

(2014) 09 MP CK 0050

In the Madhya Pradesh High Court

Case No : Writ Appeal Nos. 704, 705, 706, 707 and 708/2010

Madhya Bharat Gramin Bank

APPELLANT

Vs

Vikram Singh Rajput

RESPONDENT

Date of Decision : 17-09-2014

Acts Referred:

Citation : (2014) 09 MP CK 0050

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

Bench : Division Bench

Advocate : V.K. Shrotri, Sr. Advocate and Raju Sharma, Advocate for the Appellant; Harish Dixit and 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.2025/2008 and connected matters decided on 13.10.2010.

2. In writ petition, the petitioners/employees prayed for setting aside the promotion order (Annexure P/1) with further prayer for a direction to the employer to decide their representation (Annexure P/2).

3. Admittedly, the promotions were made from the feeder post of Officer Scale-I to promotional post of Officer Scale-II. The promotions were required to be made as per Govt. of India Notification dated 29.7.98. By way of said notification, the rules namely ?Regional Rural Banks (Appointment and promotion of Officers and Other Employees) Rules, 1998 (for brevity, the ?1998 Rules?) were brought into force. As per these rules, the criteria for promotion to Scale-II Officers is ? seniority-cum-merit?. Clause (f) of the 1998 Rules prescribes mode of selection, which reads as under :-

Mode of selection : The selection of the candidate shall be made by the committee on the basis of written test, interview and assessment of Performance Appraisals Reports for the preceding five years as an officer in scale-1/Field Supervisor.

It is also relevant to quote clause (j) of the said rules, which reads as under :-

Selection process : The selection shall be on the basis of for promotion performance in the written test, interview and Performance Appraisal Reports for preceding five years as per the division of marks given below :

A) Written test : 60 marks

B) Interview : 20 marks

C) Performance

Appraisal Reports : 20 marks

A) Written test : The candidates shall be (60 marks) required to appear for written test comprising of two parts viz. Part (A) covering Banking Law and Practice of Banking and part (B) covering Credit Policy, Credit Management including Priority Sector, Economics and Management.

60 marks allotted to written test shall be further divided as under: Part "A" 30 marks Part "B" 30 marks A list of only those candidates, who secure a minimum of 40% marks in each part shall be prepared and such candidates shall be called for interview.

B) Interview (20 marks) : There shall be no minimum qualifying marks for the interview.

C) Performance appraisal reports (20 marks) - : Performance Appraisal Reports for the preceding five years shall be considered for the purpose of awarding marks for promotion.

(Emphasis Supplied)

4. Return was filed in the said writ petition and by placing reliance on the executive instructions/decision dated 30.10.2007 (Annexure R/1) it was pointed out by the employer that as per this instruction, 65% aggregate marks were required to be obtained by the employees. Those, who have acquired 65% of marks in aggregate are promoted on the basis of their seniority.

5. It was argued by the petitioners before the writ court that fixing of 65% cut of marks is arbitrary and runs contrary to the judgment of Supreme Court in the case reported in Bhagwandas Tiwari and Others Vs. Dewas Shajapur Kshetriya Gramin Bank and Others, The writ court in para 13 of the judgment opined that the criteria of securing 65% marks out of 100% marks is not in consonance with the principle of seniority-cum-merit. By placing reliance on Bhagwandas Tiwari (supra), the writ court opined that in the said case, 75% marks as minimum merit was held to be contrary to the criteria of seniority-cum-merit. Thus, on the basis of Bhagwandas Tiwari (supra) the writ court allowed the petition and passed following directions :-

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 minimum criteria of marks on the basis of marks of interview and appraisal and those candidates who would secure the minimum marks would be entitled for promotion in accordance with the order of merit.

iii) It is hereby clarified that for final promotion, the marks obtained in written examination shall not be calculated.

iv) 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.

v) It is further clarified that the persons who would be entitled for promotion in accordance with the directions issued by this Court shall be entitled promotion from the date of issuance of the order Annexure P-1.

vi) No order as to costs.

6. During the course of argument, Shri V.S.Shrotri, Senior Advocate, assisted by Shri Raju Sharma, Advocate for the employer, contended that neither the rules nor executive instructions dated 29.10.2007 and 30.10.2007 were under challenge before the writ court. In absence of challenge, it was not open to the writ court to disturb the promotions already made. It is also argued that the judgment of Bhagwandas Tiwari (supra) was considered in subsequent judgment of Supreme Court and it was held that the criteria of percentage/minimum merit depends on the nature of the promotional post/job nomenclature and no hard and fast rule can be made in this regard. It is submitted that writ court has mechanically applied the judgment of Bhagwandas Tiwari (supra) in the present case. It is further submitted that prescribing 65% marks as minimum merit mark, by no stretch of imagination, can be said to be arbitrary or capricious in nature. In support of this contention, reliance is placed on certain judgments.

7. Per Contra, Shri Harish Dixit and Shri Sunil Jain, learned counsel for the employees supported the judgment of the writ court. It is submitted that fixing of 65% as merit marks is arbitrary and is in violation of criteria of seniority-cum-merit. Heavy reliance is placed on an example, which reads as under:-

On the strength of this example, it is urged that if a candidate secures minimum qualifying marks in written examination (24/60) and then gets even full marks in interview and in the head of service report (20/20), in total he will not get 65% marks in aggregate, it will fall short of the minimum requirement of bench mark/minimum merit. It is submitted that as per the judgment of Bhagwandas Tiwari (supra), no interference is warranted.

8. We have heard learned counsel for the parties and perused the record.

9. The employer has passed two executive instructions/orders dated 29.10.2007 and 30.10.2007 (Annexures R/2 and R/1). By issuing these executive

instructions, it was made clear that 65% would be the minimum merit. The eligible employees, who will secure 65 marks out of 100 in aggregate will be promoted on the basis of seniority.

10. It is seen that learned Single Judge has passed the entire judgment on the basis of the judgment of Supreme Court in *Bhagwandas Tiwari (supra)*. The judgment of *Bhagwandas Tiwari (supra)* was further considered by Supreme Court in *Rajendra Kumar Srivastava and Others Vs. Samyut Kshetriya Gramin Bank and Others*, Pausing here for a moment, it is relevant to mention here that in *Rajendra Kumar Srivastava (supra)* also the Bank issued a resolution of Board of Directors dated 29.11.1996 prescribing the promotion procedure (See, para 4 of the judgment). This resolution was called in question before Allahabad High Court by the employees. After considering the judgment of *B.V. Sivaiah and Others etc. Vs. K. Addankl Babu and Others etc.*, and other earlier judgments on the point including *Bhagwandas Tiwari (supra)*, the Apex Court opined in *Rajendra Kumar Srivastava (supra)* 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 posts to which promotions are to be made. The employer has discretion to fix different minimum merit, for different categories of posts, subject to the relevant rules. For example, for promotions at lower levels, it may fix lessor minimum qualifying marks and fix comparatively higher minimum qualifying marks for higher post (para 14). In para 20 of the judgment, the Apex Court considered the criteria and scheme of marks prevailing in *Bhagwandas Tiwari* and *Rajendra Kumar Srivastava (supra)*. In para 21, the Apex Court opined that a comparative analysis of the scheme of giving marks in both the cases will make it clear that the scheme in both the cases was different. Thus, it was made clear that *Bhagwandas Tiwari's* case (*supra*) will not assist the employees in the said case. A minute reading of para 20 of the judgment shows that in *Bhagwandas Tiwari (supra)* 60 marks were given in the head of work performance during previous years and 40 marks were given in the head of interview whereas in *Bhagwandas Tiwari (supra)* 30 marks were given in the head of work performance during three years and 40 marks were given for period of service (@ 2 marks per year for complete period of service subject to a minimum of 40) and in the head of interview 30 marks were allotted. In the present case, the marks are divided in the head of written examination (60 marks), interview (20) and performance appraisal report (20). Out of total marks (100), for achieving minimum merit the candidate is required to obtain 65 marks. Clause (j) of 1998 Rules, in no uncertain terms, makes it clear that the selection shall be on the basis of performance in written test, interview and performance appraisal report. Thus, scheme of marks in the present case is totally different than that of applicable in *Bhagwandas Tiwari (supra)*. In *Rajendra Kumar Srivastava (supra)* it is made clear that it is the prerogative of the employer to decide the minimum merit as per the nature of the promotional post. Suffice it to say that percentage of marks dealt with in *Bhagwandas Tiwari (supra)* cannot be applied as a thumb rule in all cases. It depends on the facts

and circumstances of each case. It depends on the nature of duties and responsibilities of the promotional post, the rules and the scheme of marks introduced by way of executive instructions/orders. The judgment of Rajendra Kumar Srivastava (supra) is followed by Supreme Court in Chairman, Rushikulya Gramya Bank Vs. Bisawamber Patro and Others,

11. Learned Single Judge has based his judgment solely on Bhagwandas Tiwari (supra). Learned Single Judge has not analyzed the scheme of marks introduced by the employer by circulars dated 29.10.2007 and 30.10.2007. In ultimate direction mentioned in para 16(ii), learned Single Judge remanded the matter back to the employer to prepare a fresh list of candidates after prescribing the minimum criteria of marks on the basis of marks of interview and appraisal and those candidates who secured minimum marks would be entitled for promotion in accordance with the order of merit. In direction (iii), it is clarified by learned Single Judge that for final promotion the marks obtained in written examination shall not be counted. In our view, both the directions run contrary to 1998 Rules and the executive instructions dated 29.10.07 and 30.10.07. At the cost of repetition, it is apt to mention that clause (j) of 1998 Rules makes it crystal clear that final selection will be made on the basis of marks obtained in the written examination, interview and performance appraisal. In absence of any challenge to the rules or executive instruction, it was not open to the writ court to issue aforesaid directions contained in para 16 of the judgment. In Amita Vs. Union of India (UOI) and Another, the Apex Court opined that 'we are afraid that the said preponements 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 that 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. A Division Bench of this Court in Writ Petition No.9491/2006 (S) (Union of India vs. M.P. Administrative Service Association and others) examined the order of Central Administrative Tribunal (CAT) passed in OA No. 778/2002. In the said case, the validity of the rules was not under challenge before the tribunal, yet the tribunal passed certain directions. The Division Bench in the said writ petition 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 Rule 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.

The Division Bench ultimately set aside the order of the tribunal but gave liberty to the employees to challenge the vires of the rules (if advised) before the tribunal.

13. On the basis of aforesaid analysis, it is clear that the learned Single Judge has mechanically applied the ratio of Bhagwandas Tiwari (supra) in the present case. The scheme of the rules, method of division of marks in different heads were not examined nor it was seen as to whether the prescription of 65% marks can be held to be arbitrary as per the nature of the promotional post. The necessary parameters are required to be examined by the courts for the purpose of determining whether minimum merit marks are arbitrary or capricious. Although learned counsel for the employees have quoted the aforesaid attractive example, in our view, no finding can be given at appellate stage on the said example, firstly, for the reason that the scheme of marks introduced by rules and executive instructions was not under challenge before the writ court and secondly, this example was also not cited before learned Single Judge.

14. In Writ Petition No. 9491/2006 (supra), the Division Bench gave liberty to the employees to assail the rules before the tribunal. This is an intra-court appeal. Hence, rather giving liberty to file fresh petition, we deem it proper to remand the matter to the writ court to deal with these aspects. It will be open for the parties to amend their pleadings to challenge the rules/instructions.

15. In ex consequenti, the writ appeals are allowed. Impugned orders back to the writ court with the observations made herein above.