
(2018) 04 GAU CK 0068
In the Gauhati High Court
Case No : WP(C) 7289 of 2015

THE UNION OF INDIA and 3 ORS

APPELLANT

Vs

GOLAK BARMAN

RESPONDENT

Date of Decision : 19-04-2018

Acts Referred:

Citation : (2018) 04 GAU CK 0068

Hon'ble Judges : AJIT SINGH C.J, ACHINTYA MALLA BUJOR BARUA

Bench : Division Bench

Final Decision : Disposed Of

Judgement

AM Bujor Barua, J.

1. Heard Mr. HK Das, learned counsel for the writ petitioner and also Mr. S Dutta, learned counsel for the respondent.

2. The respondent was appointed as a Junior Clerk with the petitioner Railways on 28.05.1985 and was promoted as a Senior Clerk on 19.09.1993.

While he was posted in the Office of the CPO, Maligaon, he was further promoted to the post of Head Clerk(E).

3. On 01.04.2003, a new division being the Rangia Division was carved out and formed by bifurcating the erstwhile Alipurduar Division. Along with

the formation of the new Rangia Division, a process of restructuring the various cadres and posts in different establishment within the petitioner

Railways was also undertaken. In fact, as given to be understood, the formation of new Zones and Divisions and a restructuring of the cadre and

posts are a part of the same overall process.

4. In order to give effect to the bifurcation of the Alipurduar Division and formation of the Rangia Division a decision was taken that out of the cadre

strength of 171 of the Alipurduar Division, 20 posts are indivisible and the balance 141 posts were to be divided in the ratio of 50:50, and accordingly,

71 posts were allotted to the Rangia Division, while 70 posts were retained in the divided Alipurduar Division. It is also stated that in the process of

restructuring of cadres and posts a cutoff date of 01.11.2003 was put in force for giving effect to the restructuring.

5. As a sequel to such restructuring, the Alipurduar Division had released only 16 out of the 71 posts to the Rangia Division up to 01.11.2003 and

thereafter the balance of the posts were released in a phased manner. It is also the stand of the petitioner Railways that although the 71 posts were

required to be transferred to the Rangia Division upon the bifurcation, but, it was not so transferred as required and the restructuring some of the 71

posts were done in the Alipurduar Division itself i.e., before the posts were released to the Rangia Division. As a result of such delayed release, the

incumbents who had joined the transferred posts upon creation of the new division at Rangia could not avail the benefit of the restructuring, to which

they were otherwise entitled.

6. A Circular bearing RBE No. 177/2003, dated 09.10.2003 was issued by the Railway Board providing for the process by which the restructuring

was given effect. One of the relevant provision of the circular of 09.08.2003, as provided in Clause 1 thereof, was that the restructuring would be

done with reference to the sanctioned cadre strength as it stood when the transfer of the posts in the headquarter offices of the new Zonal

Railways/new Divisions are closed and that the restructuring would be restricted to the persons who were working in a particular cadre on such cutoff

date when the transfer of posts would be closed. It is taken note of that the Circular dated 09.10.2003 does not provide for any specific cutoff date

and accordingly it is to be understood that whenever the transfer of the posts to the newly created Zones or Divisions were completed, the same itself

would be the cutoff date for considering the restructuring.

7. The relevance of 01.11.2003, being the cutoff date was that prior to the said date, in almost all the newly created Zones and Divisions, the process

of transferring the cadres and the posts were completed. But as already noted in the Rangia Division the transfer of cadres and posts from the

Alipurduar Division were not completed as on 01.11.2003, inasmuch as, as

informed by the petitioner authorities, only 16 posts out of the 71 posts allotted to Rangia Division were initially transferred and the balance of the posts were subsequently transferred in a phased manner. In the given circumstances, the cutoff date referred in the Circular dated 09.10.2003, in respect of Rangia Division, would have to be understood to be the concerned date by which the transfer of all the 71 posts allotted to it were completed.

8. Another provision of the Circular dated 09.10.2003 as provided in Clause 19 is that due to the re-organisation of the Zones and Divisions, the cadre position in the new Zones and Divisions would take some time to stabilize, and, therefore, it was required to be ensured that any incumbent transferred to the new Zone or Division does not get the double benefit of restructuring, i.e., once in the parent department and again in the new Zones/Division.

9. Subsequent thereof, another Circular No.PC-III/2003/CRC/6, dated 06.01.2004 was issued wherein Clause 1 provided that the restructuring of the cadres will be made with reference to the sanctioned cadre strength as on 01.11.2003. Clause 4.3 thereof provided that all vacancies arising from 02.11.2003 would be filled up by normal selection procedure.

10. A statement has been made by the learned counsel for the petitioner Railways that for the purpose of restructuring the cadres where incumbents were also upgraded, the procedure of seniority with reference to their respective ACRs were adopted. Whereas on the other hand, the provision of Clause 4.3 as indicated above, refers to filling up of the vacancies arising after 02.11.2003 by the normal selection procedure, which is understood to be a selection on merit.

11. The different procedure adopted for restructuring and for filling up of vacancies arising after 02.11.2003 is that the process of restructuring was initiated as an one-time measure where incumbents on the basis of their seniority were considered for restructuring. On the other hand, as indicated by the Circular of 06.01.2004, the process of restructuring would be done with reference to the cadre strength as on 01.11.2003 and, therefore, all vacancies that were available in the newly created Zones or Divisions would be subjected to the restructuring on the basis of the criteria of seniority read with the ACR. But the vacancies that may arise on or after 02.11.2003 are not required to be subjected to the restructuring and, therefore, such

vacancies would be filled up by adhering to the regular selection procedure, which also includes merit.

12. In the aforesaid circumstance, when the situation prevailing in the newly created Rangia Division is taken into consideration, it has to be taken note

of that the posts which were required to be transferred from the Alipurduar Division were not transferred prior to 02.11.2003, and, therefore, as

required the restructuring could not be given effect. In the given situation, the sanctity of the cutoff date of 01.11.2003 in the newly created Rangia

Division will not hold good and for determining the cutoff date for the purpose of the Rangia Division, the provision of the Circular dated 09.10.2003,

would be relevant which provides that the restructuring of the cadre would be done with reference to the sanctioned cadre strength when the cadres

in the offices of the new Zonal Railways/new Divisions were closed.

13. Accordingly, in the Rangia Division the restructuring as an one time measure by following the criteria of seniority would have to be done even in

respect of such cadres and posts which were transferred to the Rangia Division after 01.11.2012.

14. It is stated by the petitioner Railways that initially 76 No. of posts were transferred/allotted to the Rangia Division, which was subsequently

increased to 121. Accordingly, as per the Circular dated 09.10.2003, the 121 cadred posts in the Rangia Division would have to be subjected to the

process of restructuring as an one time measure by following the criteria of seniority.

15. The respondent who was initially working as a Head Clerk in the establishment of the CPO at Maligaon Guwahati had opted to be transferred and

posted against the cadred posts available in the Rangia Division. For the purpose the petitioner was released from the office of the CPO Maligaon on

28.11.2003 and he had joined the Rangia Division on 01.12.2003.

16. The grievance of the respondent was that in the intervening process he was not given the benefit of restructuring as had been given to the other

similarly situated employees. The claim of the respondent for a consideration for the benefit of restructuring culminated in the communication dated

08.08.2007 of the SPO/Rectt. & LC for the General Manager (P), wherein, it was provided that as per the DRM(P)/APDJ's letter No. E/RP-

482/205/AP(C) dated 12.07.2007, the restructuring of 61 posts in the clerical

grade at Alipurduar was already done based on the premises of there being a total of 172 posts. Accordingly, it was provided that restructuring cannot be granted twice in respect of the said posts as proposed in the Rangia Division.

17. Accordingly, the respondent preferred the OA No.266/2007 before the Central Administrative Tribunal, Guwahati (CAT), wherein, the relief sought for was to set aside the communication dated 08.08.2007 with a further direction that the applicant be given retrospective promotion pursuant to the restructuring process as per the Office Memorandum dated 09.10.2003.

18. The petitioner Railways had taken a stand before the CAT that a consideration was given to the claim of the respondent for promotion upon restructuring while he was posted as Head Clerk (E) in the CPO Maligaon, where he could not be promoted as 19 similarly situated Head Clerks were promoted by an order dated 22.09.2004, where the respondent was at Serial No.50 of the seniority list. A further stand was taken that the order of promotion dated 22.09.2004 was strictly on the basis of seniority and none were promoted who were junior to the respondent, other than one Ramila Thakuria who belonged to the SC category.

19. The CAT in its order dated 28.06.2010 took the view that although the respondent was considered for the benefits of restructuring at CPO Maligaon as on 01.11.2003, but could not be so promoted as he was beyond the entitlement in order of seniority. It was further concluded by the CAT that merely as because the respondent was subsequently transferred to the Rangia Division, he does not merit one more consideration.

20. The order of CAT 28.06.2010 was assailed by the respondent in a writ petition before this Court which was numbered as WP(C) 6360/2011. The Division Bench by its judgment and order dated 27.09.2012 gave a final consideration to the said writ petition wherein, a conclusion was arrived that it is not possible to conclusively hold that the respondent was considered for the benefit of restructuring at CPO Maligaon. A view was taken that it was not unimpeachably clear as to whether the case of the respondent, in view of the seniority position at CPO Maligaon, was at all considered for promotion to the next higher post of OS-II. In the judgment and order it was also taken note of that as the posts were transferred to the Rangia

Division after 01.11.2003 and that only 10 out of the 71 posts allotted to Rangia

Division were transferred as on 01.11.2003 and the balance 61 posts were made available only thereafter, therefore the incumbents who did not get the benefit of restructuring in their parent department are entitled to a consideration for restructuring in the Rangia Division against the whole of the 121 posts, which were ultimately made available at Rangia. According to the learned Division Bench, the said view also finds support in a letter dated 23.02.2007 of the DRM (P) Rangia Division made to the General Manager (P). Further a conclusion was also arrived that the memorandums dated 17.05.2007 and 06.09.2007 also belies the rigidity of the cutoff date of 01.11.2003, which was sought to be relied upon by the petitioner Railway authorities. Accordingly, by the judgment and order dated 27.09.2012 the order dated 28.06.2010 of the CAT was interfered and the petitioner Railways were directed to consider the case of the respondent for the restructuring benefit on the basis of the 121 posts allotted to the Rangia Division, which were released after 01.11.2003. It was provided that such consideration for restructuring would strictly be made in terms of the circular dated 09.10.2003.

21. Pursuant to the aforesaid requirement of the judgment and order dated 27.09.2012, the communication dated 07.04.2013 of the APO/Legal Cell for the General Manager (P) Maligaon was issued. The said communication reveals that the petitioner authorities were aware that they are required to consider the respondent for restructuring against the 121 posts allotted the Rangia Division, but released after 01.11.2003, strictly in terms of the circular dated 09.10.2003.

22. The said direction in the judgment and order dated 27.09.2012 has to be understood to mean that the petitioner authorities are required to consider the respondent for restructuring against the 121 posts available in the Rangia Division. By the requirement of considering the reconstruction against the 121 posts, it necessarily has to be a consideration for promotion/upgradation to the post of OS-II on the basis of seniority against the available posts which were allotted to the Rangia Division even after 01.11.2003. Even though the circular dated 06.01.2004 in clause 4.3 provided that all vacancies arising from 02.11.2003 will be filled up by normal selection procedure, i.e., a merit consideration, but as required by the judgment and order dated 27.09.2012, the vacancies amongst the 121 posts in the Rangia Division,

although may have occurred after 01.11.2003, are required to be taken up for restructuring on the basis of seniority and not a merit consideration.

23. The communication dated 17.04.2013, ostensibly made pursuant to the judgment and order dated 27.09.2012, reveals that the petitioner authorities had embarked upon an exercise to reformulate the issues for consideration. Such reformulation of the issues would be impermissible in view of the

fact that such issues sought to be raised had already been considered and adjudicated in the judgment and order dated 27.09.2012 and the said

judgment and order having attained its finality, it is no longer available to the petitioner Railway authorities to re-determine the same.

24. Be that as it may, the communication of 17.04.2013 reveals that as on 01.11.2003, 76 posts were available in the Rangia Division and the staff of

the Rangia Division as per their seniority position in their cadre were considered for restructuring against the 76 posts. The communication further

reflects that even if the respondent was not considered for promotion in his earlier Division, i.e., at CPO Maligaon, but still he could not be so

promoted against the 76 posts as per his seniority position in the Rangia Division. Thereafter, the communication provides that the respondent was

considered against the additional available posts i.e., the posts available beyond the initial 76 posts, but up to 121, which according to the petitioner

authorities included 12 vacancies of OS-II. The communication clearly provides that against the said vacancies of OS-II, the respondent was called

for the selection but as he was not successful, therefore, he was not promoted. According to the communication of 17.04.2013, the said exercise

where the respondent was considered against the 12 vacancies, but was unsuccessful, constituted due compliance of the requirement of the judgment

and order dated 27.09.2012 of the Division Bench.

25. Being aggrieved with the communicated dated 17.04.2013, the respondent preferred the OA No.212/2013 before the CAT. The CAT by its

judgment and order dated 28.04.2015 arrived at a conclusion that the communication of 17.04.2013 indicates that the petitioner Railway authorities had

considered the case of the respondent for restructuring against 76 posts, whereas, the Division Bench of this Court had required that the respondents

case for restructuring be considered against 121 posts allotted and released to the Rangia Division after 01.11.2003. The CAT was of the view that as

the judgment and order dated 27.09.2012 in WP(C) 6360/2011 was not carried in appeal before the Supreme Court, the same had attained its finality

and the petitioner authorities are bound to comply with it. Accordingly, the order contained in the communication dated 17.04.2013 was set aside for

not being in conformity with the judgment and order dated 27.09.2012 and the petitioner authorities were required to consider the restructuring benefit

to the respondent strictly as per the circular dated 09.10.2003 and by taking into consideration the number of posts for restructuring to be 121.

26. The judgment and order of the CAT dated 28.04.2015 in OA No.212/2013 has been assailed by the petitioner Railway authorities in the present

writ petition. The grounds for assailing the judgment of the CAT of 28.04.2015 is that the respondent having been considered for restructuring in his

parent division at CPO Maligaon is not entitled to any further consideration for the restructuring; in any event, the respondent having been considered

for restructuring against the 76 posts transferred and made available in the Rangia Division is not entitled to any further restructuring ;and in the

aforesaid circumstance in compliance of the judgment and order dated 27.09.2012 the Division Bench in WP(C) 6360/2011, the case of the

respondent was considered as an annual review against the 12 further posts of OS-II available in the Rangia Division but he could not come

successful in the consideration.

27. The first ground of the petitioner Railway authorities is no longer available inasmuch as, in the judgment and order dated 27.09.2012, the Division

Bench had made it explicitly clear that the consideration given to the respondent in his parent division at CPO Maligaon, as claimed by the petitioner

authorities, is unacceptable and a view was taken that infact no such meaningful consideration was given.

28. With regard to the second ground that the respondent was considered for restructuring against the 76 posts, it is taken note of that by an order

dated 22.09.2004, 6 number of Head Clerk (E) were promoted to the post of OS-II. Subsequently, another Head Clerk (E), namely Putal Das was

also promoted. According to the petitioner authorities, out of the 76 posts, only 7 posts of OS-II were available for promotion under restructuring and

accordingly, the first 6 persons in order of seniority were promoted, whereas, Putal Das being a SC candidate was promoted under the law of

reservation.

29. What is noticeable is that in the consideration for restructuring against 7 vacant posts of OS-II out of the 76 posts available in the Rangia Division,

the criteria seniority with reference to ACR alone was followed and at that relevant point of time as the seniority position of the respondent was

beyond the available vacancies, therefore, he could not be so promoted.

30. But when the consideration of the respondent against the 12 further vacancies of OS-II, as reflected in the communication dated 17.04.2013 is

examined, it is noticed that while such consideration was given, the respondent was at Serial No.3 in order of seniority. But when the order of

promotion dated 16.06.2008 is looked into, it is noticed that the incumbents at Serial No.7 , Ashis Kumar Das, Serial No.12, Suren Kalita, Serial No.15,

B.K. Saha and Serial No.21, Khagen Chandra Boro were promoted.

31. The learned counsel for the petitioner had made a statement that the consideration against the further 12 available vacant posts of OS-II were

given as per the said order of promotion dated 16.06.2008.

32. The said statement of the learned counsel firstly reflects that no consideration was given to the claim of restructuring of the respondent against the

121 vacancies as directed in the judgment and order dated 27.09.2012 of the Division Bench, inasmuch as the judgment and order of the Division

Bench is 27.09.2012, whereas the order of promotion is dated 16.06.2008. In any view of the matter, upon a pointed query, the learned counsel for the

petitioner Railway authorities states that the petitioner was not so promoted in order dated 16.06.2008 inasmuch as, he did not come out successful in

the merit consideration. Accordingly, the learned counsel for the petitioner Railway authorities relies upon clause 4.3 of the circular dated 06.01.2004

to submit that as these vacancies occurred from and after 02.11.2003, therefore, the consideration has to be given in order of merit alone. Apart from

the said order of 16.06.2008, the learned counsel for the petitioner could not bring it to the notice of the Court of any other order by which a

consideration was given to the respondent. The said aspect has the relevance inasmuch as in the communication dated 17.04.2013, which was

ostensively made pursuant to the judgment and order dated 27.09.2012 of the Division Bench, it had been provided that the respondent was called for

selection against the 12 vacancies but he did not come out successful. In any view, the communication of 17.04.2013 clearly reflects that the respondent was called for the selection but he did not come out successful, meaning thereby, that the respondent had failed to get selected for promotion as per merit.

33. The aforesaid premises leads to a conclusion that either the direction of the Division Bench of this Court in the judgment and order dated 27.09.2012 to consider the case of the respondent for restructuring against the 121 posts, strictly in terms of the circular dated 09.10.2003 was either not carried out at all or if carried, the same was done by following the criteria of merit. In either case, such consideration as claimed to be made in the communication dated 17.04.2013, does not meet the requirement of the direction of the Division bench in its judgment and order dated 27.09.2012 in WP(C) No.6360/2011, which infact had attained its finality.

34. The judgment and order dated 07.09.2012 clearly provides that the case of the respondent be considered for restructuring against the 121 posts and that too in strict compliance of the circular dated 09.10.2003. The circular dated 09.10.2003 does not provide for any consideration in terms of merit and the same was issued merely in connection with the restructuring process that was initiated. Admittedly, the restructuring process was an one time consideration in order of seniority and therefore, in compliance of the judgment and order dated 07.09.2012, the petitioner authorities are bound to consider the case of the respondent for restructuring as per the order of seniority and not to subject him to any process for evaluation on merit. Further such consideration for restructuring would have to be made against the 121 posts that were allotted to the Rangia Division, irrespective of the fact whether the post was released and made available either prior or subsequent to 01.11.2003.

35. It is further to be taken note of that the requirement of the judgment and order dated 27.09.2012 to consider the restructuring of the respondent against the 121 posts released and made available in the Rangia Division, by following the criteria of seniority with reference to ACR is that there is a categorical conclusion of the Division Bench that due to the intervening circumstances, the respondent was deprived from being considered from restructuring as an onetime measure on the basis of seniority when the same

was actually required to have been done and therefore, in order to mitigate the grievance, it was held that the interest of justice would be met if he be given a consideration for restructuring against the 121 posts, i.e., by following the criteria of seniority.

36. In the circumstance the stand of the petitioner authorities that the vacancies available from and after 02.11.2003 would have to be considered on the criteria of merit as provided in clause 4.3 of the circular dated 06.01.2004 would be inapplicable in the case of the respondent. As a corollary even if such a stand is deemed to be acceptable, the same would be a violation of Article 14 inasmuch as, the respondent being a separate class of its own due to the intervening circumstances as indicated above, cannot be placed at the same footing as that of others, who are being considered for promotion against vacancies available on or after 02.11.2013.

37. In view of the above, no infirmity is found in the conclusion of the CAT in its judgment and order dated 28.04.2015 in OA No.212/2013 requiring the petitioner Railway authorities to consider the restructuring benefit to the respondent strictly as per the circular dated 09.10.2003 and by taking the number of posts for the restructuring benefit to be 121.

38. Accordingly, the writ petition is disposed of by directing the petitioner Railway authorities to consider the respondent for the restructuring benefit to the post of OS-II in the Rangia Division against any of the 121 posts released and allotted to the Rangia Division by following the criteria of seniority at the relevant point of time. The aforesaid direction be carried out against any available vacant post of OS-II out of the 121 posts and as the requirement of the earlier judgment and order of this Court was not duly complied, in the event no such vacant post is available for the present, the consideration be given against any other vacant post of OS-II in the Rangia Division, if necessary by creating a post for the purpose.

39. The aforesaid direction be carried out within a period of three months from the date of receipt of the certified copy of the order. Interim order passed earlier stands vacated.