

(2013) 05 DEL CK 0211

In the Delhi High Court

Case No : Writ Petition (C) 2872 of 2012

Employees Provident Fund Organization

APPELLANT

Vs

Rakesh Ranjan and Others

RESPONDENT

Date of Decision : 29-05-2013

Acts Referred:

Constitution of India, 1950 — Article 14, 16, 226

Citation : (2013) 05 DEL CK 0211

Hon'ble Judges : V. Kameswar Rao, J;Pradeep Nandrajog, J

Bench : Division Bench

Advocate : Aparna Bhat, for the Appellant; M.K. Bhardwaj, for the Respondent

Final Decision : Dismissed

Judgement

V. Kameswar Rao, J.—Order dated January 25, 2012 passed by the Central Administrative Tribunal allowing OA No. 2769/2010 is in challenge. Petitioner has been directed to appoint candidates with respect to the examination held for promotion to the post of Enforcement Officer/Assistant Accounts Officer (re-designated as Accounts Officer) by treating the examination as on All-India basis. Recruitment to the post of Enforcement Officer/Assistant Accounts Officer (re-designated as Accounts Officer) under the Employees Provident Fund Organization is governed by the Enforcement Officer/Assistant Accounts Officer Recruitment Rules 2002 (hereinafter referred to as "Rules of 2002").

2. 50% of the posts are to be filled up by promotion, 25% by promotion through a Limited Departmental Competitive Examination (LDCE) and 25% by direct recruitment.

3. The writ petition concerns appointment on the basis of Limited Departmental Competitive Examination. The stipulation under the Rules is, persons with three years regular service as Section Supervisors and Junior Hindi Translators with 3 years of regular service in the pay scale of Rs. 3000-8000 and DEO (Grade C) with three years of regular service in the pay scale of Rs. 5000-8000 including

those DEO (Grade C) who have already put in 5 years regular service in DEO (Grade A) and Social Security Assistants/Assistants/Stenographers/DEO Grade "A" and Grade "B" with 5 years regular service in the scale of Rs. 4000-6000 in the respective regions are eligible to compete.

4. Respondents competed for the examination.

5. Whereas respondents allege that the examination was on All-India basis, petitioners state that it was on regional basis and this explains different cut off marks in different regions.

6. That on the basis of pleadings the Tribunal framed the question which arose for its determination i.e. whether the examination scheme for making appointments region-wise would be arbitrary and hit by Article 14 of Constitution of India. For answering this question the Tribunal relied upon the judgment of the Supreme Court reported as Radhey Shyam Singh and others, etc. Vs. Union of India and others, . The conclusion of the Tribunal is reproduced as under:

Following the dictum of the Hon"ble Supreme Court in Radhey Shyam Singh (supra), we hold that zone-wise selection irrespective of merit of the candidates who had appeared in all India examination for promotion to the post of Enforcement Officer/Accounts Officer, would be illegal. Even though, it is not mentioned, but it appears that the Apex Court made the operation of its judgment prospective for the reason that examination had been held in 1993 and the matter came to be disposed of by it in 1997, and by that time the selected candidates had since been appointed for about four years or so. Further, once the Hon"ble Supreme Court declared the law way back in 1997, the respondents ought to have followed the same. Once, the law may be declared by the highest Court of the land for the first time with regard to a particular situation, the judgment may be prospective, but when the law is known and the respondents may still persist with their illegal stand, it will be iniquitous to deny the applicants relief by making the judgment prospective.

7. We have heard learned counsel for the parties. Ms. Aparna Bhat, learned counsel for the petitioner reiterates the submission as made before the Tribunal that under the Scheme of the examination, 2002 and the Rules of 2002, it is envisaged that the Examination is held region-wise against the vacancies existing in each of the region. She bring to our notice the schedule attached to the Rules of 2002 showing the eligibility for the post of Enforcement Officer/Accounts Officer. According to her, it so happened, where, the number of vacancies were more, the people with lesser marks got selected and vice versa. The respondents could not have agitated their non selection on the ground, that the same is arbitrary and violative of Article 14 of the Constitution of India.

8. Per contra, Mr. M.K. Bharadwaj, learned counsel appearing for the respondents would support the judgment of the Tribunal and state that the Tribunal has rightly allowed the original application as the same is contrary to the ratio laid down by the Supreme Court in the case of Radhey Shyam Singh's case (supra).

He would further submit that the examination is necessarily an All India Examination having been conducted all over India. The appointing authority for Enforcement Officer/Accounts Officer is the Central Provident Fund Commissioner who is based in the Central Office and not the Regional Provident Fund Commissioner who is heading the region. He would further submit that the total sanctioned strength as per Rules of 2002 is 920 and has not been segregated regionwise. In other words the posts/vacancies cannot be considered to be region based. His further submission is that, based on the merit secured by the candidate, seniority list is prepared on all India basis from which officers are considered for further promotion to the post of Assistant Provident Fund Commissioner. He takes support from the judgment of the Hon'ble Supreme Court in Radhey Shyam Singh's case (supra).

9. Before we deal with the respective submissions of the counsel for the parties it is necessary to give brief history of the Rules of 2002, scheme of examination framed by the petitioner organization from time to time. We are concerned in this writ petition with the post of Enforcement Officer/Accounts Officer. The Recruitment Rules for the said post were notified for the first time on March 03, 1990. The schedule of the Rules of 1990 prescribes different posts as feeder post in the respective regions. The rules of 1990 were amended in the year 1992, 2002 and 2006 respectively. The amendments were to the extent, the nomenclature of certain posts were changed and the revised pay scales were shown. That apart the petitioner organization has framed Departmental Competitive Examination Scheme for promotion to the post of Enforcement Officer/Accounts Officer from time to time. They were framed initially in the year 1990, then 1992 and 2002. For the purpose of this case we are concerned with the Scheme of Examination of 2002. Some relevant provisions of the Scheme of Examination, 2002 are (i) it governs the filling up of the vacant posts of Enforcement Officer/Accounts Officer in the regions and Section Officer in head office; (ii) The word examination has been defined to mean examination for promotion to the posts of Enforcement Officer/Accounts Officer in the regions and Section Officer in the head office; (iii) the examination shall however be conducted only in regions where the vacancies were notified in any year against the examination quota.

10. The Scheme of Examination of 2002 through clause 5 stipulates that the examination is a competitive examination and the successful candidates will be arranged in order of merit with reference to the marks obtained by them in the examination. Clause 8(i) and clause 8 (iv) of the scheme reads as under:-

8(i) The general candidate who would secure at least 40 marks in each paper and candidates belonging to SC/ST communities obtaining 35% marks in each paper shall be entitled to be arranged in the order of merit in their respective region/head office, as the case may be taking into account the total marks secured by them in the examination. The number of candidates to be declared successful in the examination in respect of each region and head office shall be

only to the extent of vacancies notified for that region/head office.

8(iv) On being declared successful in the examination the candidates from the regions will be eligible for consideration for promotion to the post of Enforcement Officer/Accounts Officer in their respective region only and the candidates from head office for the post of Superintendant in the head office only.

11. Clause 11 of the Scheme of examination of 2002 stipulates the list of candidates declare successful in the examination in respect of each region/head office will be circulated to the respective region/head office in which the candidate appeared.

12. The Scheme of Examination of 2002 was amended twice; one in the year 2009 and the other in the year 2010. By way of the amendment of the year 2009 the word "Superintendent" was replaced by the word "Section Officer" and in the year 2010 the words Assistant Accounts Officer was replaced by the words "Accounts Officer". In any case the Scheme of 2002 remained largely the same and is of relevance in this case.

13. The petitioner organization also framed regulations in exercise of powers conferred by sub-section 7 of 5(D) of the Employees Provident Fund and Miscellaneous Provisions Act, 1952, called the Employees Provident (Officers and Employees Conditions of Services) Regulations, 2008. Regulation 11 which is of some significance in this case is reproduced hereunder:-

Liability to transfer:(1) every employee of the organization carrying a scale of pay equivalent to the scale of pay of any group A or group B (Gazetted) post under the Central Government shall be liable to be served anywhere in India in any office of the organization.

(2) Every employee of the organization carrying a scale of pay of a group B (Non-gazetted) post under the Central Government and group C & D employees shall be liable to serve anywhere in the respective regions in which they are appointed.

Provided that any Senior Hindi Translator/Junior Hindi Translator may be transferred outside their own region on administrative exigencies and according to staffing pattern.

14. From the reading of the Scheme of the Examination of 2002, Regulations of 2008 the following position emerges (i) the Examination Scheme governs the filling up of vacant posts of Enforcement Officer/Accounts Officer in the regions and Section Officer in the head office; (ii) the Examination shall be conducted only in regions where the vacancies are notified in any year against the examination quota. In other words, where in a given region no vacancy has arisen in a particular year the examination shall not be held in that region/head office; (iii) the number of candidates to be declared successful shall be only to the extent of vacancies in that region/head office; (iv) On being successful the candidates from the regions will be eligible for promotion to the post of Enforcement Officer/Accounts Officer in their respective region only; (v) the list

of candidates declared successful in respect of region/head office shall be circulated to the respective region/head office in which the candidate appeared; (vi) the group B post (non gazetted) are liable to serve in the respective regions in which they are appointed.

15. It is an admitted position that the circular dated September 01, 2009 and the promotions with which we are concerned, are under the Limited Departmental Competitive Examination quota. Even though recruitment is by way of promotion, the promotion through Limited Departmental Competitive Examination quota is different from a normal promotion which is based on ACRs, seniority and the employee concerned coming in a zone of consideration, whereas in the Limited Departmental Competitive Examination an employee meeting eligibility pursuant to a circular, applies for being considered for promotion based on examination. There is no concept of seniority. An employee securing merit, depending upon vacancies, is promoted. Through this channel, the promotion is accelerated with regard to those employees who because of low seniority may not be eligible for normal promotion but can seek advancement based on their performance in the examination.

16. The respondents have filed an Original Application before the Tribunal primarily seeking the relief that the selection made by the petitioner for promotion to the post of Enforcement Officer/Accounts Officer be set aside and for a direction to the petitioner to prepare the final merit list on the basis of marks secured, treating the exam as the All India Exam. The respondents did challenge the vires of the scheme of Examination of 2002, as being violative of Article 14 and 16 of the Constitution of India. Such a challenge is not tenable in law. The said Scheme is in existence for the last seven years (on the date of circular i.e. September 01, 2009). Promotion under the Limited Departmental Competitive Examination was held in 2003 in terms of the same Scheme. The respondents surely had knowledge of the same. Even otherwise, here are the persons, who having applied for the examination, appeared in the same, not finding themselves in the appropriate merit has challenged the scheme of examination of 2002 and the result. The Scheme of Examination of 2002 clearly stipulates that the number of candidates declared successful in the examination in respect of each region and head office shall be only to the extent of vacancies notified for that region/head office only. Further it also stipulates clearly that on being declared successful in the examination the candidates from the regions will be eligible for consideration for promotion in their respective regions. The challenge after the results have been declared is clearly an after-thought. The law in this regard is well settled. The Supreme Court in the case reported as *Manish Kumar Shahi Vs. State of Bihar and Others*, has held as under:-

16. We also agree with the High Court that after having taken part in the process of selection knowing fully well that more than 19 % marks have been earmarked for viva-voce test, the petitioner is not entitled to challenge the criteria or process of selection. Surely, if the petitioner's name had appeared in the merit

list, he would not have even dreamed of challenging the selection. The petitioner invoked jurisdiction of the High Court under Article 226 of the Constitution of India only after he found that his name does not figure in the merit list prepared by the Commission. This conduct of the petitioner clearly disentitles him from questioning the selection and the High Court did not commit any error by refusing to entertain the writ petition. Reference in this connection may be made to the judgments in *Madan Lal and Others Vs. State of Jammu and Kashmir and Others*, *Marripati Nagaraja and Others Vs. The Government of Andhra Pradesh and Others*, *Dhananjay Malik and Others Vs. State of Uttaranchal and Others*, *Amlan Jyoti Borooah Vs. State of Assam and Others*, and *K.A. Nagamani Vs. Indian Airlines and Others*.

17. Now coming to the submissions of the counsel for the parties, we deal with the submission of Mr. M.K. Bhardwaj. According to him when the appointing authority of the Enforcement Officer/Accounts Officer is the Central Provident Fund Commissioner and not the Regional Provident Fund Commissioner, the exam is necessarily is All India Exam and not regional. Such a submission is liable to be rejected. The appointing authority is not the determinative factor to hold that the selection/appointment must necessarily be through an All India Exam. The Recruitment Rules, the Scheme of Examination, 2002 and Regulations 2008 together determine the eligibility, the manner of selection and appointment. All have to be read together. The answer has to be found in them. A reading of them clearly reveals that, even though the appointing authority is Central Provident Fund Commissioner, the selection is through examination conducted against vacancies notified for each region, and the candidates from the respective region, are eligible for consideration for promotion.

18. His submission that the total strength being 920 the same is determinative of the fact that the post are to be filled on All India Basis. There is a fallacy in this submission of Mr. Bhardwaj. The circular dated September 01, 2009 itself indicates the vacancies in each region which would demonstrate that the total strength of 920 have been allocated to the regions. It is noted that the promotions through the other mode of seniority, direct recruitment are also made in the regions. In so far as his submission regarding seniority is concerned, the petitioners have justified the preparation of seniority on the basis of merit because the next promotion post is that being of Assistant Provident Fund Commissioner which is an All India post seniority becomes relevant and in so far as persons promoted under the Limited Departmental Competitive Examination quota is concerned, their position in the seniority list has to be determined on the basis of merit only. We are of the view that the submissions made by Mr. Bhardwaj are not conclusive to hold that the Enforcement Officer/Accounts Officer posts must necessarily be filled on All India basis.

19. We further note that, the petitioner organization, conducted 9 departmental examination, after the year 1990, in the regions, where vacancies were available and the results were declared region-wise. It is seen that the past practice has

been to conduct examination region-wise. The practice having support of Rules of 2002, Scheme of Examination 2002, such examination cannot be held to be an All India Examination.

20. That apart it is seen that the inter region transfers are made on request and in that eventuality the seniority is given at the bottom of the region to which the officer is transferred. A reference in this regard can be made to the counter affidavit filed by the petitioner in SLP No. 3014/2011 and SLP No. 30142/2011 titled as M.M. Thomas & Ors. v. Union of India, which forms part of the writ record.

21. The reliance placed by the Tribunal on the opinion of the Supreme Court reported as Radhey Shyam Singh and others, etc. Vs. Union of India and others, . is totally misplaced. The ratio is not applicable to the facts of this case. The Supreme Court was dealing with a case where the selection was for initial recruitment where vacancies were not indicated and the submissions advanced by the appellant there is that they were denied proper opportunity of appearing in the examination at the centre where the number of vacancies may be large, there being more and better chances of selection. In the case in hand the recruitment is by way of promotion through Limited Departmental Competitive Examination where the Rules of 2002, Scheme of Examination 2002 and Regulations of 2008 stipulates that the examination to be held region-wise against the available vacancies in the concerned region, confining to the personnel who are working in the respective region. The vacancies are clearly indicated in the circular for which the applications are called. The other mode of promotion through seniority and direct recruitment is also made in the respective region. We are of the view that there are many distinguishing features. The ratio of the opinion of the Supreme Court in Radhey Shyam Singh's case (supra) has no applicability.

22. We find that one aspect which was not urged, is that persons who have been selected for the post of Enforcement Officer/Accounts Officer have not been made parties in the litigation before the Tribunal and in this Court. Such persons are necessary parties and should have been impleaded. The law is well settled by the Supreme Court and we refer to one opinion of the Supreme Court reported as Tridip Kumar Dingal and Others Vs. State of West Bengal and Others, .

41. Regarding protection granted to 66 candidates, from the record it is clear that their names were sponsored by the employment exchange and they were selected and appointed in 1998-1999. The candidates who were unable to get themselves selected and who raised a grievance and made a complaint before the Tribunal by filling applications ought to have joined them (selected candidates) as respondents in the original application, which was not done. In any case, some of them ought to have been arrayed as respondents in a "respective capacity". That was also not done. The Tribunal was, therefore, wholly right in holding that in absence of selected and appointed candidates and without affording opportunity of hearing to them, their selection could not be set

aside.

23. This is another reason for us to set aside the judgment/order of the Tribunal, we do so. The order/judgment dated January 25, 2012 passed in Original Application No. 2769/2010 is set aside. The writ petition is allowed. The Original Application No. 2769/2010 filed by the respondents, before Central Administrative Tribunal, Principal Bench, New Delhi is dismissed. No costs.