(2008) 02 OHC CK 0037

In the Orissa High Court

Soumendra Nath Das APPELLANT

Vs

Rushikulya Gramya Bank and Another RESPONDENT

Date of Decision : 12-02-2008

Acts Referred:

Citation : (2008) 1 OLR 769

Hon'ble Judges : B.P. Das, J;A.K. Samantaray, J

Bench : Division Bench

Final Decision : Allowed

Judgement

B.P. Das, J.—The petitioners, who are working as officers in the cadre of Junior Manager in Rushikulya Gramya Bank and posted in different branches of the Bank in Ganjam district, have filed this writ petition challenging the process of selection adopted by the Bank for promotion of officers from Juni6r Management-I (JM-I) scale to Middle Management-II (MM-II) scale on the ground that the same was done in an arbitrary manner and in violation of the statutory guideline issued by the Government of India in the Ministry of Finance (Banking Division).

2. The petitioners are all officers of JM-I scale. According to them, they were eligible to be promoted to MM-II scale. Pursuance to the circular dated 23.6.2004 issued by the Head Office of the Bank vide Annexure-2 for promotion to various cadres including promotion to 17 posts in MM-II grade from JM-I grade/the process of selection was initiated with the issue of call letters to eligible candidates and also circular for written examination and interview. The admitted fact is that all these promotions are governed by a set of rules called the Regional Rural Banks (Appointment and Promotion of Officers and other Employees Rules, 1988 (for short ''the Rules''), vide Annexure-1, and the amended Rules of 2002. Rule 2 appearing in Third Schedule of the Rules, which governs the aforesaid promotions, is extracted hereunder:

2. (a). Name of post Scale II Officer (b) Classification Group "A" (c) Source of appointment 100% by promotion (d) Whether promotion to be Promotion shall

be made made on seniority basis or on the basis of Seniority seniority-cum-merit basis, -cum-merit. (e) Eligibility Officers holding post for eight years as an Officer on regular basis in the RRB shall be considered for promotion in Scale II post in that Bank. Provided that no officer shall be considered for promotion he has been confirmed in the feeder grade post. Provided further that the board may, with the prior approval of National Bank, relax the qualifying service for a period not exceeding two years, if eligible officers are not available. NOTE

I. The officers eligible for promotion to the post of Area Manager/Senior Manager/ Officers Scale II on or before publication of this notification shall continue to be considered for promotion to Scale II Officer post.

II. The service of the incumbents, who are holding the post eligible for promotion before publication of this notification shall continue to be counted for the purpose of promotion to the Scale II Officer post.

(f) Mode of Selection The selection of the candidates shall be made by the committee on the basis of written test, interview and assessment of Performance Appraisal Reports for the preceding five years as an officer in Scaled/Field Supervisor. (g) Composition of Committee The Committee (for considering Promotion) shall consist of the following persons namely (i) The Chairman of the concerned Regional Rural - Chairman (ii) A director nominated by the Sponsor Bank - Member (iii) A director nominated by the National Bank - Member Note

If none of the members of the committee belongs to Scheduled Castes/ Scheduled Tribes, the board may nominate a person belonging to Scheduled Caste/Scheduled Tribes as an additional member and such person shall participate in the process of selection by the concerned Committee.

(h) Reckoning of the The minimum eligibility in terms minimum Eligibility of the number of years of service for promotion shall be reckoned as on the 1st April of the year in which the vacancy is expected to arise or has actually arisen. (i) Number of candidates to The number of candidates to be considered be considered for promotion for promotion from officer Scale I to officer Scale II shall be restricted to four times the number of vacancies available for promotion. (j) 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 TOTAL marks : 100 marks (A) Written test (60 marks) The Candidates shall be 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 written test shall be further divided as under. Part "A" 30 marks Part "B" 30 marks A list of only those candidates who secure 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 Performance Appraisal Reports for Reports (20 marks) the preceding five years shall be considered for the purpose of awarding marks for promotion.

3. There is no dispute that the petitioners are eligible to be considered for the aforesaid promotion and there is also no dispute that all of them went through the process of selection and became unsuccessful. Another undisputed fact is that the basis of promotion of officers from JMI-I scale to MM-II scale is seniority-cum-merit. It is, however, alleged that the opposite parties have deviated the aforesaid Rules by fixing a bench mark over and above the criteria prescribed in the Rules for promotion to the aforesaid posts. Mala fide against the authorities has also been alleged.

4. Before delving into the merits of the allegation so far as mala fide is concerned, let us first see whether there is any deviation of the Rules governing the field or whether the process of selection is in accordance with the Rules.

5. This Court while issuing notice on the writ petition passed an interim order on 7.1.2005 in M.C. No. 13863/2004 directing that the process of promotion/ selection from the post of Junior Management Grade Scale-I to Middle Management Grade Scale-II in the Bank may continue but no final selection/ posting shall be made without its leave. During pendency of the writ petition, an allegation was made that the Bank authorities issued a notification and by circumventing the order of this Court were trying to give effect to the promotion by transferring the promoted officers, considering which this Court by order dated 3.6.2005 directed that the O.P.-Bank authorities shall not give effect to the notification dated 28.5.2005 (Annexure-4) in respect of such officers who are being transferred on promotion from JM Grade Scale-I to MM Grade Scale-II. While the matter was heard-in-part, on 16.8.2005 in the absence of learned Counsel for the petitioners considering the submission of the learned Counsel for the opposite parties that by virtue of the interim order dated 3.6.2005 the chain of transfer has been stayed because of which the Bank is facing difficulty, this Court vacated such interim order. Thereafter the petitioners filed an application being M.C. No. 10311/2005 to recall the order dated 16.8.2005 vacating the interim order. Considering the aforesaid application, this Court by order dated 29.8.2005 refused to recall the order dated 16.8.2005 vacating the stay but directed that in the event the petitioners succeed in the writ petition, any order passed in the meantime in consequence of vacation of stay shall be subject to the result of the writ petition. The aforesaid order still continues.

6. A counter affidavit has been filed by O.P. Nos. 1 and 2, i.e., the Bank and its Chairman. The opposite parties in the aforesaid counter affidavit have taken a stand that in order to adopt elimination process, the procedure of bench mark was introduced. Fact remains that the Rules do not prescribe for such bench marking after the candidates come out successful in the written test. The opposite parties in this regard have stated in paragraph 10 of the counter

affidavit:

10. That in reply to para-9 of the writ petition it is submitted that as a matter of fact there is no qualifying marks prescribed for interview and performance appraisal reports. Petitioners also admitted in their averments that once written test is over, selection shall be on respective marks awarded in interview and performance report. It is a figment of imagination on the part of the petitioners that a senior once secures 40% in the written test should be placed higher in the selection list, similarly petitioners view that performance appraisal means seniority and hence longer seniority be preferred to lesser seniority is not correct and is not based on facts. Performance appraisal refers to the performances rendered by a particular employee for the reported period. Even then the Selection Committee by fixing a ''Bench Mark'' on the overall performance on written test, interview and performance appraisal report have also taken due care of seniority of the candidates. That means a senior after securing minimum ''Bench Mark'' gets selected even though a junior get higher marks than him. The petitioners eventually failed to get the minimum bench marks fixed by the Selection Committee.

Basing upon the aforesaid averments, Shri C.A. Rao, learned Counsel appearing for the O.P.-Bank, contended that the decision taken by the management of the Bank prescribing bench mark was justified.

7. Shri J. Patnaik, learned Senior Counsel appearing for the petitioners, in order to fortify his argument placed reliance on a decision of the apex Court in B.V. Sivaiah and Others etc. Vs. K. Addankl Babu and Others etc., . Shri Patnaik drew our attention to the observations made by the apex Court in paragraph 10 of the aforesaid judgment and submitted that as between the two principles of seniority and merit, the criterion of ''seniority-cum-merit'', lays greater emphasis on seniority. He also drew our attention to the observations made by the apex Court in the aforesaid case in paragraph 11 and 15, which are reproduced below:

11. In State of Kerala and Another Vs. N.M. Thomas and Others, A.N. Ray, C.J., has thus explained the criterion of seniority-cum-merit.:

With regard to promotion the normal principles are either merit-cum-seniority or seniority-cum-merit. Seniority-cum-merit means that given the minimum necessary merit requisite for efficiency of administration, the senior though the less meritorious shall have priority, (p. 930 of SCR) : (at p. 500 para 38 of AIR)

15. In State of Mysore Vs. C.R. Sheshadri and Others, the Court was considering the question whether the High Court could have given a direction to the State to give to the respondent therein notional promotion to the post of Deputy Secretary with effect from the date on which his junior secured such promotion. This Court said that such a direction could not be given by the High Court because promotion of a Government servant was basically in Government''s discretionary power and that in the absence of positive proof of the relevant service rules it was hazardous to assume that by efflux of time the respondent

would have spiralled up to Deputy Secretaryship and that the proper direction could only be that Government would reconsider the case of the respondent afresh for purpose of notional promotion. In that context, this Court pointed out that if the rule of promotion is one of ''sheer seniority'' it may well be that promotion is a matter of course and that if seniority-cum-merit is the rule, promotion is problematical. Since the relevant rule governing promotion to the post of Deputy Secretary had not been placed before it, the Court was not required to define the criterion of ''seniority-cum-merit'' and to delineate the fine distinction between the criterion of ''seniority-cum-merit'' and the criterion of ''merit-cum-seniority'' in the matter of promotion. In the observations on which reliance has been placed by the learned Counsel for the Rural Banks and the promoted officers the distinction between ''seniority-cum-merit'' and ''merit-cum-seniority'' has been obliterated and both the criteria have been equated. Since comparative assessment of merit is required to be made while applying the criterion of ''merit-cum-seniority'' and for ''seniority-cum-merit'' no such comparative assessment is required, the aforementioned observations in the case of State of Mysore Vs. C.R. Sheshadri and Others, on which reliance has been placed cannot be regarded as correctly reflecting as to what is meant by the criterion of ''seniority-cum-merit.

8. Learned counsel for the petitioners also relied upon a later decision of the apex Court in Bhagwandas Tiwari and Others Vs. Dewas Shajapur Kshetriya Gramin Bank and Others, in which reference was made to Sivaiah (supra). The observations made in paragraphs 10 and 14 of the said decision, which are relevant for the present purpose, are as follows:

10. The impugned judgment of the learned single Judge and Division Bench of the High Court missed one basic factor. The circular nowhere refers to the minimum marks being relatable to criteria A and C and nowhere there is a stipulation of obtaining minimum 35 marks as a compulsory measure. If really the intention was to apply the said minimum marks to said criteria it would have been specifically provided that way. It is noted by the High Court that in the circular or in the 115th or 117th report of the respondent No. 1-bank there was no mention about this aspect. The doctrine of reading down the provisions has really no application to the facts of the case. If the stand of respondents is accepted, it would mean addition of a condition which is not specifically provided for. That is impermissible.

9. There is no basis, in the instant case, for the stand that for assessing merit a minimum number of marks has been prescribed. The contention that minimum marks were 45 out of 60, means that an employee is to secure 75% of marks. Such a high percentage can not be a measure of prescribing minimum marks to assess merit. It obviously would be a case of shifting the focus to merit-cum-seniority. In para 37 of Sivaiah case (supra), this Court noted that minimum marks prescribed for assessing merit do not depart from the seniority-cum-merit principle. But the factual position is different here. There is no mention that 45

marks out of 60 relate to the prescription of minimum marks for assessing the merit. In Jalal Uddin''s case (supra) it was noted that in seniority-cum-merit greater emphasis is on seniority though it is not the determinative factor. In the case of merit-cum-seniority, merit becomes a determinative factor. In fact, the position noted by this Court in paragraphs 19, 20, 24 and 25 of Sivaiah case (supra) dealt with almost identical fact situation, apart from paragraph 16 of the judgment.

10. On the other hand, learned Counsel for the opposite parties, relied upon a decision in Sivaiah (supra) and drew our attention to the following observations made in paragraph 37 thereof:

37. During the course of hearing of the appeal the learned Counsel for the respondent-Bank has placed before us the relevant documents relating to the impugned selection and promotion. On a perusal of the said documents we find that 50 marks out of the total of 100 marks were prescribed as the minimum qualifying marks for interview and only those who had obtained the qualifying marks in interview were selected for promotion on the basis of seniority. It was, therefore, a case where a minimum standard was prescribed for assessing the merit of the candidates and those who fulfilled the said minimum standard were selected for promotion on the basis of seniority. In the circumstances, it cannot be said that the selection has not been made in accordance with the principle of ''seniority-cum-merit". We are, therefore, unable to uphold the impugned judgment of the High Court. The appeal has to be allowed and the impugned judgment of the High Court dated February 7, 1997 passed by the learned single Judge of the High Court has to be set aside and the promotion of the appellant on the post of Area/Senior Manager under order dated April 8, 1993 has to be affirmed.

Learned counsel further relied upon the judgment of the apex Court in Majeet Singh, UDC and others Vs. Employees'' State Insurance Corpn. and another, and submitted that the decision to prescribe bench mark was within the domain of the management of the Bank.

11. Reading the decision of Sivaiah we are of the opinion that Shri Rao only picked up the observation made in paragraph 37 of the said decision, which will not be of any help to the case of the O. Ps. as the facts of the said case are totally different from the case at hand. In Sivaiah''s case, a minimum qualifying mark was prescribed. But in the present case, the process of promotion is guided by a set of rules, which do not provide for fixation of bench mark. Fixation of bench mark has been done by the management of the Bank in violation of the Rules governing the field. It was also admitted by the opposite parties in paragraph 10 of their counter affidavit, which we have quoted earlier, that they had fixed the bench mark and this, according to us, is de horse the Rules. This is a case where the principle of seniority-cum-merit is the basis for promotion, which means that given the minimum necessary merit requisite for efficiency of administration, the senior, even though less meritorious, shall have priority. (See

State of Kerala and Another Vs. N.M. Thomas and Others, . In Sivaiah''s case (supra), the position was highlighted in paragraph 18, which is quoted hereunder:

We thus arrive at the conclusion that the criterion of ''seniority-cum-merit'' in the matter of promotion postulates that given the minimum necessary merit requisite for efficiency of administration the senior, even though less meritorious, shall have priority and a comparative assessment of merit is not required to be made. For assessing the minimum necessary merit the competent authority can lay down the minimum standard that is required and also prescribe the mode of assessment of. merit of the employee who is eligible for consideration for promotion. Such assessment can be made by assigning marks on the basis of appraisal of performance on the basis of service record and interview and prescribing the minimum marks which would entitle a person to be promoted on the basis of seniority-cum-merit.

12. The view as taken in Sivaiah''s case was also taken in Bhagwandas Tiwari''s case (supra). The question was whether the Bank can fix a minimum mark on the face of the Rules providing for promotion on the basis of seniority-cum-merit. The apex Court held that prescribing a high percentage of 75 for being eligible for the promotion could not be a measure of prescribing minimum marks to assess the merit and it obviously would be a case of shifting the focus to merit-cum-seniority instead of seniority-cum-merit.

13. In view of the position of law enunciated by the apex Court, we have no hesitation to hold that prescription of bench mark is in violation of the promotion policy of the Government of India and the Rules governing the field.

14. In view of our aforesaid finding that the process of selection was in violation of the Rules, we do not feel it necessary to go into the allegation of mala fide made by the petitioners.

15. We, therefore, allow this writ petition and quash the entire process of selection made in relation to the promotion of officers from JM-I scale to MM-II scale in Rushikulya Gramya Bank in pursuance of the circular dated 23.6.2004 issued by the Head Office of the Bank, vide Annexure-2 and direct the opposite parties to make fresh selection in accordance with the Rules.

We make no order as to costs.

A.K. Samantaray, J.

16. I agree.

