

(2014) 09 MP CK 0051

In the Madhya Pradesh High Court

Case No : Writ Appeal Nos. 701, 702 and 703/2010

Madhya Bharat Gramin Bank

APPELLANT

Vs

Brijesh Kumar Sharma

RESPONDENT

Date of Decision : 17-09-2014

Acts Referred:

Citation : (2014) 09 MP CK 0051

Hon'ble Judges : Sujoy Paul, J;Sheel Nagu, J

Bench : Division Bench

Advocate : V.S. Shrotri, Sr. Advocate assisted by and Raju Sharma, Advocate for the Appellant; Sunil Jain, Advocate for the Respondent

Final Decision : Allowed

Judgement

Sujoy Paul, J.—These writ appeals are directed against the common order of Writ Court passed in WP No. 4517/2009 and connected matters dated 13th October, 2010.

2. Writ petitioners assailed the promotion order of the employees on the post of scale -III Officer. This is not in dispute between the parties that the promotions in questions are governed by statutory rules namely Regional Rural bank (Appointment and Promotions of Officers and other employees), Rules 1998 (hereinafter called as "1998 Rules") . Promotional post of scale-III Officer is classified as (Group-A). It is apex level post in the middle managerial category. Criteria for promotion is "seniority-cum-merit". Clause (J) prescribes selection process. As per clause (J), selection shall be on the basis of performance in the interview and performance appraisal reports (PARs) for the preceding five years, as per division of marks given below:-

(a) Interview 25 marks

(b) Performance Appraisal Report 75 marks Total 100 marks.

3. Before the Writ Court, the employer has filed two executive instructions /

orders dated 29.10.2007 and 30.10.2007. By these orders, it was shown as to how the marks are to be given and calculated in the said promotion process. In the writ petition, petitioner prayed for following relief :-

1. Kindly quash the order impugned in this petition Annexure P/1 passed by respondents No. 1 to 3 and also appeal of petitioner may kindly be allowed to promote for the post of middle management Grade-III.

2. Costs may also be allowed.

4. The Writ Court allowed the petition and passed the following instructions:-

(i) The impugned order of promotion is hereby quashed.

(ii) The matter is remanded back to the respondent - bank to prepare a fresh list of candidates after prescribing the criteria of securing minimum marks on the basis of marks obtained by the employee in interview and appraisal of A.C.R. In accordance with the Rules, 1998.

(iii) Necessary orders be passed in this regard within a period of three months from the date of receipt of the copy of the order and upto that period, the persons who have been promoted be permitted to continue to work on their promoted posts.

(iv) It is hereby clarified that the respondents- Bank is free to prescribe the criteria of securing minimum marks in interview and appraisal of A.C.Rs. considering the criteria of promotion i.e. seniority-cum-merit.

(v) No order as to costs.

5. Shri V.S. Shroti, learned Senior counsel, assisted by Shri Raju Sharma submits that learned single Judge has erred in law in passing the said directions. He submits that neither the 1998 Rules nor the executive instructions, aforesaid were called in question in writ petition. The promotion order was in consonance with the said Rules and instructions. In absence of challenging the Rules and instructions, it was not open to the court to interfere with the promotion order. In addition, it is submitted that the writ court has erred in mechanically applying the judgment of Supreme Court in the case of Bhagwandas Tiwari and Others Vs. Dewas Shajapur Kshetriya Gramin Bank and Others, He submits that the prescription of minimum merit is managerial / administrative exercise. It depends on the nature of duty and responsibilities of the promotional post. Learned single Judge has erred in applying the judgment of Bhagwandas Tiwari (Supra) without considering the fact that in the present case, the promotions were made to Scale-III post which is apex level post in the middle management grade.

6. Per Contra, Shri Sunil Jain, learned counsel for the employees supported the order passed by the writ court. He submits that criteria of 75% of minimum merit, fixed by the employer is arbitrary and capricious in nature. Writ court has not committed any legal error and therefore, no interference is warranted.

7. We have heard learned for the parties and perused the record.

8. A plain reading of impugned judgment makes it clear that the learned single Judge has completely based its order on the judgment of Apex court in Bhagwandas Tiwari (Supra). The learned single Judge upto para 10 has mentioned about the facts of the case and contentions of the parties. Thereafter, certain paragraphs of judgments of Supreme Court were quoted. Directions issued in ultimate para 15 of the impugned order is based on para 13 of the impugned order, which reads as under:-

13. It is clear from the judgment of Hon"ble Supreme Court in the case of Bhagwandas Tiwari (Supra), that prescribing a criteria of securing minimum 75% marks for promotion is contrary to the principle of seniority-cum-merit. Hence, as per the aforesaid judgment of the Hon"ble Supreme Court the prescribed criteria of securing 75% minimum marks for the propose of promotion is contrary to the principle of seniority-cum- merit. Hence, the criteria fixed by the respondent-Bank for promotion is against the principle of seniority-cum- merit.

9. The basic question is whether the learned single Judge was justified in applying the judgment of Bhagwandas Tiwari (Supra) in the present case. The judgment of Bhagwandas and other relevant judgments on the point were again considered by the Supreme court in Rajendra Kumar Srivastava and Others Vs. Samyut Kshetriya Gramin Bank and Others, in which the Apex Court opined that what should be the minimum necessary merit for promotion, is a matter that is decided by the management, having in mind the requirements of the post to which promotions are to be made. The employer has discretion to fix different minimum merit, for the different categories of posts, subject to the relevant rules. For example, for promotions at lower levels, it may fix lesser minimum qualifying marks and fix a comparatively higher minimum qualifying marks for the higher post. In para 16 of the said judgment, the apex court opined that where the assessment of minimum merit is with reference to previous performance record (Annual Confidential Reports) and / or by interview, as contrasted from a written examination, prescription of 78% as minimum, will not be considered as unreasonably high. In para 20 and 21 of the judgment in Rajendra Prasad (supra) the Apex court considered the scheme of marks applicable in Bhagwandas Tiwari (Supra) and in Rajendra Prasad and opined that scheme of allotment of marks were totally different in both the cases and therefore, the decision in Bhagwandas Tiwari is of no assistance to the appellant therein. It is also relevant to mention here that in case of Rajendra Prasad, the employees challenged the resolution of the Board of Directors dated 29.11.1996 prescribing the promotion procedure (para 4).

10. In the light of this judgment, which is again followed by the Supreme Court in 2013 (6) SCC 287 (Sarva Uttar Pradesh Gramin Bank and Ors. Vs. Manoj Kumar Chak) and Chairman, Rushikulya Gramya Bank Vs. Bisawamber Patro and Others, it is clear that for deciding whether a particular percentage / minimum merit is arbitrary or not, court is required to see the nature of the promotional

post and other relevant factors. Cut off percentage mentioned in Bhagwandas Tiwari (Supra) cannot be applied as a straight jacket formula / thumb rule in all cases. It depends on facts and circumstances of the case, nature of duty and responsibilities of promotional post, rules and promotion process made in this regard etc.

11. We find force in the argument of the appellants that writ court has mechanically applied the judgment of Bhagwandas Tiwari (Supra) in the present case. Ultimate direction contained in para 15(ii) of impugned judgment shows that learned single Judge has remanded back the matter to the Bank to prepare a fresh list of candidates after prescribing the criteria of securing minimum marks on the basis of marks obtained in interview and appraisal of ACRs. This direction is given after holding that criteria of securing 75% marks is contrary to the principle of seniority-cum-merit. Interestingly, the said criteria is based on executive instructions which were placed on record by the employer along with the return. The writ petitioner did not challenge those executive instructions / orders whereby promotion process was prescribed. The question is whether withstanding the 1998 Rules and instructions, aforesaid, it was open to the writ court to pass the impugned directions. In our opinion, it was not permissible for the writ court to issue said directions. We find support in our view from the judgment of Apex Court in Amita Vs. Union of India (UOI) and Another, The relevant portion reads as under:-

We are afraid that the said proponentes do not deserve acceptance inasmuch as when the constitutional validity had not been assailed and further what would be the role and authority of a tribunal or a court while declaring the rule, notification or schedule of categorization as invalid to issue any further command for change of percent or categorization. That is not the debate and cannot be the debate in the present writ petition as what was not the assail before the tribunal. We say so as the petition does not state so. It is well settled in law that he who challenges the constitutional validity the onus is on him and the pleadings are to be specific.

12. The Division Bench of this court in WP No. 9491/2006 (Union of India Vs. M.P. Administrative Service Association and Ors.) examined the correctness of the order passed by the Central Administrative Tribunal (Tribunal). The Tribunal passed certain directions to the Government. The M.P. Administrative Service Association filed OA No. 778/2002 before the Tribunal seeking certain directions and bifurcation of posts without challenging the relevant rules. The Division Bench opined as under:-

If the order of the tribunal is properly analyzed, there is no scintilla or shadow of doubt that the tribunal has issued directions how the Rules has to be worked out. The tribunal has, in fact, directed how the bifurcation should be made. The said direction amounts to amendment or change in the Rule. The same cannot be done even through an interpretative process as the language of the Rule is absolutely clear. What would be the fall out when constitutional validity is

challenged and the same is declared as unconstitutional, would totally be the another matter.?

Ultimately the petition of the Govt. was allowed and liberty was reserved to the employees to file a fresh application before the Tribunal challenging the constitutional validity of the Rules.

13. In the light of aforesaid legal position, it is clear that learned single Judge has erred in issuing certain directions which run contrary to the executive instructions / promotion process. It was clearly impermissible when neither Rules or the executive instructions were under challenge. This amounts to rewriting the rules / prescribing procedure by way judgment, which is outside the jurisdiction of Court. We are not oblivious of the fact that in WP No. 9491/2006 the Tribunal's order was under challenge whereas the present appeals are intra court appeals. Hence matter can be remanded to writ court to deal with these aspects by reserving liberty to the parties to challenge the relevant provisions.

14. To sum up, in our opinion, learned Single Judge has erred in mechanically holding that 75% cut off merit is bad in law. This finding can be given only after examining relevant parameters discussed above. Writ court needs to undertake this exercise by keeping into account the relevant legal position. Thus, we deem it proper to set aside the impugned judgment and give liberty to the parties to amend the writ petition challenging the rules / instructions, if so advised. The impugned order dated 13th October, 2010 is set aside.

15. Writ appeals are allowed to the extent indicated above. No costs.