of law. He further submits that the Hon^{ble} Supreme Court in Sabharwal's case (supra) has clarified that the post based approach would apply to promotions also and that this Tribunal has decided OA No.3984/2011 on correct lines.

11. The relevant facts, and the circumstances that led to the hearing of the OA by Full Bench are stated in the preceding paragraphs, within permissible limits of brevity. There is no denial of the fact that the 1961 Rules provided for vacancy based allocation between direct recruits and promotees in the ISS. To be precise, the number of vacancies that have arisen in the promotional post in a particular year is decided, and then the allocation between the direct recruits and promotees, namely 60:40 is made. This was changed in the year 2005 by way of an amendment. According to this, once the vacancies that have arisen in a particular year are determined, they are identified with reference to the category of employee on account of whose retirement it has arisen. In other words, if an officer who was appointed to the post by way of direct recruitment has retired, the vacancy so arisen is allocated to the direct recruit and similarly if the vacancy has arisen on account of an officer who was appointed on promotion, it is earmarked for a promotee.

12. That the Rules amended in the year 2005 provide this type of allocation between the promotees and direct recruits in the feeder category for the purpose of promotion to the next higher post, is beyond any pale of doubt. The whole issue is as to the manner in which the vacancies that arose prior to the amendment of the Rules, are to be allocated between promotees and direct recruits. It has already been mentioned in the preceding paragraphs that the allocation used to be vacancy-based till the Rules were amended in the year 2005, which resulted in the allocation being made post-based. The judgment of the Hon'ble Supreme Court in R. K. Sabharwal's case was treated as the basis for the change of the approach.

The Hon'ble Supreme Court rendered its judgment on 10.02.1995. It was in relation to the method of working of the reservation in promotions in the services in Irrigation Department of the State of Punjab. With a view to ensure that the proper balance between the reserved and unreserved categories is maintained, the State Government issued instructions providing for preparation of a 100-point roster, in which point numbers 1, 7, 15, 22, 30, 37, 44, 51, 58, 65, 72, 80, 87 and 91 were earmarked for SC, and point numbers 26 and 76 for Backward Classes. In the process, the candidates belonging to the SC category in the feeder post occurring relatively below in the seniority list were promoted, in preference to their seniors, hailing from unreserved category. Therefore, the very basis of the roster was challenged. The Hon'ble Supreme Court has taken into account, the relevance of the roster. It was held that the roster would in fact ensure that the reservation does not exceed the prescribed limits. Reference was also made to the judgment of the Supreme Court in Indira Sawhney v Union of India [AIR 1993 SC 477]. The observation of the Supreme Court reads as under:

"9. The quoted observations clearly illustrate that the rule of 50% a year as a unit and not the entire strength of the cadre has been adopted to protect the rights of the general category under clause (1) of Article 16 of the Constitution of India. These observations in Indra Sawhney case [1992 Supp (3) SCC 217 : 1992 SCC (L&S) Supp 1 : (1992) 22 ATC 385 : AIR 1993 SC 477] are only in relation to posts which are filled initially in a cadre. The operation of a roster, for filling the cadre-strength, by itself ensures that the reservation remains within the 50% limit. Indra Sawhney case [1992 Supp (3) SCC 217 : 1992 SCC (L&S) Supp 1 : (1992) 22 ATC 385 : AIR 1993 SC 477] is not the authority for the point that the roster survives after the cadre-strength is full and the percentage of reservation is achieved."

The Supreme Court has also explained the meaning of the expressions "posts" and "vacancies" in para 7, which reads as under:

"7. The expressions 'posts' and 'vacancies', often used in the executive instructions providing for reservations, are rather problematical. The word 'post' means an appointment, job, office or employment. A position to which a person is appointed. 'Vacancy' means an unoccupied post or office. The plain meaning of the two expressions make it clear that there must be a 'post' in existence to

enable the 'vacancy' to occur. The cadre-strength is always measured by the number of posts comprising the cadre. Right to be considered for appointment can only be claimed in respect of a post in a cadre. As a consequence the percentage of reservation has to be worked out in relation to the number of posts which form the cadre-strength. The concept of 'vacancy' has no relevance in operating the percentage of reservation."

Nowhere in the judgment, there was any discussion about the allocation of posts between the promotees, on the one hand, and the direct recruits, on the other.

13. The DoP&T issued a memorandum dated 02.07.1997, laying down the guidelines for the purpose of implementation of reservations, in the light of the judgment of the Hon'ble Supreme Court in R. K. Sabharwal's case.

Paragraphs 1 to 4 of Annexure-I appended to the memorandum, indicating the principles for making and operating post-based rosters, read as under:

"1. As hitherto, these rosters are only an aid to determine the entitlement of different categories with regard to the quota reserved for them. They are not to determine seniority.

2. The model rosters have been drawn up keeping in mind two fundamental principles - the reservation for the entitled categories is to be kept within the prescribed percentage of reservation and the total reservation should in no case exceed 50% of the cadre.

3. There should be separate rosters for direct recruitment and for promotions where reservation in promotion applies.

4. The number of points in each roster shall be equal to the number of posts in a cadre."

From a perusal of paras 1 and 2, it becomes clear that the objective of drawing model rosters is to keep the reservations within the prescribed percentage, and then to ensure that the reservation does not exceed 50% of the cadre. In para 3, it was directed that separate rosters must be prepared for the categories of direct recruitment, on the one hand, and promotions, where reservation is provided for, on the other. Unfortunately, para 3 appears to have been taken as the basis for applying the principle of post-based allocations in the context of division between the promotees and direct recruits. That was never the intention in issuing the office memorandum dated 02.07.1997. The same is evident from para 5 of Annexure-I, which reads as under:

"5. While cadre is generally to be construed as the number of posts in a particular grade, for the purpose of preparation of roster, it shall comprise posts required to be filled by a particular mode of recruitment in terms of the applicable recruitment rules. To illustrate, in a cadre comprising 200 posts, where the recruitment rules prescribe a ratio of 50:50 for direct recruitment and promotions, the roster for direct recruitment shall have 100 points and that for

promotion shall have 100 points - thus making a total of 200."

Throughout the memorandum, reference is just made to reserved categories, and the effort was to ensure that the rule of 50% is not violated. The annexure also reflect this very pattern, and not the maintenance of roster between the promotees and direct recruits.

14. For one reason or the other, the vacancies that arose in the respondent-organisation from 1997 onwards, till the amendment of the Rules, were not filled. A letter was addressed on 31.03.2010 to the DoP&T seeking clarifications. Two separate tables were furnished depicting the allocation of vacancies, if they are worked out on vacancy-based, on the one hand, and post-based, on the other. Having referred to the office memorandum dated 02.07.1997, the respondent observed immediately as under:

"8. In a separate reference DoP&T clarified vide OM No.36036/5/2008-Estt (Reserved) dated 17.04.2009 that "settled legal position is that provisions of applicable RRs/Service Rules being statutory in nature would prevail over the administrative instructions."

It is in this background that the following clarification was issued on 21.04.2010:

"...it may be mentioned that Recruitment Rules/Service Rules are statutory in nature and as such the provisions contained in the same would prevail."

Any officer in the respondent organisation who was in charge of the promotions would have proceeded on the basis of this clarification, duly applying the unamended Rules for the vacancies in question. However, an office memorandum dated 30.07.2010 was issued by placing reliance upon the memorandum dated 02.07.1997, and once again, seeking clarification. Strangely enough, the DoP&T took a U-turn and issued office memorandum dated 30.08.2010, as under:

"Subject: Clarification on implementation of post based reservation rosters.

The undersigned is directed to refer to the M/o Statistics & Programme Implementation's O.M. No.12016/6/97-ISS Vol.-I dated 30.7.2010 on the above subject and to say that all posts after 2.7.1997 are required to be filled on the basis of post based rosters even if the vacancy relates to a period prior or after 2.7.1997."

It is in this background, that the order dated 13.10.2011 impugned in the present OA, was issued stating that the vacancies that arose between 1997 and 2005 would be filled by applying the principles contained in office memorandum dated 02.07.1997.

15. This very issue arose for consideration in OA No.3984/2011 - Rajender Mohan Saxena & others v Union of India & others. Through judgment dated 31.05.2012, the OA was dismissed by taking the view that the impugned order accords with the judgment of the Hon'ble Supreme Court in R. K. Sabharwal's case.

16. In this OA, arguments were advanced before the Division Bench as well as before us, to the effect that the judgment in R. K. Sabharwal's case has absolutely nothing to do with the allocation between promotees and direct recruits in the context of promotion, and equally office memorandum dated 02.07.1997 deals with the method of working out reservations alone. It is also argued that Dr. R. N. Bhatnagar's case was one in which the allocation was to be made between different categories of Professors in the medical services. The Punjab and Haryana High Court applied the principle enunciated in R. K. Sabharwal's case. When the aggrieved parties approached the Hon'ble Supreme Court, a different view was taken in Dr. R. N. Bhatnagar's case, and it was held inter alia, as under:

"9. ...It has, therefore, to be appreciated that when posts in a cadre are to be filled in from two sources, whether the candidate comes from the source of departmental promotees or by way of direct recruitment, once both of them enter a common cadre, their birthmarks disappear and they get completely integrated in the common cadre. This would be in consonance with the thrust of Article 16(1) of the Constitution of India. No question of exception to the said general thrust of the constitutional provision would survive as Article 16(4) would be out of the picture in such a case. Consequently, the decision rendered by the Constitution Bench in R.K. Sabharwal case (supra) in connection with Article 16(4) and the operation of roster for achieving the reservation of posts for SCs, STs, and BCs as per the scheme of reservation cannot be pressed into service for the present scheme of Rule 9(1) is not as per Article 16(4) but is governed by the general sweep of Article 16(1). The attempt of learned counsel for the respondent to treat a quota rule as a reservation rule would result in requiring the State authorities to continue the birthmarks of direct recruits and promotees even after they enter the common cadre through two separate entry points regulating their induction to the cadre. Therefore, the roster for 3 promotees and one direct recruit is to be continued every time a vacancy arises and there is no question of filling up a vacancy arising out of a retirement of a direct recruit by a direct recruit or on the retirement vacancy of a promotee by a promotee. Consequently, the question of rotating the vacancies as posts or for treating the posts mentioned in the rules of recruitment as necessarily referable to total posts in the cadre at a given point of time in the light of R.K. Sabharwal judgment, therefore, cannot survive for in the case of a quota rule between direct recruits and promotees, the same is to be judged on the touchstone of Article 16(1) and the statutory rules governing the recruitment to the posts of Professor constituting the Punjab Medical Education Service (Class I) and not on the basis of Article 16(4). The Division Bench in the impugned judgment with respect wrongly applied the ratio of R.K. Sabharwal case governing Article 16(4) to the facts of the present case which are governed by Article 16(1) (emphasis supplied)."

In para 11, it was observed as under:

"11. ...The quota of percentage of departmental promotees and direct recruits has to be worked out on the basis of the roster points taking into consideration vacancies that fall due at a given point of time. As stated earlier, as the roster for 3 promotees and one direct recruit moves forward, there is no question of filling up the vacancy created by the retirement of a direct recruit by a direct recruit or the vacancy created by a promotee by a promotee. Irrespective of the identity of the person retiring, the post is to be filled by the onward motion of 3 promotees and one direct recruit. Consequently, learned counsel for the appellant and learned Senior Counsel for the intervenor were right when they contended that the High Court in its impugned judgment had patently erred in invoking the ratio of the decision of this Court in R.K. Sabharwal case which was rendered in an entirely different context for resolving an entirely different controversy which did not arise on the facts of the present case. They were also right in contending that the ratio of the decision of this Court in Paramjit Singh case [(1979) 3 SCC 478] read with the decision of this Court in the same case reported in Paramjit Singh would get squarely attracted in the facts of the present case.... (emphasis supplied)"

Unfortunately, this judgment was not brought to the notice of the Bench which decided OA No.3984/2011. To the extent the same is in conflict with the judgment in R. K. Sabharwal's case, it deserves to be treated as per incuriam. At any rate, it cannot be said to have been decided on proper lines.

17. It is a different matter that an altogether new legal regime has come into existence, consequent upon the amendment of the Rules in the year 2005. The manner in which the respondents wanted to allocate the posts between the promotees and direct recruits, year after year, may accord with the amended rule 8. The validity of the said rule is not the subject matter of this OA. However, in respect of the vacancies that existed before the amendment of the Rules, the vacancy-based pattern, which was the hallmark under the unamended Rules, needs to be followed. It is fairly well settled that unless an amendment expressly provides for it, it would operate prospectively, and the promotions against the vacancies that arose prior to the amendment of the Rules, must be effected in accordance with the Rules which were in force as on the date on which the vacancies arose.

18. We, therefore, hold that the view expressed in OA No.3984/2011 is contrary to the law laid down by the Hon'ble Supreme Court in Dr. R. N. Bhatnagar's case, and to that extent, it is not correctly decided. Consequently, we allow this OA, and set aside the impugned order dated 13.10.2011. The respondents shall allocate the vacancies in the promotional posts from the category of JTS that arose between 1997 and 2005, in accordance with the unamended Rules. There shall be no order as to costs.