

(2009) 07 MAD CK 0388

In the Madras High Court

Case No : Writ Petition No. 7045 of 2006

Union of India (UOI)

APPELLANT

Vs

R. Chitra and Others

RESPONDENT

Date of Decision : 29-07-2009

Acts Referred:

Constitution of India, 1950 — Article 14, 16, 16(1), 16(4), 335
Recruitment Rules, 1982 — Rule 10, 11, 9(1)

Citation : (2009) 6 MLJ 434

Hon'ble Judges : T.S. Sivagnanam, J; Elipe Dharma Rao, J

Bench : Division Bench

Advocate : Syed Mustafa, Govt. Pleader, for the Appellant; R. Vaigai, for R1 and Usha Raman, for R8 and R9, for the Respondent

Final Decision : Dismissed

Judgement

T.S. Sivagnanam, J.—The question which arises for consideration in this Writ Petition is as to whether the quota rule prescribed under the relevant Service Rules for promotion to the post of Statistical Officer should be implemented on Post-Based Roster or vacancy based.

2. The Union of India represented by the Union Territory of Pondicherry is the Writ Petitioner and the first respondent is the applicant before the Central Administrative Tribunal. For the sake of convenience, the parties are referred to as per their ranking given in the Original Application in O.A. No. 593 of 2004.

3. The applicant, R. Chitra approached the Tribunal and filed O.A. No. 593 of 2004, praying for a direction to set aside the order passed by the first respondent dated 27.2.2004 and for a consequential direction to promote her to the post of statistical Officer with effect from 27.2.2004, the date when she became eligible for the post with all attendant benefits.

3. The case of the applicant is that she holds a Masters Degree in Mathematics with Statistics as one of her optional subjects. She joined the services as

Statistical Inspector on 23.8.1988 and was placed in the scale of pay of Rs. 5000-8000 with effect from 1.1.1996 and thereafter she was given higher pay scale under the Assured Career Progression (ACP) Scheme and placed in the scale of Rs. 5500-9000. The grievance of the applicant was that, though she was given higher pay scale, she was not given promotion to the post of Statistical Officer which would enable her to get further promotions. It is submitted that the next avenue of promotion available to the applicant is that of a Research Assistant, which post has been re-designated on 24.3.1994 as Statistical Officer.

3.2. At this juncture it is useful to refer to the Recruitment Rule notified on 8.1.1982 for the post of Research/Statistical Officer which stipulates the method of recruitment for the said post. Rule 10 stipulates that the method of recruitment shall exclusively be by promotion only. Rule 11 states that "promotion from the grade of Statistical Inspector/Statistical Assistant/Price Inspector with six years of regular service in the grade for graduates/post graduates and eight years of regular service for non-graduates". Promotion shall be in the ratio of 3:5 in between non graduates and graduates/post graduates.

3.3. By relying upon the Recruitment Rule 1982, as mentioned above, the applicant would submit that, the qualification for promotion from the grade which she had been working i.e. Statistical Inspector to that of Statistical Officer is that a graduate or post graduate should have six years of regular service in the grade and non-graduates should have 8 years of regular service in the grade for promotion to the post of Statistical Officer and that the same shall be in the ratio of 3:5 between non-graduates and graduates/post graduates, and that she was entitled to be promoted in the year 1994 itself when she had completed six years of regular service in the post of Statistical Inspector and despite several representations, she was not considered and the first respondent had promoted non graduates on the basis of Post-Based Roster. The applicant would further submit that the adoption of promotion on the basis of Post-Based Roster is totally opposed to the Recruitment Rules.

3.4. In the Original Application, the applicant has also given instances as to how the Recruitment Rule stood violated and that even on 27.2.2004, the first respondent had promoted seven non-graduates and three graduates and such promotion is in excess of the quota meant for promotion. The said non-graduates who have been accorded promotion have also been impleaded as party respondents in the Original Application as well as in this Writ Petition.

3.5. Thus, the main ground of attack by the applicant is that the first respondent ought not to have resorted to making promotion on the basis of Post-Based Roster instead of following the Recruitment Rule strictly which makes it clear that the method of filling up of vacancies shall be as per the prescribed quota for the vacancies and not for the posts.

4. The claim of the applicant was resisted by the first respondent by filing a reply statement, inter-alia contending that the ACP Scheme was introduced by the

Government as per the recommendation of the V Central Pay Commission to deal with the problems of genuine stagnation and hardship faced by the employees due to lack of adequate promotional avenue and under the scheme two financial upgradation to categories which have no promotional avenues within 12 years of regular service from the date of first appointment and the second upgradation after 12 more years of service on the same grounds is envisaged and this has no relevance to the seniority position in a hierarchy cadre.

4.2 It is further contended that the applicant cannot be given undue advantage to adopt the procedure in the Recruitment Rule for the post of Statistical officer and that the interpretation given by the applicant is not tenable. The candidates who were senior to the applicant were promoted as per the Departmental Promotional Committee's recommendations for considering the factual information on the service rendered by them in the lower post namely Statistical Inspector.

4.3 On the legal issue raised by the applicant as to whether the promotion should be on the basis of the Post-Based Roster or on the basis of the vacancies, the first respondent would submit that the ratio prescribed in the Recruitment Rules 1982, as 3:5 between non-graduates and graduates/post graduates Statistical Inspectors has been applied to the total sanctioned strength by adopting the Post-Based Roster. It is submitted that all the 24 posts were filled up with nine non graduates and 15 graduates/post graduates and whenever vacancy arise, the above quota is followed in the respective category for considering the promotion.

4.4 It has been further stated that the members of the staff from the feeder grade post viz. Statistical Inspectors were considered according to their seniority position in the final seniority list. The first respondent would further submit that it is not obligatory and possible to offer promotion immediately after completion of the minimum period of service to the Government servant as the sanctioned strength of the post in each grade has to be maintained and on occurrence of vacancy only the post shall be filled up in accordance with the Recruitment Rules. The first respondent further submits that the applicant is not entitled to claim promotion as a matter of right and as per the Recruitment Rule, seniority cum fitness has to be considered by the DPC and as per the Post-Based (vacancy) Roster and since the applicant is already getting the scale of pay of the Statistical Officer, namely Rs. 5500-9000 on upgradation of higher scale in ACP Scheme she cannot have any genuine grievance to be considered.

4.5 On the specific instances pointed out by the applicant regarding the promotions which were granted earlier, the first respondent would state that three non-graduates including one P.Devaraj have been promoted by fulfilling the quota meant for graduate/post graduates which ended with three promotions i.e. upto N. Balakrishnan at Sl.No.3 by order dated 17.5.2002, and the approval of the DPC has been obtained and there is no deviation or violation from the procedure.

4.6 The first respondent would further submit that the Post-Based Roster is adopted in accordance with the law laid down by the Hon''ble Supreme Court in R.K. Sabharwal and others Vs. State of Punjab and others, , and that the sanctioned strength of the post is the basic requirement for filling up of the vacancy and no post can be filled up in any category in excess of the sanctioned strength.

4.7 It is the further contention of the first respondent that the Post-Based Roster has to be followed as per the Government of India's instruction for filling up of vacancy when two or more categories in the feeder grades are existing. Reservation for SC/ST etc., is a separate process and the Roster is a different one which is followed as per the statutory instructions of the Government. The first respondent would further submit that under the relevant Rules, the applicant will be considered for promotion at the appropriate time i.e. on occurrence of vacancy and when her claim under graduate quota falls.

5. The Tribunal considering the matter and after placing reliance upon the two Judgements of the Hon''ble Supreme Court, by an order dated 09.12.2005, has held that the order of promotion which was impugned before the Tribunal is clearly contrary to the Service Rules and the law laid down by the Hon''ble Supreme Court and therefore, set aside the said order of promotion. The Tribunal further directed the official respondents to strictly comply with the ratio of 3:5 between non-graduates and graduates/post graduates and consider the applicant for promotion as per Rules within a period of two months from the date of receipt of the order. The said order dated 9.12.2005 is impugned in this Writ Petition.

6. We have heard Mr. Syed Mustaffa, learned Additional Government Pleader for the petitioner/respondent and Ms. R. Vaigai, learned Counsel for the first respondent/applicant.

7. The learned Additional Government Pleader while reiterating the submissions made before the Tribunal would submit that the Tribunal ought to have considered the minutes of the Departmental Promotion Committee, which are clear and indicate that the quota rota rule was strictly followed and the persons in the seniority rank from 43 to 61 were duly considered. It is his further submission that in the minutes of the Departmental Promotion Committee, it has been pointed out that there was clear indication that posts were filled up on adhoc basis by seniority and there was no zone of consideration and the manner of selection - fitness alone had to be adopted and in view of the 11 vacancies having to be filled up equal number of candidates were considered for assessment for the fitness and order of seniority specified.

8. The learned Additional Government Pleader would further submit that the Tribunal ought not to have interfered with the promotion given as the Department had rightly acted by filling up the vacancies on the basis of the ratio and the whole process was on adhoc basis and therefore when regular promotion is made, it can be on the basis of applying ratio. The learned Additional

Government Pleader heavily relied upon the Judgment of the Hon''ble Supreme Court in R.K. Sabharwal's case, cited supra, and submits that the findings rendered by the Tribunal is contrary to the Service Rules and the law laid down by the Hon''ble Supreme Court.

9. The learned Additional Government Pleader would further submit that the regular promotions would be done in accordance with the amended Recruitment Rules notified in G.O.Ms. No. 68/F2/2005 dated 21.11.2005. In support of his submission, the learned Government Pleader took us through the minutes of the meeting of the Departmental Promotion Committee and the relevant portions of the amended Recruitment Rules and prayed for setting aside the order passed by the Tribunal.

10. Ms.R.Vaigai, learned Counsel appearing for the first respondent/applicant, on the other hand would contend that the order passed by the Tribunal is in accordance with law, just and fair and does not call for any interference. The learned Counsel would further submit that the reliance placed on the Judgment of the Hon''ble Supreme Court in R.K. Sabharwal's case is not tenable as the said Judgment has no application to the facts and circumstances of this case. The learned Counsel submit that the Recruitment Rules which would be relevant for the purpose of deciding the present matter is the Recruitment Rule which was in vogue when the selection was made which was notified by Notification dated 8.1.1982 and that the Recruitment Rule contemplates that the method of recruitment shall be by promotion and shall be only based upon the vacancies at the relevant point of time. The learned Counsel would submit that the Department erroneously applied the Post-Based Roster and thereby the applicant has been unjustly denied her right to be considered for promotion in accordance with the Recruitment Rule.

11. The learned Counsel invited our attention to the Order dated 27.2.2004, which is a promotion order issued to nine incumbents who have been promoted to the post of Statistical Officer. The Department had contended that they proposed to fill up 11 posts and accordingly, ratio of 3:5 had been applied, but the order dated 27.2.2004 shows that only nine incumbents have been promoted. Out of the nine, seven are non-graduates and two are graduates. By relying on this order dated 27.2.2004, the learned Counsel for the applicant would submit that the entire process is untenable and contrary to the provisions of the Recruitment Rules.

12. The learned Counsel placed reliance upon the Judgement of the Hon''ble Supreme Court in State of Punjab and Others Vs. Dr. R.N. Bhatnagar and Another, and submits that the roster for promotion between graduates and non graduates is to be continued whenever vacancies arise and there is no question of filling up of a vacancy arising out of retirement, by direct recruitment - by direct recruitment or on retirement vacancy by a promotee ? by a promotee. The learned Counsel placed reliance on the said judgment and submit that it has been made clear that the ratio in R.K. Sabharwal's case cannot be applied to the

facts and circumstances of the present case.

13. The learned Counsel placed reliance on the Judgment of the Hon'ble Supreme Court in All India Federation of Central Excise Vs. The Union of India and others, , which has followed the Judgment in Dr. R.N. Batnagar's case referred above, and submits that the Judgment referred in R.K. Sabharwal's case is not applicable as it deals with promotion of SC/ST Officers for which special provisions has been made under Article 335 of the Constitution. With the above submissions, the learned Counsel prayed for dismissal of the Writ Petition.

14. We have considered the submissions made on either side and perused the materials available on record.

15. The question which arises for consideration is as to whether the Department was justified in following the Post-Based Roster for the purpose of promotion to the post of Statistical Inspectors. The argument of the Department is that they followed the ratio laid down by the Hon'ble Supreme Court in R.K. Sabharwal's case and that therefore the promotion cannot be faulted. It is the further case of the Department that the present promotions are adhoc promotions and that the earlier promotions were also adhoc and as and when regular promotions are made, the provisions of the Recruitment Rules as notified on 21.11.2005 would be followed and that the case of the applicant would be considered at the appropriate time. Further, it is the contention of the Department that the benefit granted under the ACP Scheme has no relevance to the seniority position in hierarchy cadre and the applicant cannot be given undue advantage without adopting the procedure in the Recruitment Rule. The Department's contention being that on the date when the D.P.C. met i.e. on 25.2.2004. there were 11 vacancies namely 8 regular vacancies due to retirement and promotion of incumbents, one short term vacancy and two anticipated regular vacancies which were proposed to be filled up.

16. It is recorded in the minutes of the DPC held on 25.2.2004, that the cadre of Statistical Officer had a strength of 24 posts and 5 non graduates and 15 graduates were working at the relevant point of time. The due share between the non-graduates and graduates is 9:15 and as such the first four vacancies have to be filled up by non-graduates and the remaining seven vacancies have to be filled by three non-graduates and four graduates and therefore, it is the case of the Department that they have strictly followed the quota prescribed and there is no error.

17. Though the arguments advanced on behalf of the Department appears to be attractive, we are not inclined to accept the same for the following reasons:

As referred to above, the Recruitment Rule relevant for the present case is that which was notified on 8.1.1992. The Rule clearly shows that the method of recruitment to the vacancies was only by way of promotion and that the promotion shall be in the ratio of 3:5 between non graduates and graduates/post graduates. Therefore, the word which has been used in the recruitment Rule is

"vacancy". Therefore, it has to be seen as to whether the department was justified in adopting the Post-Based Roster.

18. The law on the subject has been crystallised in two Judgments of the Hon''ble Supreme Court as referred above, namely in the cases of Dr. R.N. Batnagar and All India Federation of Central Excise. The case before the Hon''ble Supreme Court in Dr. R.N. Batnagar''s was that the respondent therein was working as Assistant Professor in the Department of Ophthalmology in the Government Medical College, Patiala, and that he was promoted with effect from 20.6.1984. The question which arose for consideration was as to how vacancy in the post of Supervisor of Ophthalmology was to be filled up on retirement of another incumbent with effect from 31.10.1996. Under the relevant Recruitment Rule in the said case, the method of appointment was 75% by promotion and 25% by direct recruitment. The appellant in the said case, by relying upon the quota rule governing the recruitment had submitted that every three vacancies of Professors in the said cadre have to be filled in by Departmental promotees while the fourth vacancy would be filled in by direct recruitment and thereafter succeeding vacancies to be filled in by promotees and direct recruits in successive cycles of 3:1. In the said case, 16 vacancies were advertised and filled in by direct recruitment which was taken before the High Court by way of a Writ Petition. The respondent therein by placing reliance on the Judgment in R.K. Sabarwal''s case contended that there were totally five posts in the cadre of Professor and 75% thereof namely 3.75 posts had to be reserved for promotees and 1.25% posts were reserved for direct recruits and based on the said representation at the relevant point of time, when the vacancy arose, there was already one direct recruit, holding the post of Professor and the vacancy in question had to go to the Departmental promotee as he was senior most Assistant Professor. Therefore, the respondent before the Supreme Court who was the writ petitioner would contend that his claim for promotion to the post should have been processed and post should not have been advertised by direct recruitment.

19. The Appellant State contended that the ratio of the Constitution Bench judgment in R.K. Sabarwal''s case pertains to a scheme of reservation of Scheduled Caste and Scheduled Tribe persons under Article 16(4) of the Constitution and it had nothing to do with the scheme of the Rule relating to recruitment from two sources under Rule 16(1) of the Constitution. The Hon''ble Supreme Court based on the above facts held as follows:

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It has, therefore, to be appreciated that when posts in a cadre are to be filled in from two sources, whether the candidate comes from the source of departmental promotees or by way of direct recruitment, once both of them enter a common cadre, their birthmarks disappear and they get completely integrated in the common cadre. This would be in consonance with the thrust of Article 16(1) of the Constitution of India. No question of exception to the said general thrust of

the constitutional provision would survive as Article 16(4) would be out of the picture in such a case. Consequently, the decision rendered by the Constitution Bench in R.K. Sabharwal case in connection with Article 16(4) and the operation of roster for achieving the reservation of the posts for SCs, STs, and BCs as per the scheme of reservation cannot be pressed into service for the present scheme of Rule 9(1) is not as per Article 16(4) but is governed by the general sweep of Article 16(1). The attempt of learned Counsel for the respondent to treat a quota rule as a reservation rule would result in requiring the State authorities to continue the birthmarks of direct recruits and promotees even after they enter the common cadre through two separate entry points regulating their induction to the cadre. Therefore, the roster for 3 promotees and one direct recruit is to be continued every time a vacancy arises and there is no question of filling up a vacancy arising out of a retirement of a direct recruitment or on the retirement vacancy of a promotee by a promotee. Consequently, the question of rotating the vacancies as posts or for treating the posts mentioned in the rules of recruitment as necessarily referable to total posts in the cadre at a given point of time in the light of R.K. Sabharwal judgment, therefore, cannot survive for the case of a quota rule between direct recruits and promotees, the same is to be judged on the touchstone of Article 16(1) and the statutory rules governing the recruitment to the posts of Professor constituting the Punjab Medical Education Service (Class I) and not on the basis of Article 16(4). The Division Bench in the impugned judgment with respect wrongly applied the ratio of R.K. Sabharwal case governing 16(4) to the facts of the present case which are governed by Article 16(1).

(emphasis supplied)

20. Thus, the Hon'ble Supreme Court in the above Judgment while dealing with the Quota-Rota Rule providing for filling up of vacancies in the cadre of promotees and direct recruits in the ratio of 3:1 held that the Rule concerned with appointment from two sources namely that of promotees and direct recruits and it did not concern with reservation and hence Article 16(1) of the Constitution is applicable but not Article 16(4). The Supreme Court held that once direct recruits and promotees are absorbed into one cadre, they form one class and they cannot be discriminated for the purpose of further promotion.

21. Next if we see the other Judgment of the Hon'ble Supreme Court in All India Federation of Central Excise which was followed in the Judgment in Dr. R.N. Batnagar, the Hon'ble Supreme Court was dealing with the matter relating to filling up of posts in entry grade of Indian Customs and Central Excise namely Group "A" service against 50% promotion quota and that there was three feeder categories to the said post and the vacancy in the post were to be filled up in the ratio of 6:1:2. The contention advanced before the Hon'ble Supreme Court was that when a vacancy of Group "A" post was to arise due to retirement of a promotee Officer, it must be filled up by another promotee Officer of the Central Excise only and not by a promotee Officer of other category. The Hon'ble

Supreme Court rejected the said contention and held that once Officers where from three categories are promoted to Group "A", they seized to have their birth marks of their previous categories and there would then be no question of filling up of a vacancy in Group "A" grade by retirement of a promotee from the Department by another Officer from the same group. This is so because , one promotee Group A identity of feeder channel from such of the promotee seized to exist. In the said Judgment, the Hon''ble Supreme Court while considering the applicability of the Judgment in R.K. Sabharwal's case held as follows:

13. Reliance by the petitioners is placed upon R.K. Sabharwal case. That case deals with the principle that the posts vacated by an office recruited from the SC/ST category must be filled in only b the same reserved category. This is because of the special provision in Article 335 of the Constitution of India relating to adequate representation of the SCs/STs in the services. The birthmarks there remain even on promotion inasmuch as a particular number of posts in the promotional category are reserved to be filled in only from among SCs/STs. On the other hand, so far as a normal quota rule between two feeder channels for recruitment or promotion by a quota between different feeder groups (as in the case before us), the relevant precedents are Paramjit Sing Sandhu v. Ram Rakha Mal and State of Punjab v. Dr. R.N. Bhatnagar. In Paramjit Sing case which related to recruitment from among promotees and direct recruits, D.A. Desai, J. pointed out that if a quota rule between direct recruits and promotees were treated as a rule of reservation, then because of frequent retirements of the promotees who were generally closer to retirement, most vacancies in the promotional posts would repeatedly go to the aged promotees leaving little scope for direct recruitment. At p. 196, the learned Judge clarified as follows: (SCC para 6)

What this Court meant while saying that when a quota rule is prescribed for recruitment to a cadre, it meant that quota should be correlated to the vacancies which are to be filled in. Who retired and from what source he was recruited may not be very relevant because retirement from service may not follow the quota rule.

The learned Judge further pointed out: (SCC p.196, para 6)

Promotees who come to the service at an advanced age may retire early and direct recruits who enter the service at a comparatively young age may continue for a long time. If, therefore, in a given year larger number of promotees retire and every time the vacancy is filled in by referring to the source from which the retiring person was recruited, it would substantially disturb the quota rule itself. Therefore, while making recruitment quota rule is required to be strictly adhere to.

22. In the above Judgment, the Hon''ble Supreme Court had rejected the contention of the writ petitioners that vacancy arising due to retirement of a promotee officer belonging to a particular feeder category must be filled by that

category only. It also held, the Judgment in R.K.SABHARWAL case is not applicable in such matters. It is to be noted that in the above case before the Supreme Court, the UPSC sought to justify the deviations from the ratio on the ground that the promotions were adhoc. In paragraph No. 18 of the Judgment, the Hon''ble Suprme Court held that even assuming that for the purpose of adhoc promotion, it would be fair to follow the ratio of 6:2:1. Further, in the instant case, it is not the case of the respondent Department that they have not followed the ratio. Per contra, it is their case that the ratio has to be applied on "Post-Based Roster" and not based on "vacancy". Hence, there is no justification on the part of the Department to state that since the promotions are adhoc, they would be entitled to adopt a Post-Based Roster.

23. Thus in view of the above legal position, it is to be held that the promotion has to be done in the ratio prescribed namely 3:5 based on the vacancy position and the department erroneously followed the Post-Based Roster.

24. The next contention of the Department is that the promotions are adhoc and therefore the regular promotions would be done only under the new Recruitment Rules which have been notified on 21.11.2005. The new Recruitment Rule, notified in 2005, would not have relevance for deciding the present dispute and the relevant Rule would be the Rule which has been notified on 8.1.1982. The 1982 Rule, clearly states that the method of recruitment to the vacancies in the post shall be only by promotion and such promotion shall be in the ratio of 3:5 between non graduates and graduates/post graduates. Therefore, the Department ought to have followed the vacancy based roster in accordance with the ratio instead of Post-Based Roster. It is not the case that the Department has not followed the ratio, but the Department would contend that this ratio is post based and therefore there is no error in the approach. The law having been settled by the Hon''ble Supreme Court, in the above referred Judgment, the respondents while effecting promotions, during 2004 cannot take a contrary stand which would cause undue hardship to the persons like the applicant.

25. In the instant case, the applicant who is a graduate/post graduate was entitled for being considered for promotion as early as on 1994 and has been languishing without consideration and at this point of time, the Department cannot be heard to say that the present promotion is adhoc and that the promotions given in 2004 were adhoc and that the promotions given earlier in 2002 were also adhoc and the applicant has to wait till the Department conducts fresh promotion under the new recruitment rule. This approach of the Department is wholly unreasonable and violative of Articles 14 and 16 of the Constitution of India.

26. The learned Counsel for the Department placed reliance upon the Judgement of the Supreme Court in All India Judges Association and Others Vs. Union of India (UOI) and Others, . In paragraph No. 29 of the said Judgment, the Hon''ble Supreme Court observed that as the rules and the Central Government's 40 point roster rules which has been prescribed deals with quotas for scheduled

case and scheduled tribes and when roster system is followed, there is no question of any dispute arising and the 40 point roster has been considered and approved by the R.K. Sabharwal's case. We find that the decision in All India Judges Association's case does not apply to the facts and circumstances of the present matter and does not advance the case of the Department.

27. The Tribunal has considered the entire facts and circumstances of the case and correctly applied the law laid down by the Hon'ble Supreme Court and allowed the Original Application. In view of the above, we find no reason for interfering with the order passed by the Tribunal. Accordingly, the above Writ Petition is dismissed. It is stated by the learned Counsel appearing for the applicant that though two months time was prescribed by the Tribunal to comply with the directions, inspite of no interim order being granted by this Court during the pendency of the Writ Petition, the direction has not been obeyed and that the petitioner is greatly prejudiced. Therefore, the Department is directed to comply with the direction issued by the Tribunal, within a period of six weeks from the date of receipt of a copy of this order. No costs.