
(2014) 09 DEL CK 0362
In the Delhi High Court
Case No : W.P.(C) 406/2014

Sukhbir Singh

APPELLANT

Vs

Union of India

RESPONDENT

Date of Decision : 23-09-2014

Acts Referred:

Constitution of India, 1950 — Article 14, 16, 226

Citation : (2014) 09 DEL CK 0362

Hon'ble Judges : Vipin Sanghi, J;S. Ravindra Bhat, J

Bench : Division Bench

Advocate : Ajesh Luthra and Sriparna Chatterjee, Advocate for the Appellant;
Sanjay Katyal, Advocate for the Respondent

Final Decision : Allowed

Judgement

S. Ravindra Bhat, J.—Claiming to be aggrieved by an order of the Central Administrative Tribunal ("CAT ") dated 07.08.2013 in OA-4070/2012, the writ petitioners have approached this Court under Article 226 of the Constitution of India. Their grievance was that the Recruitment Rules relevant for filling up vacancies in the cadre of Junior Reception Officers (JRO) prescribed that post to be filled inter alia by promotion to the extent of 2/3rd of the total cadre; the post is a non-selection post. The procedure adopted by the respondents, to determine suitability, was challenged as unwarranted, since it, in effect, amounted to elimination of eligible candidates on the basis of a selection criterion.

2. The brief facts are that on 16.02.2012, the respondents notified the Recruitment Rules (RRs) for the post of JRO and decided to fill 14 vacant posts. The RRs required the posts to be filled by promotion of Multi Tasking Staff (MTS) (Reception), working in the pay band of Rs. 5200-20200/- plus grade pay of Rs. 1800/-, having 11 years of regular service in that grade. The RRs also prescribed that whilst promotions were to be on "non-selection" basis, the candidates had to qualify a suitability test. The suitability test devised by the respondents was put in issue before the CAT. It consisted of the following elements:-

(i) Assessment report from the CAD/Ads (ie. report of the superior officer) 40 marks

(ii) Written Test 30 marks

(iii) Interview 30 marks

The candidates had to secure atleast 40% marks in each of the above processes.

3. The respondents held the written examination on 10.07.2012. On 06.09.2012, a panel of 14 names of candidates found fit for promotion was published. The petitioners' names were not shown in this list. They represented to the respondents against denial of promotion. As no satisfactory reply was received, they approached the CAT, challenging their non-selection. They argued that the respondents acted in violation of Articles 14 and 16 of the Constitution, and more importantly, that the selection procedure was contrary to the RRs. It was urged that executive instructions could not have prevailed over the rules. The RRs, submitted the petitioners, provided for the non-selection method but the respondents adopted a merit criterion, ignoring the seniority. It was argued that the respondents included the name of Sh. Bhageshwar Mehto (MTS) in the panel even though he did not attend the interview, as he was on leave during that period due to the death of his mother.

4. The respondents denied the petitioners' averments and alleged that selection of JRO in the security office was in accordance with the RRs, by promotion from amongst MTS (Reception) staff, on the basis of a qualifying suitability test and thereafter assessment by DPC. Those who qualified in the suitability test were assessed by DPC on the basis of seniority-cum-fitness. As far as Bhageshwar Mehto's promotion was concerned, the respondents stated that he was the only available ST candidate for one vacancy earmarked for ST; it was also admitted that Sh. Mehto was absent in the written test. It was also stated that for SC/ST candidates relaxed standards were adopted as laid down in DoP and T O.M. No. 36012/23/96-Estt.(Res) Vol.II dated 03.10.2000.

5. The CAT, in its impugned order, reasoned as follows:

"9. Since in the RRs it has not been elaborated as to what the suitability test would comprise of, the respondents issued an order on 21.05.2012 indicating that the suitability test would consist of three components, namely, assessment of confidential reports, written test and interview. They also laid down that the assessment of confidential reports will consist of 40 marks while the other two components will be of 30 marks each. It was also decided that for qualifying the suitability test, the candidates will be required to obtain atleast 40% marks in each of the three components. In our opinion since the format of the suitability test has not been elaborated in the Rules the respondents did not have any other option but to prescribe the same by way of issuing Executive instructions. This does not mean that the Executive orders have prevailed over the Rules as has been stated by the applicants. By prescribing format for the suitability through

Executive instructions the respondents have only filled the gap which was existing in the RRs. They have neither violated nor ignored any provisions of the RRs. We feel that no irregularity has been committed by the respondents in doing so.

10. The applicants have also stated in their grounds that the selection made by the respondents is not in accordance with the RRs which prescribe selection of candidates on non-selection method i.e. based on their seniority. From the material made available on the record, we find that the applicants first conducted the suitability test which was qualifying in nature. This is in accordance with the RRs which prescribe that the candidates will be required to qualify a suitability test. Thus, there is no violation of RRs in holding the suitability test. Further, those who qualified in the suitability test were assessed by a DPC. The minutes of the DPC are available on record. We find that the DPC has graded the candidates either fit or not yet fit without disturbing their seniority in the feeder cadre. In the final panel prepared also, the names of those candidates who qualified the suitability test and who were adjudged as fit by the DPC have been included in order of seniority of their feeder cadre. Thus, we do not feel that the respondents selected the candidates by merit selection contrary to the RRs. The citations of Apex Court given by the applicants are not applicable in this case. As far as the applicants are concerned, from the record we find that none of them was able to clear the prescribed suitability test. Hence they could not be selected."

6. Ms. Sriparna Chatterjee, learned counsel for the Petitioners, urges that the CAT fell into error in not seeing that the circular by which the suitability test was devised, amounted to a merit based selection process. Underlining that a suitability test can mean only a screening process which would determine the fitness of the candidate, counsel stated that the procedure adopted, incorporating feedback from the superior officer, written test and interview culminating in promotion based on the merit performance (in the suitability tests) was, in fact, a merit based promotion, rather than a seniority based one and certainly not a "non-selection" procedure. She argued that this procedure was contrary to the letter and spirit of the RRs, which prohibited evaluation of comparative merits of candidates. Learned counsel relied on the judgment of a Division Bench of this Court in *Puneet and Anr. v. Union of India and Anr.*, in WP(C) No. 26/2009, dated 20.7.2010, where it was held that:

"15. What is the distinction between a "Non Selection Post" and a "Selection Post"? This is not a new question and has not arisen for being answered for the first time. The Supreme Court had an occasion to clarify on this issue and we have located two decisions, which unfortunately were not brought to our notice by either counsel. What are the decisions and what do they hold?

16. In the decision reported as *Union of India Vs. Dr. P. Rajaram and others*, the basic distinction between the "Selection Post" and the "Non Selection Post" is, whether it is to be filled by a comparative assessment on merit of all eligible

candidates or on the basis of continuous length of service.

17. In the decision reported as Union of India and others etc. Vs. Virpal Singh Chauhan etc., , it can be culled out that where appointment is in the category of seniority-cum-suitability it would be a case of "Non Selection Post Appointment" and where the requirement is to prepare a panel on inter se merit, the post is a "Selection Post".

18. It is thus apparent that a post which is treated as a "Non Selection Post" would usually be a "Promotional Post" for only then does the issue of seniority come into being. We repeat the essence of a post being a "Non Selection Post" means that subject to eligibility and suitability, seniority would be the criteria to fill up the post."

7. It was also argued that the Office Memorandum of 10-03-1989, issued by the Department of Personnel and Training (DoPT) clearly states the manner in which non-selection posts are to be filled. Ms. Chatterjee argued that this Office Memorandum clearly envisioned that where the post was a "non-selection" one, there cannot be comparative assessment of candidates and they should be categorized only as "fit" or "not yet fit" on the basis of assessment of their record of service. Furthermore, those assessed as "fit ", had to be placed in the order of their seniority in the grade from which promotions were to be made. Therefore, the procedure adopted by the respondents was, in effect, a selection procedure, where comparative merit, based on performance was the predominant consideration. This militated against the statutory rules.

8. Mr. Sanjay Katyal, appearing for the respondents, urged that the procedure adopted by the Central Government was not a selection procedure. He emphasized that the rules permitted determination of suitability, the procedure for which was devised through administrative instructions. Stressing that the rules did not prescribe any method for judging suitability, it was argued that the instructions merely outlined the suitability criteria, which the Government deemed appropriate, having regard to the nature of duties to be discharged by a JRO. It was also submitted that on aspects which the rules were silent, the executive could always frame policies through administrative instructions.

9. In Dr. P. Rajaram (supra) the Supreme Court, commenting on the difference between the selection method adopted for promotion and non-selection posts, while interpreting a circular, held that:

"52. In contradistinction to this when we look at paragraph 7 of the guidelines, which deals with non-selection method, that dispenses with the requirement to make a comparative assessment of the records. In such a case what is required is to categories the officers as fit or not yet fit for promotion on the basis of the assessment of the record of service. In so far as we are concerned with selection this paragraph does not have any application whatever. "

10. It is thus apparent that the procedure for filling non-selection posts cannot

involve any element of comparative assessment. In the present instance, the RRs, no doubt, indicate suitability of the candidate, apart from seniority. Suitability, in the context of the mandate of the rule (i.e. its being a "non-selection post ") necessarily means determination of fitness. Whilst the respondent is free to devise a reasonable method of judging suitability, such as consideration of records, appearance of the candidate (in a screening or eligibility test where minimum criteria for passing, etc. is prescribed) the adoption of any other mode, which involves ranking of the candidate based on performance would negate the rule itself. In the present instance, the suitability process involves three elements, i.e. test (30% weightage); interview (30% weightage) and 40 % CAD/Ads (i.e. report of the superior officer). The final list is based on the overall merit, which clearly points to the adoption of the selection criteria. Apart from this, there is a serious element of prejudice involved because the CAD is a mere report of the superior officer, unlike the system of ACRs, which are not only written in accordance with rules or principles, but also involve appraisal of higher officials. Thus, the entire procedure is heavily loaded with subjectivity of the officers. The objective assessment of performance based on a standard, qualifying criteria is given a short shrift. This, in the opinion of the Court is not a "non- selection " method and the procedure is not a mere suitability determination, but a comparative assessment of the candidate, predominantly based on the impressions of the superior officer, and those who interview her or him.

11. In view of the above observations, this Court is of opinion that the view taken by the Tribunal cannot be affirmed; it is accordingly set aside. The respondents shall devise a suitable procedure to judge the suitability of candidates based on a standard qualifying criteria, such as a written test, upon clearing which the candidate shall be promoted in accordance with seniority. The petitioners shall be assessed by such criteria, and if found fit, promoted with effect from the date their juniors were promoted as JROs. This process shall be completed within two months. The writ petition is allowed without any order as to costs.