

(2010) 12 AHC CK 0217
In the Allahabad High Court
Case No : Writ A. No. 61166 of 2006

Union of India (UOI) and Others

APPELLANT

Vs

Rakesh Kumar Singh and Others

RESPONDENT

Date of Decision : 09-12-2010

Acts Referred:

Citation : (2010) 12 AHC CK 0217

Hon'ble Judges : Virendra Singh, J; Ashok Bhushan, J

Bench : Division Bench

Final Decision : Allowed

Judgement

Ashok Bhushan, J.—We have heard Sri Amit Sthalekar, learned Counsel for the Petitioners in both the writ petitions and Sri Vikas Budhwar, learned Counsel appearing for private Respondents.

2. Counter and rejoinder affidavits have been exchanged between the parties and with the consent of the learned Counsel for the parties, both the writ petitions are disposed of finally.

3. Brief facts of both the writ petitions need to be noted. The facts of Writ Petition No. 61166 of 2006, briefly noted, are; Railway Board decided to restructure certain posts of Group-C and Group-D and the circular dated 9th October, 2003 was issued for the purpose. Another circular dated 6th January, 2004 was issued providing that as an one time measure the existing selection procedure for selection is modified to the extent that selection shall be based only on the scrutiny of service record and confidential report without holding any written examination or viva voce. The exercise for filling up of various selection posts took place in the Diesel Locomotive Works, Varanasi. The selection proceedings, which took place prior to 20th February, 2004, empanelled even those candidates who had secured average grading in their confidential reports. However, the selection proceedings which took place after 20th February, 2004, i.e., on 24th, 25th and 27th February, 2004 did not include those candidates

against the selection post who had secured average grading in their confidential reports. In the select list, which was prepared on the aforesaid dates, the Respondents No. 1 to 8, who were working as Assistant Engineer Grade-I, were promoted for the post of Section Engineer (In the scale of Rs. 6,500/- to 10,500/-). Several Assistant Engineers Grade-II, who were senior to Respondents No. 1 to 8 and were not included in the select list on the ground that they had secured average grading in their confidential reports, complained of their non selection and have also filed original application before the Central Administrative Tribunal, Allahabad. An order dated 16th February, 2005 was passed by the Railway Administrations cancelling the selection of Respondents No. 1 to 8. Original Application Nos. 169 of 2005, 181 of 2005 and 185 of 2005 were filed by Respondents No. 1 to 8 challenging the order dated 16th February, 2005. The Central Administrative Tribunal by its order dated 29th July, 2005 quashed the order dated 16th February, 2005 on the ground that the said order was passed without any opportunity to the Respondents. However, liberty was given by the Tribunal to the Railways to pass fresh order after giving notice. A show cause notice dated 9th August, 2005 was issued which was replied and thereafter by a detailed order dated 19th August, 2005 the representations of Respondents No. 1 to 8 were rejected and the selection of the Respondents held on 24th, 25th, and 27th February, 2004 was held to be illegal and they were reverted to their substantive posts. Aggrieved against the order dated 19th August, 2005 Original Application No. 1039 of 2005 was filed by Respondents No. 1 to 8, which has been allowed by the Tribunal by judgment and order dated 15th September, 2006. This writ petition has been filed by the Union of India and others challenging the order dated 15th September, 2006 of the Central Administrative Tribunal.

4. The facts of Writ Petition No. 61446 of 2006, briefly noted, are; after passing of the order dated 19th August, 2005, as noted above, holding the selection of Respondents No. 1 to 8 as illegal, notification dated 29th December, 2005 was issued by the Chief Personnel Officer whereby selection/recruitment on the post of Section Engineer was notified. The said selection was challenged by Respondents No. 1 to 8 by filing Original Application No. 41 of 2006. Both the Original Application Nos. 1039 of 2005 and 41 of 2006 were decided on the same date, i.e., 15th September, 2006. Following the judgment of the Tribunal of the same date in Original Application No. 1039 of 2005, Original Application No. 41 of 2006 was also allowed setting aside the notification dated 29th December, 2005. Writ Petition No. 61446 of 2006 has been filed by the Union of India and others challenging the said order.

5. Sri Amit Sthalekar challenging the orders passed by the Central Administrative Tribunal, contends that the Tribunal committed error in setting aside the order of the Railways dated 19th August, 2005. It is submitted that there was already a circular dated 8th October, 1993 with regard to restructuring that average grading given in the confidential report does not mean unfit for promotion. It is submitted that in the selection which was held on 24th, 25th and 27th February,

2004, the Senior Assistant Engineers who had earned average grading, were not promoted on a wrong basis that a candidate is entitled to selection only when he secured 60% in the service record. It is submitted that after the Railway Board has issued a clarification on 6th April, 2004 clarifying that selection consequent to restructuring of the post as mentioned in the earlier circular dated 6th January, 2004 has to be done keeping in view of the earlier circular dated 8th October, 1993. It is submitted that the circular dated 6th April, 2004 was only clarificatory and it did not introduce any new criteria. Sri Sthalekar submits that Tribunal committed error in taking the view that circular dated 6th April, 2004 can be applied only prospectively and cannot have effect on the selection already made in February, 2004. It is submitted that no new criteria was introduced by circular dated 6th April, 2004, rather it clarified that with regard to selection against the posts, which have come into existence due to restructuring, the employees who have earned average grading are neither unfit nor they can be denied promotion on that ground. It is submitted by Sri Sthalekar that selection, which was conducted on 24th, 25th and 27th February, 2004 was in disregard to earlier circular dated 8th October, 1993 and was rightly corrected for giving the benefit to those who were entitled for promotion on the selection post. Sri Sthalekar further submits that the order of the Railway Board dated 19th August, 2005 gave appropriate reasons for cancelling the selection which took place on 24th, 25th and 27th February, 2004 after giving due notice to the Respondents and the view of the Tribunal that the order does not give ample reason for cancelling the selection is fallacious. It is submitted that the employees, who were erroneously bypassed, were entitled for the benefit extended to them after cancelling the erroneous selection. Sri Sthalekar also submits that Original Application No. 41 of 2006 filed by Respondents No. 1 to 8 challenging the order dated 29th December, 2005 was allowed on the basis of the order of the Tribunal dated 15th September, 2006 passed in Original Application No. 1039 of 2005 and the order dated 15th September, 2006 passed in Original Application No. 1039 of 2005 being erroneous, the order passed by Tribunal in Original Application No. 41 of 2006 deserves to be automatically set-aside.

6. Sri Vikas Budhwar learned Counsel appearing for Respondents No. 1 to 8, contends that there was no error in the selection which took place on 24th, 25th and 27th February, 2004. He submits that subsequent circular dated 6th April, 2004 was not available at the time of selection and shall be applicable only to selection which is held subsequently. It is submitted that circular dated 6th April, 2004 cannot eliminate the selection held earlier. It is submitted that Tribunal has rightly taken the view that circular dated 6th April, 2004 shall be applicable prospectively and has no effect on the selection already made. Reliance has been placed by Sri Vikas Budhwar on the judgment of the Apex Court in the case of B.L. Gupta and Another Vs. M.C.D., It is further submitted that circular dated 8th October, 1993 clarified the earlier restructuring policy dated 27th January, 1993 and it cannot be in any manner admitted or treated clarificatory to circular dated 6th January, 2004. He submits that there is no mention in the circular dated 6th

January, 2004 that it adopts the clarification which was issued with regard to earlier restructuring policy.

7. We have considered the submissions of learned Counsel for the parties and have perused the record.

8. The Tribunal by the impugned orders has allowed the original applications filed by the contesting Respondents setting aside the order dated 19th August, 2005 in substance on the following grounds:

(i) The circular dated 6th April, 2004 adds a new element to the selection for the post in question and can have no retrospective effect. The new element having been introduced by circular dated 6th April, 2004, it can have no effect on the rights of the contesting Respondents which accrued earlier to that.

(ii) The order dated 19th August, 2005 does not answer the issues raised in the representations of the contesting Respondents, hence the order dated 19th August, 2005 deserves to be set-aside.

9. The circular dated 8th October, 1993, which has been relied by counsel for the Petitioners, is to the following effect:

R.B.E No. 151/1993

Subject: Promotion of employees against upgraded posts on account of restructuring.

(No. E(NG)I-92/CR/3 dated 08/10/1993)

It has been brought to the notice of the Board that on some of the Railways" employees who have been graded as "Average" in their Confidential Reports are not being, considered for promotion against the vacancies arising out of restructuring of cadres, ordered vide Board"s letter No. PC-III/91 /CRC/1 dated 27.01.1993 (RBE 19/1993), only on account of their average reports.

2. In this connection your attention is invited to Board"s letter No. E(NG)I-92/CR/3 dated 01.03.1993 wherein it has already been clarified that average report in itself does not mean "unfit for promotion". Accordingly, it is clarified that employees who are graded "average" in C.R. should not be denied the benefits of restructuring only on account of their average reports.

10. The circular dated 8th October, 1993 was issued in context of restructuring policy which was introduced on 27th January, 1993. In the year 1993 also restructuring of the post was done and promotions were given to large number of persons and in that context it was clarified that employees, who have been graded as "average" in their confidential reports should not be denied the benefit of restructure. The said circular was issued since it was brought to the notice of the Railway Board that several employees, who have been graded as "average" in their confidential report, were not considered for promotion. In the present case also decision was taken for restructuring of certain Group-C and Group-D

posts. The circular dated 6th January, 2004 was issued in continuation of earlier circular dated 9th October, 2003. With regard to procedure for selection following was mentioned in paragraph 4 of the circular dated 6th January, 2004:

Existing 4 The existing classification of the posts classification and covered by the these orders as "selection" filling up of and "non-selection", as the case may be, vacancies remains unchanged. However, for the purpose of implementation of these orders, if an individual Railway servant becomes due for promotion to a post classified as a "selection" post, the existing selection procedure will stand modified in such a case to the extent that the selection will be based only on scrutiny of service records and confidential reports without holding any written and / or viva-voce test. Naturally under this procedure the categorization as "outstanding" will not figure in the panels. This modified selection procedure has been decided upon by the Ministry of Railways as a one time exception by special dispensation, in view of the numbers involved, with the objective of expediting the implementation of these orders. Similarly for posts classified as "non- selection" at the time of this restructuring the promotion will be based only on scrutiny of service records and confidential reports. In the case of Artisan staff, the benefit of restructuring under these orders will be extended on passing the requisite Trade Test. However, in case of placement of Supervisors (erstwhile Ministries) to grade Rs. 5000-8000 the instructions contained in Para-13.2 should be followed.

11. The circular dated 20th October, 1999 providing for normal procedure for filling up of selection post has been brought on record as Annexure-8 to the writ petition. The detail procedure contains holding of written examination and viva voce and in that context it was laid down that on service records marks shall also be allocated on the basis of grading, i.e. for Average 2 marks, good 3 marks, very good 4 marks and for outstanding 5 marks. The circular dated 20th October, 1999 provided for cut off marks for calling in the viva voce and for final selection. The 60% aggregate marks, which included the marks of service record, was fixed in that context.

12. For the exercise consequent upon the restructuring of the post, relaxation was granted in the normal procedure of selection and it was decided that selection will be held only on the basis of service records. When the normal procedure stood relaxed for purpose of restructuring, it cannot be read that there is some minimum mark prescribed to be achieved by a candidate for being selected against the post of Section Engineer. It is not disputed that several seniors were not promoted only because they had secured average grading in their service record. The Selection Committee, which held the selection on 24th, 25th and 27th February, 2004, had held the employees, who had secured average grading, unfit for promotion and they were bypassed. The clarificatory circular dated 6th April, 2004 was issued thereafter.

13. Reliance has been placed by learned Counsel for both the parties on the circular dated 6th April, 2004. It is useful to refer the relevant portion of the

circular dated 6th April, 2004, which is to the following effect:

Sub: Restructuring of certain Group "C" & "D" cadres. Please refer to this Ministry's letters No. PC-III/2003/CRC/6 dated 09.10.2003 (RBE 177/2003) & 06.01.2004 (RBE 5/2004) and PC-III/2003/CRC/7 dated 03.03.2004 (applicable to RDSO only) on above subject.

2. ICF have raised doubts regarding the modified selection procedure as detailed in para 4 of Board's letter dated 06.01.2004 (RBE 5/2004) and have sought further elaboration of this aspect. The issue has been examined and it is clarified that the existing selection procedure should be modified to the extent that the selection will be based only on scrutiny of service records and confidential reports without holding any written and/ or viva-voce. In this procedure, the Selection Board is supposed to consider the claims of the eligible staff one by one in order of their seniority. It will scrutinise the service records and confidential reports of staff beyond the number equal to the number of posts calculated in terms of Para 4.1 of Boards' restructuring order dated 06.1.2004 only to the extent the number of staff is found unsuitable for promotion. Further, while implementing the restructuring on the basis of the above procedure, instructions contained in Board's letter No. E(NG)I-92/CR/3 dated 08.10.93 (RBE 151/1993) should be kept in view.

14. A perusal of the aforesaid circular indicates that the said circular was issued to clarify certain doubts which was expressed with regard to circular dated 6th January, 2004. The circular dated 6th April, 2004 is only clarificatory explaining the procedure which is to be adopted to give effect restructuring order dated 6th January, 2004. As noted above, for selection consequent to restructuring there was one time relaxation to the normal procedure of selection. In the circular dated 6th January, 2004 as well as the circular dated 9th October, 2003 there is nothing to read therein that for selection consequent to restructuring there has to be minimum marks to be obtained on the service record and there was any benchmark prescribed for selection. The benchmark prescribed for selection was in the normal procedure for selection which has been brought by circular dated 20th October, 1999. The selection committee while conducting selection on 24th, 25th and 27th February, 2004 bypassed several senior officers under the misconception that there is benchmark prescribed and those persons who have secured average entry are unfit for selection. This was an error which was committed by the selection committee. It was also clearly pleaded before the Tribunal by the counter affidavit filed by Sri Y.K. Jaiswal in Original Application No. 1039 of 2005 that even in different selections of Diesel Locomotive Works up to 20th February, 2004 the posts classified as selection post created as a result of restructuring, were filled by suitability of the candidates based on confidential reports of last three years and record of service and "average" grading was not treated as disqualification. However, the selection committee which conducted the selection on 24th, 25th and 27th February, 2004 erroneously considered fit only those employees who secured 60% of total 15 marks i.e. 9 or above, for

promotion due to which senior eligible staffs were deprived of benefit of promotion. Nothing has been brought to our notice that there was any benchmark for selection for filling up the post consequent to restructuring of 60% ceiling. The 60% ceiling, as observed above, was with regard to normal selection which was based both on written test and viva voce including the marks of service record. The Railway Board clarified the situation by circular dated 6th April, 2004 as quoted above, and it cannot be said that by clarification a new element or criteria of selection has been introduced.

15. The view of the Tribunal that circular dated 6th April, 2004 shall only apply prospectively and shall not effect the selection already made, is erroneous. No new criteria was introduced by circular dated 6th April, 2004, rather it was clarificatory pointing out that as per the earlier circular dated 8th October, 1993 the staff who have received average grading is also fit for promotion.

16. Thus we are of the considered opinion that there was no question of applicability of circular dated 6th April, 2004 prospectively. The circular being clarificatory it cleared doubt and established that selection which was held on 24th, 25th and 27th February, 2004 was erroneous and the same was rightly corrected by the authorities.

17. Admittedly, before passing the subsequent order dated 19th August, 2005 show cause notice was given to Respondents No. 1 to 8 and their representations were also considered, hence the principles of natural justice were also complied with. The Railway Administration was fully empowered to rectify the mistake which was found erroneous after giving notice to the Respondents.

18. The second reason given by the Tribunal that the order dated 19th August, 2005 did not consider the issues raised in the representations is also incorrect. The reasons for holding the selection erroneous and contrary to the clarificatory circular dated 8th October, 1993 were clearly pointed out in the order dated 19th August, 2005. The main reason for cancelling the selection having been pointed out explicitly in the order dated 19th August, 2005, it cannot be said that the issues raised in the representations were not adverted to.

19. It was always open for the railway authorities to correct the error which had crept in selection held on 24th, 25th and 27th February, 2004 and set the same right. The error was corrected after giving notice in which we do not find any fault.

20. Now comes the judgment of the Apex Court which has been relied by learned Counsel for the Respondents in B.L. Gupta's case (supra). The said case was a case where the selection took place on the basis of the Recruitment Rules of 1978 which rules were subsequently amended in the year 1995. The selection was held for 171 vacancies but actually appointment was given to only 79 candidates. The examination for promotion was held for filling up the posts of Assistant Accountant and those who could not be promoted approached the High Court. The High Court had directed that the appointment of 79 persons pursuant

to the examination which had been held in December, 1993 was in order, but the rest of the vacancies had to be filled as per the 1995 Rules. Against the judgment of the High Court appeal was filed, which was allowed directing for declaring the result of all 179 vacancies. While considering the said case, following was observed in paragraphs 8 and 9 of the judgment by the Apex Court:

8. In these appeals the main contention which has been raised by the aggrieved erstwhile Junior Clerks is that the vacancies which had arisen prior to 1995 amendment of the Rules could only be filled as per the Rules of 1978. Therefore, the High Court could not have directed the vacancies which had arisen prior to 1995 Rules to be filled according to 1995 Rules. It was secondly submitted that the number of vacancies which existed being 171 and if the minimum standard which was required to be attained by the persons taking the examination was 50%, as was alleged to have been stated in the counter-affidavit filed in the High Court and 171 candidates were available, then the number of posts which should have been filled was 171 and the shortfall in filling up of the vacancies should be made good. Mr. Sanghi, on the other hand, submitted that as his clients have been working as Assistant Accountants ever since 4-1-1990 and a large number of them had retired and only about 140 or so remained in service and who are likely to retire in the near future, it would be very unjust that they who were previously working as Senior Clerks and were senior to the other Appellants, who were erstwhile Junior Clerks, should be required to take the examination and compete with them.

9. When the statutory rules had been framed in 1978, the vacancies had to be filled only according to the said Rules. The Rules of 1995 have been held to be prospective by the High Court and in our opinion this was the correct conclusion. This being so, the question which arises is whether the vacancies which had arisen earlier than 1995 can be filled as per the 1995 Rules. Our attention has been drawn by Mr. Mehta to a decision of this Court in the case of *N.T. Devin Katti v. Karnataka Public Service Commission*. In that case after referring to the earlier decisions in the cases of *Y.V. Rangaiah v. J. Sreenivasa Rao*, *P. Ganeshwar Rao v. State of A.P.* and *A.D. Calton v. Director of Education* it was held by this Court that the vacancies which had occurred prior to the amendment of the Rules would be governed by the old Rules and not by the amended Rules. Though the High Court has referred to these judgments, but for the reasons which are not easily decipherable its applicability was only restricted to 79 and not 171 vacancies, which admittedly existed. This being the correct legal position, the High Court ought to have directed the Respondent to declare the results for 171 posts of Assistant Accountants and not 79 which it had done.

21. There cannot be any dispute to the proposition laid down in the aforesaid case that when the statutory rules were framed in the year 1978, the vacancies had to be filled up only according to the 1978 Rules. The Amendment Rules, 1995 were prospective and the vacancies which had occurred prior to the amendment of the Rules were to be governed by the old rules. The present is not

a case where there is any amendment in the circular or rules regarding criteria for promotion on the post of Section Engineer. The procedure for selection consequent to restructuring of the post, in the present case, was same and one time relaxation was provided for filling the post. By subsequent circular dated 6th April, 2004 no amendment was made in any criteria, rather only clarification was issued that for promotion exercise the earlier circular dated 8th October, 1993 shall be kept in mind, which had provided that persons securing average grading shall not be treated to be unfit and they shall be in the zone of consideration. Thus the above case does not help the Respondents in the present case.

22. In view of the foregoing discussions, the order of the Tribunal dated 15th September, 2006 passed in Original Application No. 1039 of 2005 cannot be sustained.

23. The Original Application No. 41 of 2006 filed by Respondents No. 1 to 8 challenging the notification dated 29th December, 2005 initiating fresh selection process after the order dated 19th August, 2005 was decided following the order of Tribunal dated 15th September, 2006 passed in Original Application No. 1039 of 2005. We having taken the view that the order passed by Tribunal dated 15th September, 2006 in Original Application No. 1039 of 2005 is erroneous, the order passed by the Tribunal dated 15th September, 2006 in Original Application No. 41 of 2006 automatically falls on the ground.

24. In the result both the writ petitions are allowed. The orders dated 15th September, 2006 impugned in both the writ petitions are set-aside and the Original Applications No. 1039 of 2005 and 41 of 2006 stand dismissed.

25. Parties shall bear their own costs.