

(2008) 02 DEL CK 0298

In the Delhi High Court

Case No : Writ Petition (C) No's. 11371-73 of 2005

Union of India (UOI) and Others

APPELLANT

Vs

Bharat Bhushan and Another

RESPONDENT

Date of Decision : 15-02-2008

Acts Referred:

Citation : (2008) 148 DLT 158 : (2008) 101 DRJ 313 : (2008) 3 SLJ 53

Hon'ble Judges : Vipin Sanghi, J;A.K. Sikri, J

Bench : Division Bench

Advocate : A.K. Bhardwaj, for the Appellant; Party-in-Person, for the Respondent

Judgement

A.K. Sikri, J.—This petition raises an interesting question of law. The question which requires consideration is as to whether SC/ST candidates appointed by promotion on their own merit are entitled to be adjusted against the reserved points of the roster, or in the general category. The respondents herein, who belong to general category, claim that action of the Government in not adjusting such SC/ST candidates against the reserved points but giving them the slots in the general category was not appropriate. They challenged the action of the Government by filing OA No. 2095/2004. This OA has been allowed by the Tribunal vide its judgment dated 31.1.2005. Feeling aggrieved, the Union of India has preferred this petition impugning that judgment. Before taking note of the rival contentions, it would be appropriate to note as to how Tribunal has dealt with the issue.

2. Respondents, who are to in numbers, were employed as Inspectors of Central Excise under the charge of Chief Commissioner, Central Excise, Delhi, (petitioner No. 3 herein). The cadre of Inspectors is a feeder cadre for promotion to the post of Superintendent Grade "B". As per the recruitment rules for this promotional post, an Inspector with 8 years" service on regular basis is eligible for consideration for promotion to the next grade of Superintendent Grade B which is a selection post. The selection is to be made on the basis of relative performance of the Inspectors in the feeder cadre and their seniority in that cadre. As per

Government of India instructions, reservation to the extent of 15% and 7.5% is provided for SC/ST category Inspectors for promotion to the said post respectively. This policy of reservation is implemented by post based roster system introduced vide DOP&T OM dated 2.7.1997 read with OM dated 11.7.2002. The Chairman, Central Board of Excise & Customs (petitioner No. 2 herein) has issued letter dated 18.3.2003 interpreting aforesaid OM dated 11.7.2002 stating that this reservation is to be granted in the following manner:

It is clear that there are a total of 282 vacancies of which 39 and 24 are reserved for SCs and STs. Remaining 219 vacancies are un-reserved. If a select list is prepared for 282 candidates taking into account the merit of the candidates, first 219 candidates of the select list would be candidates selected by their own merit. If some SC/ST candidates are included in these first 219 candidates, they are evidently selected on their own merit and would be adjusted against unreserved slots. SC/ST candidate appearing at S. No. 220 onwards whether out of the normal or the extended zone of consideration will be taken to have been selected by reservation.

3. As per the aforesaid clarification, those SC/ST candidates who are selected on their own merit are to be adjusted against unreserved slots. Following this mandate, when promotion of Inspectors to the Superintendent Grade B was made, some of the persons belonging to SC/ST category were adjusted against unreserved posts meant for general category candidates.

4. It is the issuance of these orders with which the respondents herein felt aggrieved and filed OA before the Tribunal u/s 19 of the Central Administrative Tribunal Act. They contended that these orders caused prejudice to their interest seeking promotion to the post of Superintendent Grade B. It was their submission that SC/ST candidates who had availed the benefit of reservation and got promotion had been adjusted against unreserved slots to the prejudice of general candidates and reserved slots are included as backlog vacancies in violation of the instructions, which action was violative under Articles 16 & 14 of the Constitution. They relied upon the judgment of the Hyderabad Bench of the Tribunal dated 31.7.2003 in the case of B.C.K. Ralu v. Chief Commissioner of Central Excise, A.P. Zone and Anr.

5. After considering the aforesaid submission of the respondents and the submissions of the petitioner herein, the Tribunal directed the petitioners to apply the principles evolved by it in B.C.K. Ralu (supra). Entire discussion in this behalf can be traced to two paragraphs in the impugned judgment which are reproduced below:

7. A perusal of the OA makes it amply clear that applicants are Inspectors of Central Excise and seek promotion to the post of Superintendent Grade "B". They have sought benefit of the Tribunal's order dated 31.7.2003 in the case of B.C.K. Ralu (supra). The learned Counsel for respondents further stated that the Tribunal's orders relied upon by applicants relate to promotion from a lower post

to the post of Inspector and as such, the issue involved in the present case is not identical to that of the case of B.C.K. Ralu. This contention of respondents is not acceptable. True that applicants before us are Inspectors while applicants in the case of B.C.K. Ralu belonged to the feeder category for promotion to the post of Inspectors. In the present case, applicants are Inspectors and seek promotion to the next higher post of Superintendent Grade "B". This distinction is immaterial as the principle decided in the case of B.C.K. Ralu is applicable to the present case as well.

8. Having regard to the discussion made above, we dispose of the present OA with a direction to the respondents to apply the principles evolved by the Court in the case of B.C.K. Ralu (supra) and decide, by passing a detailed and speaking order, applicants' representation Annexure A-4 dated 2.4.2004 within a period of two months from the date of communication of these orders. Ordered accordingly.

6. It is clear from the aforesaid order that Tribunal did nothing more than holding that the case of the respondents was covered by B.C.K. Ralu (supra) and directing the petitioners to apply the principles contained therein.

7. Copy of the judgment in B.C.K. Ralu (supra) is also enclosed with this writ petition and it would be prudent to take note of the principles laid down by the Hyderabad Tribunal in the said case as well.

8. A perusal of that judgment would reveal that the Tribunal had considered the import of office memo dated 11.7.2002 read with office memo dated 2.7.1997 and also some of its earlier judgments. These aforesaid office memoranda were interpreted by the Tribunal in the following manner:

Heard the learned Counsel on both sides. We have gone through all the facts of the case and the material placed before us along with the arguments put forth by the learned Counsel on both sides.

The position is now clear from the DOPT Office Memorandum dated 2.7.1997 and further clarification issued on 11.7.2002 that if an SC/ST/OBC candidates recruited through direct recruitment competes with unreserved candidates in all aspects and is selected to the unreserved vacancy based on his merit, he would be counted as unreserved candidate. But if an SC/ST/OBC candidate gets a higher merit/rank and if he is a person who had earlier availed the benefits of reservations/concessions, he has to be accommodated against reserved quota only.

9. Based on the aforesaid principle of law stated by the Tribunal, the Tribunal in that case found that since 15 SC/ST candidates who had taken over their position in the general category and had been shown against unreserved vacancies but had already availed the benefit of reservation in one form or the other were not allowed to take their place against the vacancies meant for unreserved candidates and they had to be considered and accommodated only against the reserved vacancies which were meant for them within the stipulated percentage.

It further held that OM dated 11.7.2002 was nothing but clarification of earlier OM dated 2.7.1997 which was misinterpreted by the official/respondents in the said case on the basis of wrong understanding that whether promoted in their own merit or promoted due to benefit of reservation, all such SC/ST candidates would be considered against unreserved points. The Tribunal also pointed out that OM dated 2.7.1997 was issued as a consequence of the judgment of the Apex Court in R.K. Sabharwal and others Vs. State of Punjab and others, and Therefore it was to be given effect to on the basis of principle laid down in R.K. Sabharwal (supra). The Tribunal also referred to some of its earlier judgments taking this view as is clear from the following discussion:

This action of the respondents is contrary to the very concept and object of the office memo dated 2.7.1997 read with the clarificatory memo dated 11.7.2002 and the following judgments which explain to draw distinction between the SC/STs who have availed the benefit of relaxation:

- 1) Bir Singh and Ors. v. Union of India and Ors. dated 30.7.2002 - held that it has to be exercised whether the SC/ST candidates who qualified the selection with central standards has received the benefit of reservation in lower grade posts held by them resulting in their accelerated promotion.
- 2) Sibram Adak v. Union of India and Ors. Kolkatta C.A.T. Bench dated 31.1.2001 - held that once a SC/ST candidate availed accelerated promotion in their reserved category, he cannot change the line and ask for promotional avenue as a general category candidate.
- 3) Ram Singh v. Union of India and Ors. Patna C.A.T. Bench dated 4.8.1999 - held that a SC/ST candidate who has availed relaxation/concessions has to be adjusted against reserved vacancy only despite securing high position in the select list on his own merit.

Contrary to the above judgments, of this Tribunal 40 SC/ST candidates who have availed of the benefit of reservation/ concessions in the lower cadres at the time of appointment were promoted against the unreserved slots.

POSITION OF VARIOUS OMs

10. We may state at the outset that it is common ground that the judgment of the Apex Court in R.K. Sabharwal (supra) would govern the field. It is also not in dispute that OM dated 2.7.1997 is a sequel to the aforesaid judgment of the Supreme Court as the said circular was issued to comply with the directions contained therein. It is also not in dispute that office memo dated 11.7.2002 is a clarificatory memo as certain doubts raised in implementation of OM dated 2.7.1997 are clarified therein. We may also point out that DOP&T has issued further OM dated 31.1.2005 giving further clarifications. It would be necessary to extract the relevant portions of all these office memoranda which have a bearing on the present case.

11. OM dated 2.7.1997 starts with reference to the Constitution Bench judgment

of the Supreme Court in R.K. Sabharwal (supra) and points out that it is held in the said judgment that the reservation of jobs for backward classes namely SC/ST/OBC should apply to posts and not to vacancies. The court further held the vacancy based rosters can operate till such time as the representation of person belonging to the reserved categories in a particular cadre reaches the percentage of prescribed reservation. Thereafter, the rosters cannot operate and the vacancies released by retirement, resignation, promotion etc. of the persons belonging to the general and the reserved categories are to be filled by appointment of persons from the respective category so that the prescribed percentage of reservation is maintained.

12. Going by the aforesaid principle, it was decided that existing 200-point, 20-point and 120-point vacancy-based rosters would be replaced by post-based rosters. The principles for preparing these rosters are mentioned in para 4 of the said OM. Annexure I to the OM contains explanatory notes. For our purposes, note No. 11 is relevant and we reproduce the same as below:

11. While operating the roster, persons belonging to communities for whom reservation has been made, but who are appointed on merit and not owing to reservation, should not be shown against reserved points. They will occupy the unreserved points.

13. Reading of OM dated 11.7.2002 would show that in substance it clarifies the doubts raised vis-a-vis aforesaid para 11. It indicates that DOP&T had been receiving reference from various Ministries etc. regarding adjustment of SC/ST candidates promoted on their own merit in the reservation category introduced vide OM dated 2.7.1997. It was clarified that in so far as appointment by way of direct recruitment is concerned, if the SC/ST/OBC candidates were appointed on their own merit and not owing to reservation, they were to be adjusted on unreserved points. However, doubts were raised about SC/ST candidates promoted on their own merit. In this behalf, following clarification is furnished in OM dated 11.7.2002:

(i) The SC/ST candidates appointed by promotion on their own merit and not owing to reservation or relaxation of qualifications will not be adjusted against the reserved points of the reservation roster. They will be adjusted against unreserved points.

(ii) If an unreserved vacancy arises in a cadre and there is any SC/ST candidate within the normal zone of consideration in the feeder grade, such SC/ST candidate cannot be denied promotion on the fake plea that the post is not reserved. Such a candidate will be considered for promotion along with other candidates treating and as if he belongs to general category, in case he is selected, he will be appointed to the post and will be adjusted against the unreserved point.

(iii) SC/ST candidates appointed on their own merit (by direct recruitment or promotion) and adjusted against unreserved points will retain their status of SC/

ST and will be eligible to get benefits reservation in future/further promotions, if any.

(iv) 50% limit on reservation will be computed by excluding such reserved category candidates who are appointed/promoted on their own merit.

14. A conjoint reading of the aforesaid four clarifications would make it abundantly clear that when SC/ST candidates are appointed even by promotion on their merit and not owing to reservation or relaxation of qualifications will be adjusted against unreserved points and not against reserved points. They would still retain their status of SC/ST and will be eligible to get benefit of reservation in future/further promotions. Once such SC/ST candidates getting promotion on their own merit and not due to reserved points, even while calculating 50% points on reservation such persons would be excluded meaning thereby they would not be treated as promoted against reserved category.

15. up to this point, there is no quarrel or difficulty. The problem arises in the implementation of these directions namely when it would be treated that a particular SC/ST candidate is appointed by promotion on his own merit and not owing to reservation/relaxation of qualifications. Some guidance is provided in OM dated 31.1.2005, in this behalf. Para 3 thereof affords clarification to the effect that since in the case of promotions by non selection, promotions are made on the seniority-cum-fitness and the concept of merit is not involved in such promotions, OM dated 11.7.2002 does not apply to promotions made by non-selection methods. This OM also reproduces the clarification given earlier vide OM dated 1.7.1998 which reads as follows:

It is clarified that only such SC/ST/OBC candidates who are selected on the same standard as applied to general candidates shall not be adjusted against reserved vacancies. In other words, when a relaxed standard is applied in selecting an SC/ST/OBC candidates, for example in the age-limit, experience, qualification, permitted number of chances in written examination, extended zone of consideration larger than what is provided for General category candidates, etc., the SC/ST/OBC candidates are to be counted against reserved vacancies. Such candidates would be deemed as unavailable for consideration against unreserved vacancies.

CASE AT HAND

16. This brings us to the rules for promotion to the post of Superintendent Grade B in the instant case. This promotion is governed by Superintendents of Central Excise Recruitment Rules, 1986. As per the said rules, post in question is in the pay scale of Rs. 2000-3500 (pre revised) and is treated as "Selection Post". Method of recruitment is stated to be by promotion with the proviso that not more than 5% of the total posts may be filled by direct recruitment as and when considered necessary. Thus, post in question is to be filled by promotion and the mode of promotion is "Selection". OM dated 8.2.2002 issued by DOP&T prescribes the procedure which is to be observed by DPCs when mode of

promotion is selection. It, inter alia, provides that the selection hitherto distinction in the nomenclature ("selection by merit" and "selection-cum-seniority") is dispensed with and mode of promotion in all such cases is rechristened "as selection only". It further provides that element of selectivity (higher or lower) shall be determined with reference to the relevant bench-mark ("Very Good" or "Good"). The DPC is to determine the merit of those being assessed for promotion with reference to bench-mark by grading them "fit" or "unfit" only. Those graded as fit are to be promoted.

17. For promotion to grades below the revised pay-scale of Rs. 12,000-16,500 where the mode of promotion is "selection", the bench-mark prescribed is "good". Thus, those officers who qualify the bench-mark of good will be graded by the DPC as fit or unfit. Those who are graded as fit shall be included in the select panel prepared by the DPC in order of their inter-se seniority in the feeder grade and there shall be no supersession in promotion among those who are found fit by the DPC in terms of the prescribed bench mark of "good".

Discussion with Reference to The Aforesaid Recruitment Rules vis-a-vis OMs having regard to Principles laid down in R.K. Sabharwal (supra)

18. Based on the position contained in the aforesaid recruitment rules, submission of the learned Counsel for the petitioner was that since promotion is by selection it would imply that merit is the criteria and Therefore if candidate belonging to the reserved category is promoted on the basis of his merit, he is not to be adjusted against reserved points of the reservation roster. Learned Counsel for the respondent on the other hand, had based his submission on aforesaid OM dated 8.2.2002 as per which even when the mode of promotion is "selection" all the candidates who achieve bench mark of "good" are to be classified as fit or unfit only and there is no supersession in promotion. He Therefore submitted that there was no element of merit as visualised in OM dated 11.7.2002. He also placed on record letter dated 16.3.2007 issued by the Office of Commissioner of Central Excise which, inter alia, stipulates as under:

There is no provision for supersession in promotions from the post of Inspector to Superintendent, among the officers found fit by the DPC. As per DOPT's relevant instructions governing above promotions, those graded as "fit" (i.e. who meet the prescribed bench mark) by the DPC shall be included & arranged in the select panel in order of their inter se seniority in the feeder grade.

19. On the basis of this letter his submission was that promotions to the post are only on the basis of seniority, subject to fitness and in the higher grade also inter se seniority in the feeder grade was maintained. He argued that notwithstanding the aforesaid recruitment rules, for last 30 years the promotions had always been made in the aforesaid manner. When the aforesaid submissions were made in the hearing held on 20.8.2007 taking note of the respective submissions we had directed the learned Counsel for the Union of India to file an affidavit explaining this position. However, no affidavit was filed and learned Counsel for

the petitioner chose to argue the case without affidavit contending that position in rules was clear and there was no such necessity.

20. After considering the respective submissions and the position contained in various office memoranda, we are of the opinion that having regard to the recruitment rules, it cannot be said that the promotion to the post of Superintendent Grade B is merely on the basis of seniority. It is treated as selection post. The procedure to be observed by the DPC when the mode of promotion is selection as prescribed in OM dated 8.2.2002. As per this OM the bench mark "good" is provided. No doubt, the persons are to be ultimately rated as "fit" or "unfit". However, only those candidates would be eligible for promotion who are declared fit and to get the declaration of fit, DPC has to consider and arrive at a conclusion, on the basis of ACRs and other material provided to it, as to whether they are to be graded as good. There is an element of selection here and unless a candidate achieves this bench mark, he would be treated as unfit. Fit or unfit Therefore has relevance to achieving the prescribed bench mark and does not have the same connotation as seniority-cum-fitness. The bench mark "good" has the element of merit.

21. Therefore, what is relevant for us to note as to whether SC/ST candidates are selected for promotion to this post on the same standard as applied to general candidates. If that is so, they would not be adjusted against reserved vacancies. On the other hand, if relaxed standards are applied in making their promotions, for example lesser Bench Mark, lesser period of qualifying service, bringing them in zone of consideration because of the reason of their being SC/ST, comparatively lesser ACRs etc., then they would be deemed as promoted against reserved vacancies. The bench mark for general category candidates is good. It is not known and nothing has come on record to show as to what was the bench mark provided for those Inspectors who belonged to the categories of SC/ST. In the absence of such material provided before us or before the Tribunal it is not possible to come to a definite conclusion. At the same time, we find that without focusing on this aspect which was relevant, the Tribunal simply followed B.C.K. Ralu (supra) and directed the petitioners to pass a detailed and speaking order on the representation of the respondents herein. In these circumstances, having regard to the aforesaid legal position, we modify the directions contained in the order of the Tribunal and dispose of the writ petition by substituting the following directions:

Those candidates belonging to SC/ST category who were recommended for promotions applying the same bench mark of "good" as applicable to the general candidates such SC/ST candidates would be adjusted against unreserved points. On the other hand such SC/ST candidates who are given promotion on the basis of relaxed standards would be treated as promoted against reserved vacancies.

22. The representation of the respondents herein shall be considered in the aforesaid light and speaking orders shall be passed thereon within three months from today. There shall no orders as to cost.