
(2016) 05 AHC CK 0290
In the Allahabad High Court
Case No : Writ Petition No. 44873 of 2001

Sri Krishna

APPELLANT

Vs

Union of India

RESPONDENT

Date of Decision : 30-05-2016

Acts Referred:

Constitution of India, 1950 — Article 226

Citation : (2016) 11 ADJ 496 : (2016) 4 UPLBEC 3280

Hon'ble Judges : Sudhir Agarwal and Mohd. Tahir, JJ.

Bench : Division Bench

Advocate : Govind Saran, S.C, for the Respondent; Bhoopendra Nath Singh, Advocate, for the Petitioner

Final Decision : Allowed

Judgement

1. Petitioner was appointed as Khalasi on 11.11.1982. For promotion on the post of "Blacksmith" against two vacancies and "Hammerman", one vacancy, applications were called from eligible persons and a Trade Test was held on 21.4.1990. Petitioner applied for promotion on the post of "Blacksmith" in the pay scale of Rs.950-1500/-. Result of Trade Test was declared on 29.5.1990. Divisional Railway Manager promoted one Naushey on the post of "Blacksmith" and Gyan Singh on the post of "Hammerman". Since there were two vacancies notified in the cadre of "Blacksmith", petitioner awaited for his promotion for some time and thereafter made a representation on 12.12.1990 requesting respondent competent authority to promote him against existing vacancy of "Blacksmith". When no order was passed, petitioner filed Original Application No.1469 of 1993, which was disposed of vide order dated 6.12.1993, directing respondent competent authority to decide representation of petitioner by a reasoned and speaking order within three months.

2. Pursuant to aforesaid order of Tribunal dated 6.12.1993, Divisional Superintending Engineer (III) Northern Railway, Allahabad (hereinafter referred to as "the DSE") communicated his decision on petitioner's representation vide

order dated 7.9.1994, stating that Trade Test conducted on 21.4.1990 was never approved by competent authority i.e. Senior Divisional Engineer (I) Allahabad. Record of Trade Test was seized by Vigilance Department. Assistant Engineer, Northern Railway, Etawah sent select list of Trade Test for approval to competent authority on 14.8.1991 but after scrutiny Senior Divisional Engineer did not approve selection pursuant to Trade Test and cancelled the same vide letter dated 13.9.1991. Thus on the basis of Trade Test held in 1990, petitioner cannot be promoted.

3. The order dated 7.9.1994 as also non promotion of petitioner was assailed in Original Application No. 1702 of 1994. Tribunal vide judgment and order dated 5.7.2001 has dismissed Original Application and there against Review Application No. 64 of 2001 preferred by petitioner has also been dismissed vide order dated 28.8.2001. Hence this writ petition.

4. Learned counsel for petitioner submits that Tribunal completely misled and failed to appreciate the fact that petitioner was not claiming any parity with Gyan Singh. He had categorically pleaded that Gyan Singh was a candidate for promotion on the post of "Hammerman" and pursuant to Trade Test held on 21.4.1990 he was promoted as "Hammerman" while Naushey who was at serial no. 1 in the list of successful candidates for the post of "Blacksmith", was so promoted. Tribunal completely misread claim of petitioner that he was claiming promotion vis-a-vis Gyan Singh and on account of mis-appreciation of facts, has illegally dismissed Original Application. He also submitted that Trade Test was held for two vacancies of "Blacksmith" and only one was filled in by promoting Naushey. Thus denial of promotion to petitioner on the ground that aforesaid test was not approved by competent authority was farce for the reason that on the basis of same Trade Test, promotion of Naushey had continued but Tribunal completely misled itself in appreciating this fact and observing that petitioner made representation on 12.12.1990, claiming promotion on the post of "Blacksmith", though existence of vacancy on the post of "Blacksmith" was denied by the respondent, hence review was not maintainable. He further submitted that impugned judgment and orders passed by Tribunal are thoroughly illegal as there was complete non application of mind on the part of Tribunal and therefore, impugned judgment and orders are liable to be set aside. He also submitted that petitioner was illegally denied promotion on the post of "Blacksmith" though he passed Trade Test and secured second place in the merit list, still only one promotion was made and thereafter, claim of petitioner was denied on the ground that Trade Test was not approved, ignoring the fact that Naushey was already promoted on the basis of same Trade Test and on that very basis, denial of promotion to petitioner on the post of "Blacksmith" was not justified. He also pointed out that subsequently, after abolition of post of "Hammerman", existing post of "Blacksmith" was sought to be filled in by designating Gyan Singh, who was promoted as "Hammerman" on the basis of same Trade Test. It is submitted that entire action of respondents competent authority was wholly malicious in law, illegal and amounts to denial of

Constitutional and legal right of petitioner for consideration for promotion in accordance with law.

5. We have perused pleadings exchanged between the parties before Tribunal and relevant documents placed thereat. Copy of result of trade test held on 21.4.1990 for the posts of "Blacksmith" and "Hammerman" clearly shows that seven persons appeared in Trade Test for the posts of "Blacksmith" and eight persons appeared in Trade Test for the posts of "Hammerman". Three persons namely Naushey, Sri Krishna (petitioner) and Munna Lal were declared pass having secured 70, 67 and 60 marks out of 100 for the posts of "Blacksmith". Four persons were declared pass for "Hammerman" i.e. Gyan Singh, Shiv Lal, Shiv Shanker and Nawab Singh having secured 71, 64, 63 and 60 marks out of 100. The aforesaid result is said to have been forwarded by Divisional Engineer Etawah to Inspector of Works, Etawah, for information on 29.5.1990. On the same date Divisional Engineer Etawah also issued a promotion order promoting Naushey as "Blacksmith" and Gyan Singh as "Hammerman" in the pay scale of Rs. 950-1500 against existing permanent vacancies, observing that they have been found eligible as a result of trade test cum suitability test held for the posts of "Blacksmith" and "Hammerman". This fact of promotion of Naushey as "Blacksmith" and Gyan Singh as "Hammerman" has been pleaded by petitioner in paras 4.3 and 4.4 of Original Application.

6. In para 4 of written statement filed by respondents before Tribunal, para 4.3 of Original Application has not been denied. However, with respect to para 4.4, respondents in para 5 have said that there was separate list of Trade Test for "Blacksmith" and "Hammerman". Gyan Singh being first in the list of "Hammerman" was promoted as "Hammerman". This shows that the factum that Naushey and Gyan Singh both were promoted on 29.5.1990 on the posts of "Blacksmith" and "Hammerman" after being successful in the Trade Test conducted on 21.4.1990 are admitted by respondents. The stand, therefore, taken by respondents in the order dated 7.9.1994, while deciding petitioner's representation, that Trade Test conducted on 21.4.1990 was not approved by competent authority is not correct but is contrary to record, particularly, in view of the fact that it is said that Trade Test was cancelled by letter dated 13.9.1991 though no material has been placed either before Tribunal or before this Court that when Trade Test held on 21.4.1990 was cancelled, as a consequence thereof, promotions of Naushey and Gyan Singh made on the post of "Blacksmith" and "Hammerman" were also cancelled inasmuch as the same could not have continued if Trade Test result itself was cancelled on 13.9.1991. In para 6 of written statement, it is however pleaded that petitioner could not be promoted as "Blacksmith" since sanctioned post and vacancy was not available. In para 7 of written statement, it is said that there was no vacancy of "Blacksmith" till 19.8.1993 hence no one was promoted as "Blacksmith". In para 8 of written statement, it is said that post of "Hammerman" was subsequently abolished and a decision was taken that the persons already working as "Hammerman" would not be reverted but their designation would be changed to

"Blacksmith" after conducting a proper Trade Test. It is also said that in real sense, it was not a Trade Test since pay scale of "Blacksmith" and "Hammerman" was same.

7. We find that pleadings in paras 5 and 8 of written statement are self-contradictory inasmuch as on the one hand, in para 5, respondents had pleaded that Trade Test held for the post of "Blacksmith" and "Hammerman" are different being different cadres but simultaneously in para 8 it is pleaded that there was no sense of any trade test if "Hammerman" was designated as "Blacksmith".

8. In our view, Tribunal clearly erred in law in assuming that petitioner was claiming parity with Gyan Singh to fortify his claim for promotion as "Blacksmith" and thus committed manifest error of law apparent on the face of record. In fact, what has been emphasised by petitioner is that Gyan Singh was admittedly passed Trade Test held for the post of "Hammerman" and promoted accordingly. Petitioner was denied promotion as "Blacksmith" on the ground of lack of vacancy. Respondents pleaded that till 19.8.1993 there was no vacancy of "Blacksmith", therefore petitioner could not be given promotion but when post of "Hammerman" was abolished how Gyan Singh was promoted and designated as "Blacksmith" and against which vacancy is neither explained nor clarified. Whether any vacancy actually occurred on or after 19.8.1993 is also not made clear. Tribunal without looking into this aspect of the matter and without appreciating this fact passed impugned orders holding that as per respondents, there was no vacancy of "Blacksmith" available for promotion of petitioner and Gyan Singh was a candidate for "Hammerman" which was a different cadre ignoring the fact that subsequently Gyan Singh was also adjusted as "Blacksmith", after abolition of post of "Hammerman", without showing that any subsequent vacancy occurred where against any subsequent Trade Test for all eligible persons was or could be held and therein Gyan Singh qualified hence promoted as "Blacksmith".

9. Before us also respondents have reiterated in para 5 of the counter affidavit that Vigilance Personnel seized record of Trade Test held on 21.4.1990 and thereafter the said Trade Test was not approved by competent authority vide letter dated 13.9.1991. When questioned, whether two persons already promoted on the post of "Blacksmith" and "Hammerman" were reverted back after cancellation/disapproval of their promotion orders by competent authority, learned counsel appearing for respondents could not give any reply at all. He further submitted that Gyan Singh was subsequently promoted as "Blacksmith" on the basis of Trade Test held on 19.8.1993. For this purpose, a copy of record of Trade Test held individually for Gyan Singh has been filed as Annexure-1 to the counter affidavit, showing that on 19.8.1993 Gyan Singh was working as "Hammerman" and a trade test was held on 19.8.1993 for the post of "Blacksmith" Grade III, only for Gyan Singh, and he was declared pass after obtaining 64 marks. Why Trade Test for Gyan Singh was held individually in August, 1993 and against which vacancy of "Blacksmith", could not be explained

by learned Standing Counsel even in counter affidavit, particularly when it was pleaded by respondents before Tribunal that there was only one vacancy of "Blacksmith".

10. Record further shows that Divisional Superintending Engineer issued an order on 12.9.1994 approving Trade Test individually for Gyan Singh held on 19.8.1993. Respondents have also filed a copy of chart of final sanctioned strength of staff as on 1.7.1993 as (part of Annexure-3 to the counter affidavit) which shows that there were two posts of "Blacksmith" at Etawah on 1.7.1993. From the facts disclosed above, it is evident that one post was occupied by Naushey who was promoted as "Blacksmith" pursuant to passing his Trade Test on 21.4.1990. It is not stated anywhere as to who was the second person holding post of "Blacksmith" in 1990-91 so as to justify stand of respondents that there was no vacancy of "Blacksmith" where against petitioner could have been promoted. It is also not pleaded anywhere that in 1993 when Trade Test was held for Gyan Singh, individually, for the post of "Blacksmith", a vacancy had occurred due to somebody's retirement or promotion or for any other reason and to fill in such vacancy, Gyan Singh was permitted to appear in individual trade test.

11. Even otherwise, we are clear in our mind that such a procedure could not have been adopted by respondents for the reason that if any subsequent vacancy would have occurred, it would have required a trade test for promotion on the post of "Blacksmith", under the Rules it was incumbent upon respondents to allow all eligible persons to apply for such promotion and after holding trade test, permitting all such incumbents to participate therein, subsequent vacancy, if any, could have been filled in by promoting a person who would have passed and secured highest marks. It is not the case that such procedure was followed for making Gyan Singh as "Blacksmith" in 1993.

12. In these circumstances, in order to clarify further things, we required respondents to bring correct facts before Court, whereupon a supplementary counter affidavit was filed by one Utkarsh Jaiswal, Assistant Divisional Engineer, North Central Railway, Etawah admitting that trade test was held on 21.4.1990 for filling in vacancies on the posts of "Blacksmith" and "Hammerman". A joint panel was declared on 21.4.1990. Due to urgency of work Naushey was promoted as "Blacksmith" and Gyan Singh as "Hammerman". The record was seized by Vigilance Department and released in July, 1991. Thereafter competent authority i.e. Senior Divisional Engineer III, Northern Railway, Allahabad passed an order dated 13.9.1991 directing Assistant Engineer, Northern Railway, Etawah that trade test may be cancelled and fresh trade test may be conducted. It also directed Assistant Engineer that position of vacancy should be recorded before sending trade test results for approval. A photo copy of the said letter has been filed as Annexure-SCA-1 to supplementary counter affidavit. Assistant Engineer then asked for clarification vide letter dated 20.9.1991 that since Naushey and Gyan Singh were already promoted as "Blacksmith" and "Hammerman" against

permanent vacancies already existing, vide promotion order dated 29.5.1990, whether these persons should be reverted or only remaining panel is to be cancelled. No clarification was received though Assistant Engineer sent reminders dated 15.10.1991, 19.8.1991 and 1.9.1993. Assistant Engineer vide letter dated 13.9.1991 also informed Senior Divisional Engineer III, Allahabad that one vacancy of "Blacksmith" exists under Inspector of Works, Etawah. Since post of "Hammerman" was not sanctioned in revised strength, as such, Gyan Singh "Hammerman" was trade tested for the post of "Blacksmith" but not yet posted against existing vacancy of "Blacksmith", hence appropriate directions were sought regarding cancellation of previous Trade Test partly or wholly so that the vacancies may be filled in accordingly.

13. We are not informed that any clarification was issued by Senior Divisional Engineer and this also shows that vacancy of "Blacksmith" was already existing as it was not a new one which occurred sometime in 1993. Therefore, stand of respondents that there was no vacancy of "Blacksmith" where against petitioner could have been promoted is also factually incorrect.

14. Learned counsel appearing for respondents also could not show as to under which provision, against existing vacancy of "Blacksmith", only Gyan Singh could have been permitted to appear in Trade Test, instead of calling applications from all eligible persons, who are willing to compete for promotion to the post of "Blacksmith". Without looking into these aspects of the matter and referring to earlier letter dated 13.9.1991, Divisional Superintending Engineer rejected petitioner's representation vide order dated 7.9.1994 and conveniently ignored the question, whether persons already promoted should be reverted or the decision was only for partial cancellation and whether in 1990, when Trade Test was held, it was for one or two vacancies of "Blacksmith". The stand of respondents is that after promotion of Gyan Singh as "Blacksmith" there remained no vacancy available where against petitioner could have been promoted. Here we may also place on record that though result of Trade Test held individually for Gyan Singh for the post of "Blacksmith" was approved by competent authority but order showing that Gyan Singh was ever promoted as "Blacksmith" has not been placed on record. It appears that after Gyan Singh passed Trade Test held for "Blacksmith" and it was approved by Divisional Superintending Engineer on 12.9.1994. Respondents treated Gyan Singh, as appointed as "Blacksmith" without any actual order issued by them. Learned counsel appearing for the respondents also could not show before us any appointment order of Gyan Singh as "Blacksmith". The officer who sworn supplementary counter affidavit and is present today also could not inform that there is any letter available on record. These facts very clearly show that respondents have acted in a most illegal, whimsical, arbitrary and unjustified manner. There were two sanctioned posts of "Blacksmith" at Etawah and both were vacant in 1990 when Trade Test was held on 21.4.1990. In a selective manner, respondents promoted only Naushey, the person who was first in merit list of the candidates who passed Trade Test for the post of "Blacksmith" but the

next candidate i.e. petitioner was ignored without any reason thereof. For another cadre i.e. "Hammerman", Gyan Singh passed Trade Test and secured first place in the merit list and he was promoted as "Hammerman". Obviously, petitioner could not have any grievance against promotion of Gyan Singh as "Hammerman" since petitioner was a candidate against existing vacancy of "Blacksmith". Petitioner awaited for his promotion and then made representation and pursued the matter. The plight of petitioner aggravated when Gyan Singh promoted as "Hammerman" was allowed individually to appear in a Trade Test for the post of "Blacksmith" and that Trade Test was approved by competent authority and the respondents then treated Gyan Singh as stand appointed on the post of "Blacksmith", though neither any such appointment order was passed nor any process of promotion permitting all eligible persons to participate for such vacancy was separately conducted nor, as a matter of fact, earlier Trade Test was ever cancelled and a fresh Trade Test of all concerned persons was held. In these circumstances, petitioner has clearly been discriminated by denying him promotion on the post of "Blacksmith" against the existing vacancy which was available in 1990 till 19th August, 1993 or 1994 when Gyan Singh was treated to have been appointed against such vacancy of "Blacksmith".

15. In the circumstances, petition deserves to succeed and impugned orders dated 5.7.2001 and 28.8.2001 passed by Tribunal as also the order dated 7.9.1994 passed by respondent no.2 rejecting petitioner's representation cannot be sustained.

16. In the result, writ petition is allowed. The impugned judgment and orders dated 5.7.2001 and 28.8.2001 passed by Tribunal and order dated 7.9.1994 passed by respondent no.2 rejecting petitioner's representation are hereby set aside.

17. Now the question is about further relief which can be granted to petitioner. Since petitioner had a right to be promoted as "Blacksmith" before Gyan Singh who belong to a different cadre of "Hammerman" but already promoted and could not have been adjusted against existing vacancy of "Blacksmith" to defeat and ignore claim of petitioner for promotion on the post of "Blacksmith", hence we direct that petitioner shall be treated to be promoted as "Blacksmith" from the date Gyan Singh was treated to be appointed on the said post of "Blacksmith" and shall be entitled for all consequential benefits. Respondent railway authorities however shall be entitled to recover amount of salary which may be payable to petitioner pursuant to this judgment for the period he did not discharge responsibilities of higher post of "Blacksmith" from responsible erring officials for whose fault petitioner suffered and stood denied his lawful claim for promotion on the post of "Blacksmith" after holding such inquiry as permissible under the Rules.

18. Since petitioner has been unnecessarily dragged in entire litigation twice before Tribunal and then before this Court, which could have been avoided by respondents if acted with due care and caution, petitioner is held entitled to cost

quantified to Rs.25,000/-.