
(2019) 01 RAJ CK 0259

In the Rajasthan High Court

Case No : Civil Writ Petition No. 11809 Of 2014

S.S. Mina

APPELLANT

Vs

State Of Rajasthan And Ors

RESPONDENT

Date of Decision : 04-01-2019

Acts Referred:

Citation : (2019) 01 RAJ CK 0259

Hon'ble Judges : Alok Sharma, J

Bench : Single Bench

Advocate : R.K. Agarwal, Tanveer Ahmed, Virendera Lodha, Abhishek Sharma

Final Decision : Dismissed

Judgement

This petition has been filed with the following prayers:-

It is, therefore humbly prayed that Your Lordship may graciously be pleased to accept and allow this writ petition and by an appropriate writ, order or direction:

1. The respondents may kindly be directed to ensure the compliance of notification dated 11.9.2011 by which 12% quota of ST Category is required to be filed amongst ST Category candidates and as per letter dated 23.10.2012 which provides for rule of replacement and accordingly the respondents may be directed to consider the candidature of the petitioner for promotion to the post of Dy. Chief Engineer and for further promotion accordingly.
2. The respondents may also be directed to adhere to the note dated 7.9.2014.
3. The impugned order Nos.338, 354, 361 and 367 dated 15.10.2012 may kindly be quashed and set aside to the extent the promotion is made to the post of ST Category by the General Category Candidates/ other than ST Category Candidates and accordingly the respondents may be directed to consider candidature of the petitioner for DPC on the post of Superintendent Engineer against the vacancies of 2003-2004 or at least in the year 2006-07 and accordingly further consequential orders may also be ordered to be passed by

way of undertaking the exercise of review of the Review DPC in the interest of justice.

4. The respondents may kindly be directed to implement the notification dated 11.9.2011, which is accepted and adopted by way of passing the order dated 26.9.2012 and accordingly the Review DPC may kindly be ordered to be convened with effect from 1997 onwards.

5. The arbitrary action/omission on the part of the respondents in promoting the General Category Candidates against the post meant for ST Category may kindly be declared as arbitrary and illegal and accordingly be set right in the interest of justice.

6. Any other appropriate order, which may be found just and proper in the facts and circumstances of the case, be passed in favour of the petitioner.

7. Cost of the writ petition may also be awarded in favour of the petitioner.

In a nutshell the case of the petitioner is that he belongs to the Scheduled Tribe (ST) category and the time relevant was working as Executive Engineer with the respondent-Ajmer Vidyut Vitran Nigam Limited (AVVNL). The petitioner claims that he was entitled to be promoted to the post of Superintending Engineer in the DPC for the vacancies of 2003-04 for the said post which included one reserved for Scheduled Tribes. It has been submitted in the alternative, assuming that the petitioner was not entitled for promotion to the post of Superintending Engineer against the vacancies of 2003-04, he ought to have been considered and so promoted on the reserved post carried forward and included in the vacancies of 2006-07. Yet he was wrongly overlooked arbitrarily and illegally and the illegality compounded in filling the reserved category from a candidate in the open category. It has been submitted that aggrieved therefrom the petitioner filed SBCWP No.2645/2014 which was however on his prayer in view of the note dated 07.09.2014 under the hand of the Managing Director, AVVNL, whereupon his grievance stood remedied disposed of by the court as withdrawn on 10.10.2014.

The further case of the petitioner is that even despite the note dated 07.09.2016 under the hand of the Managing Director, AVVNL, leading to the withdrawal of SBCWP No.2645/2014 the petitioner was not promoted when due against the reserved vacancy for ST in the cadre of Superintending Engineer but was only promoted in 2009-10. The petitioner therefore inter alia seeks a direction to the respondents to adhere to the Managing Director, AVVNL note dated 07.09.2014. In the circumstances, reliefs set in this petition have been sought.

Reply to the petition has been filed by the respondentAVVNL. A preliminary objection has been taken that earlier writ petition SBCWP No.2645/2014 having been filed by the petitioner praying substantially for the same reliefs as in the present one, which was dismissed as withdrawn (without liberty) on the statement of the counsel for the petitioner, this petition is deserving of dismissal

on the public policy ground of res-judicata. In support of this contention, reliance has been placed on the judgment of the Apex Court in the case of Sarguja Transport Service Versus State Transport Appellate Tribunal, M.P. Gwalior & Others, [1987(1) SCC 5] where the Apex Court held that in respect of the same subject matter where the earlier writ petition was withdrawn, a fresh petition could not be filed. Another preliminary objection at the instance of the respondent-AVVNL as agitated by Mr.Virendera Lodha, Senior Advocate appearing with Mr.Abhishek Sharma is that the reliefs prayed in the petition, substantively entail a challenge to the order/s of promotion to the post of Superintending Engineer following the DPC of 2003-04, 2006-07 and 2008-09. It has been submitted that yet none of those promoted and likely to be affected in the event of the petition were to be allowed have been impleaded in the writ petition even in representative capacity. And resultantly this petition is also liable to be dismissed on the ground of nonimpleadment of necessary parties.

On the merits of the case, Mr.Virendra Lodha emphatically submitted that indeed one vacancy in the ST category obtained in the cadre of Superintending Engineer in the year 2003-04 which was carried forward first to 2006-07 and then to 2008-09. However only ST category candidates falling within the zone of consideration as provided under the Engineer Service Regulations, 1969 (hereinafter 'the Regulations of 1969') as relevant for promotion to the post of Superintending Engineer with AVVNL could have been considered. The relevant extended zone of consideration for ST candidates in terms of the applicable regulations was 7 times the number of vacancies under consideration in a given year. For the financial year 2003-04, there were 5 vacancies including one for ST. The zone of consideration could for the purpose therefore extend only to seniority no.35 in the seniority list of the feeder cadre of Executive Engineer. The petitioner at the relevant time was however at serial no.71 and hence was not in the zone of consideration and could therefore not be considered. With regard to the financial year 2006-07 it was submitted that only 6 posts including one carry forward post reserved in the ST category for promotion to the post of Superintending Engineer obtained. Again in terms of the zone of consideration under the operative rule only those upto serial no.42 in the seniority list of Executive Engineers were in the zone of consideration. The petitioner was at the relevant time placed at serial no.60 in the cadre of Executive Engineer with the respondent-AVVNL. Hence he could again not be considered for promotion to the post of Superintending Engineer. Mr.Virendra Lodha submitted that even though a specific claim in the writ petition for promotion as Superintending Engineer in 2008-09 has not been made in the petition, it would be desirable to clarify that in the financial year 2008-09 there were again only 5 vacant posts including the carry forward post of ST in the cadre of Superintending Engineer. For reasons earlier stated, the extended zone of consideration for ST candidates under the operating regulations was upto 35 in the seniority list of the feeder cadre of Executive Engineers. The petitioner was however at the relevant time at serial no.39 in the cadre of Executive Engineers and hence outside the zone of

consideration for promotion as Superintending Engineer and was not therefore promoted against the vacancy for ST for the year 2008-09.

Mr.Virendra Lodha submitted that the vacancy of 2003-04 in the ST category in the cadre of Superintending Engineer was thus carried forward to 2009-10. The petitioner then being within the zone of consideration was considered and promoted in that year. Mr.Virendra Lodha then emphatically submitted that the petitioner's allegation with regard to the purported promotion of general category candidates as Superintending Engineers on the reserved post for ST is misleading inasmuch as there were so when appointed to such post only on urgent temporary basis subject to availability of eligible and suitable ST candidate. No sooner the eligible ST candidate i.e. the petitioner was available he was promoted on the post reserved for ST.

Heard. Considered.

The petitioner or for that matter any employee can only have the right for promotion from the cadre of Executive Engineer to that of Superintending Engineer with the respondent-AVVNL in terms of the Engineer Service Regulations, 1969 (hereinafter 'the Regulations of 1969') - which are not under challenge. In the case of *Badrinath Versus Government of Tamil Nadu & Others*, (2000) 8 SCC 395, the Apex Court held that every officer has a right to be considered for promotion to a higher post subject to eligibility, provided she is within the zone of consideration. The statutory zone of consideration under the Regulations of 1969 for promotion from the feeder cadre to the next higher cadre for general candidate is three times the number of vacancies under consideration and for reserved candidates five times, extendable to seven times, the number of vacancies under consideration in a given year. There is no dispute as to this fact.

Mr.Tanveer Ahmed appearing for the petitioner abandoned the petitioner's claim for promotion on the post of Superintending Engineer against the reserved vacancy in 2003-04 and confined his case to the petitioner's right to be promoted as Superintending Engineer in 2006-07. He also sought a direction that the respondents adhere to the Managing Director, AVVNL note dated 07.09.2014.

It is not in dispute that 6 vacant posts of Superintending Engineer were to be filled up by the promotion in 2006-07. Even with the extended zone of consideration for ST candidates as per the Regulation of 1969 i.e. at 7 times, those upto seniority 42 could be considered. The petitioner was not entitled for consideration as he was then at serial no.60 in the feeder cadre of Executive Engineer. As such albeit a reserved post in the ST category in the cadre of Superintending Engineer indeed then obtained, the petitioner could not even be considered, what of being promoted. So too for the ST vacancy in 2008-09 which the petitioner only specifically claimed in the course of arguments on the basis of the Managing Director, AVVNL note of 07.09.2014. In the said year the vacancies for promotion as Superintending Engineer being 5 in numbers, the extended zone of consideration under the Regulations of 1969 was 35 in the seniority of

Executive Engineers with AVVNL. The petitioner was at the relevant time 39th in the seniority in the feeder cadre. He was not even entitled for consideration for promotion and can have no grievance in regard thereto. I find no force in the argument on the petitioner's behalf that the zone of consideration for Scheduled Tribe candidates ought to comprise only of Scheduled Tribe candidates and if it were to be so done qua the one reserved vacancy for Scheduled Tribe in the cadre of Superintending Engineers with AVVNL, the petitioner as the senior most ST candidate in the feeder cadre of Executive Engineer, AVVNL would without question be within the zone of consideration and hence entitled to be promoted to the reserved post in the cadre of Superintending Engineer. The argument is for one, bald and clearly desperate. No authority in support of the proposition has been brought to any notice.

Reliance on the judgment of the Division Bench of the Punjab & Haryana High Court in the case of Union of India Versus Mahender Singh & Others, Civil Writ Petition No.5771/2008 is also misplaced. For ones the submission is based on a misreading of the Division Bench's judgement which does not state the law as asserted on the petitioner's behalf i.e. that the zone of consideration for promotion for posts in the reserved category has to comprise only candidates belonging to such category. Further such an interpretation in the context of the Regulations of 1969 is inconceivable. And where it so there would have been no occasion under the Regulations of 1969 to provide for a separate zone of consideration for reserved categories at five times the number of vacancies under consideration for promotion to the higher post, extendable to seven times vis-a-vis the zone of consideration for general category candidates at three times the number of vacancies. I am of the considered view that an extended zone of consideration for reserved category candidates partakes the character of a separate i.e. different zone of consideration for them. Nothing more is warranted and it is held that the zone of consideration for promotion on the reserved post in the higher cadre is not be comprised only of reserved category candidates as submitted by counsel for the petitioner but is to be with reference to the seniority list in the feeder cadre.

Aside of the aforesaid complete lack of merits in the case of the petitioner for reasons recorded above, I am also of the considered view that in terms of Sarguja Transport Service (supra) this petition is not at all maintainable as the earlier one i.e. SBCWP No.2645/2014 claiming the same relief was dismissed as withdrawn without liberty to file afresh.

A perusal of prayers in SBCWP No.2645/2014 which are reproduced below indicates that they were similar to ones in this petition.

It is, therefore humble prayed that Your Lordship may graciously be pleased to accept and allow this writ petition and by an appropriate writ, order or direction:-
1.The impugned order Nos.338, 354, 361 and 367 dated 15.10.2012 may kindly be quashed and set aside to the extent the promotion is made to the post of ST Category by the General Category Candidates/ other than ST Category

Candidates and accordingly the respondents may be directed to consider candidature of the petitioner for DPC on the post of Superintendent Engineer against the vacancies of 2003- 2004 or atleast in the year 2006-07 and accordingly further consequential orders may also be ordered to be passed by way of undertaking the exercise of review of the Review DPC in the interest of Justice. (underlining mine)

2.The respondents may kindly be directed to implement the notification dated 11.9.2011, which is accepted and adopted by way of passing the order may kindly be ordered to be convened with effect from 1997 onwards.

3.The arbitrary action/omission on the part of the respondents in promoting the General Category Candidates against the post meant for ST Category may kindly be declared as arbitrary and illegal and accordingly be set right in the interest of justice. (underlining mine)

4. Any other appropriate order, which may be found just and proper in the facts and circumstances of the case, be passed in favour of the petitioner.

5. Cost of the writ petition may also be awarded in favour of the petitioner.

The said writ petition was dismissed as withdrawn without liberty to file afresh. That the foundation for the withdrawal lay in the petitioner's satisfaction with the note dated 07.09.2014 under the hand of the Managing Director, AVVNL is of no avail. I have perused the said note and it is in fact quite incomprehensible. The note reads as under:-

It is seen that owing to not being covered in Zone of Consideration in ST Category post to be filled up, Sh. Bogawat P.K. was promoted against the quota of S.T. (Dy.C.E.) Seat (12%). Sh. S.L. Dhanka being Dy.C.E. so promoted, the quoto of SC category (16%) is already filled up. AS per Gazette notification dt. 11/9/11 of G.O.R. the 'Law of Replacement' is to be honoured for promotion to fill up 12% quota of ST which is from 2008-09. The G.O.R. code प 2 (105) राज. / मुप-1/2012 dt. 23.10.2012 (enclosed) be gone through.

A perusal of the aforesaid note on which SBCWP No.2645/2014 was dismissed as withdrawn (with no liberty to file afresh) does not make out a case for the petitioner being legally entitled based thereon to re-agitate the issues which he abandoned in SBCWP No.2645/2014. The note in its vagueness is evidently irrelevant even to the petitioner's claim to a purported right to be promoted as Superintending Engineer in 2008-09 - as agitated only in the course of the hearing of this petition. The note aforesaid merely states that "law of replacement" was to be honoured for promotion to fill up 12 % quota of ST would be effective from 2008-09. Counsel for the petitioner, despite the court's repeated queries, was unable to explain how the Managing Director's note dated 07.09.2014 gave any succour to the petitioner on his purported right to promotion without falling in the statutory zone of consideration qua the vacancies for financial year 2006-07 or 2008-09 as claimed.

I am of the considered view that the note dated 07.09.2014 cannot also entail a solemn promise by the Managing Director, AVVNL-for whatever its worth - for the petitioner's promotion even against the vacancies of 2008-09. For one promotions from the post of Executive Engineer to Superintending Engineer with AVVNL are statutory in nature then governed by Regulations of 1969. Promotions can be recommended only by a duly constituted DPC. No Managing Director or even Chairman, AVVNL can give out an undertaking in his own individual capacity for making a particular promotion. Further promotions are dependent on the number of vacancies in issue in a given year and the zone of consideration determined thereon separately (differently) for general category candidate on the one hand and extended zone of consideration for reserved category candidates on the other hand. The petitioner was not within the extended zone of consideration for promotion to the post of Superintending Engineer on reserved seat for ST category in the vacancies of 2006-07 or thereafter till 2009-10 when he was so promoted.

I therefore find no force in the petition. Dismissed with cost of Rs.50,000/- for agitating a baseless petition a second time over in the cross-hairs of a legal prohibition following a dismissal on withdrawal of the earlier petition (without liberty to file afresh). Court time is in the nature of valuable public goods and its reckless dissipation cannot be countenanced. The costs are directed be deposited by the petitioner with the Rajasthan State Legal Service Authority, Jaipur within a period of 120 days from the date of this order failing which they be recovered from his salary.