
(2013) 11 BOM CK 0012
In the Bombay High Court
Case No : Writ Petition No. 150 of 1998

Vivek Gangadhar Davare, Range Forest Officer, Forest
Development Corporation of Maharashtra Ltd.

APPELLANT

Vs

The State of Maharashtra and Others

RESPONDENT

Date of Decision : 12-11-2013

Acts Referred:

Citation : (2014) 1 ABR 200 : (2014) 1 BomCR 760

Hon'ble Judges : R.M. Borde, J;A.I.S. Cheema, J

Bench : Division Bench

Advocate : A.B. Gatne, for the Appellant; S.G. Sangle, A.G.P. for Respondent No. 1, Shri. S.N. Boiwar, Advocate holding for Shri. Pradeep Shahane, Advocate for Respondent Nos. 2 to 4, for the Respondent

Final Decision : Dismissed

Judgement

A.I.S. Cheema, J.—In this matter, Rule was issued on 12th January, 1998. Petitioner, Range Forest Officer ("RFO" in brief) with Forest Development Corporation of Maharashtra Ltd. ("F.D.C.M." in brief), is aggrieved with the promotional order dated 26th November, 1997 issued by Respondent No. 2-F.D.C.M. in favour of Respondent Nos. 5 to 10 who are junior to him (Respondent No. 7 expired during pendency of the Petition and matter abated as regards the said Respondent). Petitioner claims that he should have been promoted in preference to Respondent Nos. 5 to 10 on the basis of seniority. He wants Rule 3(1) of F.D.C.M. relating to need to pass departmental examination for being eligible for promotion of RFO's to the post of Assistant Manager, to be struck down as violative of Article 14 and 16 of the Constitution of India. At least part of the Rule requiring RFO already in service to pass examination before 1st July, 1989 needs to be struck down.

2. It is the case of the Petitioner that F.D.C.M. is a Government of Maharashtra Undertaking. Respondent Nos. 5 to 10 are employees of Respondent No. 2-F.D.C.M. who are juniors having been recruited after recruitment of the

Petitioner. According to him, by a common training programme for Range Forest Officers by direct recruitment held by Forest Department and F.D.C.M., there was selection and after successful training some candidates got posted to Forest Department while some got posted to F.D.C.M. Petitioner was posted to F.D.C.M. in 1976-78. Up-till 1988 there were no rules framed by F.D.C.M. for departmental/promotional examination of RFO's. There was such provision for the counter parts in the Forest Department of the State and so Petitioner made applications for such benefit. Rules got framed on 30th March, 1988 for the departmental/promotional examination of RFO's to the post of Assistant Managers. Rule 3(1) made provision that RFO's recruited directly after framing of the rules, would be allowed to pass the examination in five years period. However for RFO's already in service, the time prescribed to pass the examination was of before 1st July, 1989. In default, consequences of withholding increments and denial of promotion were to follow. Departmental/promotional examination was first held in July 1988 for batch earlier to the batch of the Petitioner. He appeared in the examination held in March 1989 but did not succeed. He could not attend the examination held in September 1989 and September 1990 due to exigencies of service. The examination held in September 1991 was boycotted by Union of employees. He appeared in examination held in December 1992 but could not succeed. As per Petitioner, this gave him only one opportunity to pass examination before 1st July, 1989. In the year 1993 auditor objected to annual increments granted to Petitioner for not having passed examination before 1st July, 1989 and recovery was ordered. In view of representations made by the Petitioner and recommendations made by Divisional Manager of Forest Project Division, Nasik, annual increments withheld, were subsequently sanctioned. Petitioner is pointing out the gradation/seniority list of 1st January, 1995 and 1st January, 1997 to show that Respondent Nos. 5 to 10 are junior to him. By impugned promotion order dated 26th November 1997, they came to be promoted excluding the Petitioner. According to the Petitioner, Rule 3(1) is bad in law, discriminatory and violative of Article 14 read with 16 of the Constitution of India, being unjust with RFO's who were already in service as the Rule gave cut-off date of 1st July, 1989 to existing RFO's while it gave period of five years to RFO's who will join after framing of the Rules. Gradation/seniority list has nothing to do with the passing of departmental examination and there is no limit on the number of attempts to be made by RFO's in the said examination though there is limit of five years for granting or withholding annual increments. Thus, the Petition.

3. For Respondent Nos. 2 to 4 affidavit in reply was filed. The defence is that the Petitioner availed several chances and appeared for the examinations but he failed and employees who passed the examination were selected and therefore there is no discrimination. Respondent No. 2 is a company registered under the provisions of Companies Act, 1956. Previously, it was Forest Development Board under the State of Maharashtra and subsequently the said Board merged into the Forest Development Corporation of Maharashtra Ltd. w.e.f. 25th October, 1974.

Respondent No. 2 is wholly owned and controlled by the State of Maharashtra. Officers of the Forest Department are taken on deputation in Respondent No. 2 but not vice-versa. It is admitted that Petitioner was selected for direct recruitment as RFO and after training with others, some were appointed in Forest Department and Petitioner came to be appointed with F.D.C.M. It is admitted that till 1988 there were no Rules for departmental/promotional examination of RFO's. It is claimed that Respondent No. 2 is an independent Corporation and Rules are different and cannot be compared with Rules of Forest Department. The Respondents are pointing out the various chances which were given to Petitioner for passing of the examination. It is claimed that although cut-off date was mentioned in the Rules, it was not strictly adhered to. Examination was held six times upto 1998 and Petitioner had full opportunity to participate and he is thus now estopped from claiming that only one chance was there before 1st July, 1989 and so there was discrimination. The audit objection for annual increment has nothing to do with passing of examination and promotion. Without prejudice, it is claimed that by letter dated 10th December, 1997 the annual increments were regularized. The Petitioner was given five chances out of which Petitioner did not appear in some examinations and in the remaining examinations he was declared unsuccessful. The increments due in favour of Petitioner when subsequently released, were given retrospective effect. Gradation list is merely seniority list and promotion is subject to eligibility as stated in the Rules. Respondent Nos. 5 to 9 passed the departmental examination which is essential for promotion, and Respondent No. 10 received exemption as per Rule 3-B(2), having attained the age of 45 years at the time of promotion. Respondent Nos. 5, 6 and 8 passed the examination in September, 1989 while Respondent Nos. 7 and 9 passed the examination in September, 1990 and thus became eligible and were promoted by the impugned order dated 26th November, 1997. It is claimed that after framing of the Rules, no recruitment to the post of RFO has been done directly and hence the Petitioner cannot claim that there has been discrimination. All the RFO's were appointed prior to the commencement of Rules and those who passed examination, have been placed in promotional post according to their seniority and availability of post. There is no need to declare the Rules as invalid, as claimed by the Petitioner. Respondent Nos. 5 to 10 have already joined promotional posts and their promotions may not be disturbed. Respondents point out six examinations as held in:-(1) September, 1988 (2) March, 1989 (3) September, 1989 (4) September, 1990 (5) September, 1991 and (6) December, 1992, to show that sufficient opportunities were given to the Petitioner. It is pointed out that Petitioner appeared in the examinations held in March, 1989 and December, 1992 but he failed while he did not take benefit of the other examinations held. The Respondents want the Petition to be dismissed.

4. Petitioner vide additional affidavit, has tried to explain as to how in the examinations held in September, 1989 and September, 1990 he could not appear. In the additional affidavit, it is claimed that on Petitioner completing the age of 45 years on 31st October 1998, he has been promoted w.e.f. 22nd July, 2010.

According to him, as there was vacancy, he should have been promoted from 1st November, 1998.

5. We have gone through the Petition and heard the counsel. It has been argued by the learned counsel for the Petitioner that earlier there were no Rules till 1988 and so Petitioner did not get opportunity of promotion and when the Rules were framed, they were discriminatory, as the same gave chance to Petitioner who was already in service only till 1st July, 1989 while provided five years period for passing examination to the RFO's to be recruited after framing of the Rules. According to him, although the Rules provided stopping of increments for not passing of examination, the increments were released and so similar yard-stick could have been applied and Petitioner could have been promoted even before attaining the age of 45 years. The learned counsel for Petitioner submitted that now Petitioner has already superannuated but it is necessary to strike down the Rules as discriminatory and deemed promotion may be given to the Petitioner on completing 45 years of age, at least with effect from 1st November 1998, so that he gets necessary benefits.

6. To examine the controversy, it would be appropriate to refer to the relevant portions of "Rules of Departmental Examination of Range Forest Officers, 1998". Rule 3 and 3-B read as under:

Rule No. 3:-Inevitability (sic) of passing the Departmental examination and effects.

1) Every Range Forest Officer, other than the Range Forest Officers who are exempted from passing the Departmental Examination as per exemption clause No. 3-B of these rules will be required to pass the Departmental examination, within 5 years period, from the date of taking over the charge of the post. The Range Forest Officers who are already in service, on the date of commencement of these rules, will be required to pass this Departmental examination before 1.7.1989.

2) The annual increment of the RFO's other than the RFO's who are exempted from passing the Departmental examination as per exemption clause No. 3-B of these rules who do not pass the Departmental examination within the prescribed period, will be with-held, or Managing Director, under his discretion can retire such RFO's from service or can handle such cases by other means as deemed fit.

Note: The annual increment so withheld shall be withheld until RFO passes the Departmental examination. The date of annual increment, on passing the Departmental examination will not be postponed in case the candidate passes the Departmental examination, on expiry of prescribed period.

3. The RFO other than the Range Forest Officers, who are exempted from passing the Departmental examination as per exemption clause No. 3-B of these rules shall not be confirmed in his cadre, unless he passes the Departmental examination.

4. The RFO other than the Range Forest Officers who are exempted from passing the Departmental examination as per exemption clause No. 3-B of this rule shall not be considered fit for promotion as Assistant Manager, unless he passes the Departmental examination.

5. Examinee shall be eligible to claim travelling allowance for appearing for the Departmental examination, maximum upto two times. In case the examinee fails in the examination, the Managing Director may after considering the performance of the candidates in Departmental examination issue certificate for sanctioning T.A. to the examinee.

Rule No. 3-B:-Exemption Clause:-

1) The foresters who are promoted as Range Forest Officers, shall not be required to pass the Departmental examination prescribed for RFO's of FDCM Ltd. This exemption from passing the Departmental examination shall remain effective upto their promotion in the cadre of Assistant Manager.

2) Range Forest Officers shall be exempted from passing the Departmental examination prescribed for RFO's of FDCM Ltd. when they attain the age of 45 years.

3) Range Forest Officers of FDCM Ltd. who have passed the Departmental examination prescribed for Range Forest Officers of Forest Department of M.S. in "Forest Laws" shall be exempted from passing the Departmental examination of FDCM Ltd. in the subject "Forest Act". All such RFO's will be required to pass the Departmental examination in all remaining subjects, prescribed for the Departmental examination of Range Forest Officers of FDCM Ltd.

(Emphasis supplied)

7. As per the Petitioner, these Rules were framed and approved on 30th March, 1988. It is clear from reading of the above Rules that there is no bar as far as regards how many opportunities may be taken by the Range Forest Officers for passing of the examination. What is provided is that RFO's (other than those who are exempted under Rule 3-B) are required to pass the Departmental examination within five years, from the date of taking over the charge of the post. RFO's who were already in service, were given time till 1st July, 1989 and the default was to attract withholding of annual increment or to even face retirement. Even regarding this, as sub Rule (2) of Rule 3 shows the Managing Director was given discretion to handle such cases by other means as deemed fit. Admittedly, although increments of Petitioner were earlier withheld due to audit objection, the same came to be released with retrospective effect. There do not appear any orders of retirement. Employees already in service, armed with experience, cannot claim parity with just appointed employee if adverse action is invoked for non passing examination after giving new-comer more opportunity. Thus, the Rules as framed in this regard are workable.

8. Learned counsel for the Petitioner admitted that in the examination held in

March, 1989 Petitioner had appeared but he failed. The argument that till 1st July, 1989 Petitioner got only one opportunity to pass the Departmental examination (as examination of 1988 was limited to earlier batch) has no substance. The Petitioner does not claim that in the subsequent examinations he was prohibited from appearing. In fact he did appear in the examination held in December, 1992 and failed. According to the Respondents, after framing of the Rules, no RFO's were appointed and so Petitioner cannot claim even discrimination from the provisions of the Rule providing for opportunity to pass Departmental examination within five years period for RFO's if firstly appointed vis-?-vis those who were already in the service when the Rules came into effect. We find that the Rules cannot be treated as discriminatory as the same have been so framed and applied that the RFO's were given ample opportunities and even though the Rule provided for withholding of annual increments, the Managing Director was given discretion to handle such cases by other means. As mentioned, there is also nothing to show that anybody has been retired from service for not having passed the examination.

9. What appears from the Rules is that if the RFO does not pass the examination, he shall not be confirmed in the cadre and shall not be considered as fit for promotion for Assistant Manager. Thus the Rule basically provides that if the RFO passes the examination he would become eligible for consideration for promotion. Rule 3-B prescribes exemption for those who attain the age of 45 years. The Petitioner did reap even these fruits as he got promoted on 22nd July, 2010.

10. Learned counsel for the Petitioner relied on the case of Union of India (UOI) and Another Vs. Hemraj Singh Chauhan and Others, , for the principles of law as enunciated in Para 35 and 36 of the Judgment. Same read as under:

35. The Court must keep in mind the constitutional obligations of both the appellants/Central Government as also the State Government. Both the Central Government and the State Government are to act as model employers which is consistent with their role in a welfare State.

36. It is an accepted legal position that the right of eligible employees to be considered for promotion is virtually a part of their fundamental right guaranteed under Article 16 of the Constitution. The guarantee of a fair consideration in matters of promotion under Article 16 virtually flows from guarantee of equality under Article 14 of the Constitution.

11. According to learned counsel for the Petitioner as soon as Petitioner became eligible on completing the age of 45 years on 31st October 1998, he should have been promoted. Reliance is placed on the case of Rajinder Pal Singh Lamba Vs. Suraj Bhan and Others, , and reference is made to para 14 of the Judgment to argue that F.D.C.M. was under fiduciary duty to consider name of the Petitioner for promotion as and when the vacancy arose. Para 14 of the Judgment, reads as under:

14. Respondent 4 was under a fiduciary duty and was required to consider the name of the appellants for promotion to the post of UDC in accordance with the statutory rule as and when the vacancy arose. Unfortunately, there was lapse on the part of Respondent 4 due to which the case of the appellants for promotion could not be considered. At the same time it cannot be scored out that the appellants slept over their rights, which led to a considerable delay i.e. delay of 11 to 12 years on the part of the appellants to give representation for promotion to the grade of UDC. Delay defeats equity is a well-known principle of jurisprudence. Delay of 11 to 12 years cannot be overlooked when an applicant before the court seeks equity and specially in the case of service matters as in the said case it jeopardises the existing positions of a very large number of members of that service.

12. There can be no dispute as far as regards the principles referred to by the learned counsel. The facts, however, in the matter of Hemraj Singh Chauhan and others were different as in that matter due to delay on the part of the State the Respondents therein crossed the upper age limit of 54 years and the employees earlier eligible for promotion were rendered ineligible. Thus relief was granted. Facts in the matter of Rajinder Pal Singh Lamba are also different as in that matter LDC's of District Courts received benefit of retrospective promotion as UDC's pursuant to the order of learned Single Judge of the High Court and reaped benefit of promotion for nearly ten years when the Division Bench of the High Court faulted with the Judgment. In the peculiar facts and circumstances of that matter the Hon'ble the Supreme Court in its powers did not take away the benefits. However the Supreme Court itself has recorded that relief granted in that matter will not be treated as precedent in any other matter.

13. The present matter will have to be appreciated on its own facts to do justice between the parties. At the time of arguments, the learned counsel for Petitioner has not controverted the defence that Respondent Nos. 5 to 9 came to be promoted as they had already passed the departmental examination and Respondent No. 10 had received exemption as per Rule 3-B (2) having attained the age of 45 years at the time of promotion. Thus, the Petitioner cannot compare himself with these Respondents. Learned counsel for the Petitioner was specifically asked at the time of arguments and accepted that he was not in a position to show that any junior to the Petitioner was promoted before him, after he became 45 years of age. Record shows that although Respondent Nos. 5, 6 and 8 passed examination in September, 1989 and Respondent Nos. 7 and 9 passed examination in September, 1990 and thus became eligible for promotion, they were promoted only on 26th November, 1997. Thus, even those Respondents had to wait for considerable period even after they became eligible. Petitioner became eligible on completing the age of 45 years on 31st October, 1998 and got promoted w.e.f. 22nd July, 2010. This is not a happy state of affairs as far as F.D.C.M. is concerned. However, by that it does not mean that the Petitioner has been discriminated. All the eligible employees have a right not only to be considered for promotion but also to be considered within reasonable

time.

14. At the time of arguments, learned counsel for the Petitioner was unable to support his arguments that Petitioner should have been promoted w.e.f. 1st November, 1998, as soon as he crossed the age of 45 years. In the matter of Baij Nath Sharma Vs. Hon''ble Rajasthan High Court At Jodhpur and Another, , the appellant before the Hon''ble High Court who was a judicial officer from Rajasthan judicial service, claimed that before his retirement there were vacancies in promotion quota against which he could have been considered for promotion to Rajasthan Higher Judicial Service. He claimed promotion from the date when vacancy had arisen in the promotion quota. In that matter, the Rajasthan High Court had, on administrative side, taken a decision not to make promotions till recruitment was made from the Bar, otherwise there would be imbalance between strength of promotees and direct recruits. The appellant therein, moved the Rajasthan High Court by writ petition but the same was dismissed. By the time he filed appeal to the Hon''ble Supreme Court, he had superannuated. In Para 6 of the Judgment, the Hon''ble Supreme Court observed that:-

6. The appellant could certainly have a grievance if any of his juniors had been given promotion from a date prior to his superannuation. It is not the case here.

? In the present matter also, the Petitioner has not been able to show that anybody junior to him was promoted after he became 45 years of age or that anybody junior to him has been given promotion from the date prior to his superannuation.

15. In the matter of Baij Nath Sharma (supra), it was observed in Para 8 as under:

8. It is regrettable because of the inaction on the part of the High Court that recruitment from the Bar could not be made in time which created an imbalance in the service and ultimately it were the appellant and officers similarly placed who suffered. After having put in long years of service, it is the seniority and promotion which an officer looks forward to. He expects he is given due promotion in time. Non-promotion may be an incidence of any service. But here the appellant has been deprived of his promotion without any fault of his. The High Court said that it might be a sad state of affairs that the name of the appellant was not considered for promotion till he retired. The High Court may feel anguished but it gives no comfort to the appellant. At least for the future, such an unfortunate thing should not happen to any other officer similarly situated.

(Emphasis supplied)

? With such and other observations made by the Hon''ble Supreme Court, the appeal of Baij Nath Sharma came to be dismissed. Thus, it is clear that the Hon''ble Supreme Court did not give retrospective promotion to the appellant

therein from the date vacancy arose. Looking to the facts of the present matter as well as keeping in view the above Judgment of the Hon"ble Supreme Court, it is not possible to accept the argument of the learned counsel for the Petitioner that the Petitioner may be given deemed date of promotion with effect from 1st November, 1998.

16. For such reasons the Petitioner cannot be given reliefs as claimed. Before parting however, we do expect Respondent Nos. 1 to 4 to note above portions emphasized from Para 8 of the Judgment in the matter of Baij Nath Sharma as they are liable to give timely promotions to employees. The Writ Petition is dismissed. Rule is discharged.