(2013) 04 KAR CK 0092

In the Karnataka High Court

Case No : Writ Petition No''s. 7994 to 8003 of 2010 connected with Writ Petition No. 118999 to 11902 of 2010

Yoganand H.G. and Others — APPELLANT

Vs

State of Karnataka and Others — RESPONDENT

Date of Decision : 26-04-2013

Acts Referred:
Karnataka Civil Services Rules, 1958 — Rule 32

Citation : (2013) 76 KarLJ 407 : (2013) 4 KarLJ 201

Hon'ble Judges : N. Kumar, J;B. Manohar, J

Bench : Division Bench

Advocate : M.R. Naik, along with B.B. Bajentri and Vijay Kumar, N.R. Ravikumar and Ganesh, for the Appellant; S. Susheela, Additional Government Advocate, Sri S.M. Babu and P.S. Rajagopal Associates, for the Respondent

Final Decision : Allowed

Judgement

N. Kumar, J.—As a common question of law is involved in all these writ petitions, they are taken up for consideration together and disposed of by this common order. The 1st respondent-State of Karnataka issued a notification dated 3-11-1997 to fill up 33 posts of Commercial Tax Officers (CTOs) and 25 posts of Assistant Commissioner of Commercial Taxes (ACCTs). Accordingly, the Karnataka Public Service Commission issued a notification on 9-3-1998 calling applications from eligible candidates. The KPSC after completing the selection process published a provisional selection list of candidates on 28-9-2001. After publication of the said list, some of the candidates, who had taken the examination filed application before the Tribunal alleging certain irregularities in the valuation of answer scripts and prayed for a direction to the KPSC to revalue the answer scripts. The said application was allowed. The same was challenged before this Court. This Court also directed random review of answer scripts. The same was challenged before the Apex Court. The Apex Court upheld the order of the High Court. It is after all these process the final selected list was published on 28-2-2006 and the same was forwarded to the Government for issue of appointment orders.

2. During the pendency of this litigation, the 3rd respondent-Commissioner of Commercial Taxes filled up 252 posts of CTOs and 117 posts of ACCTs available under the quota of direct recruits by promotion from the cadre of Commercial Tax Inspectors and Commercial Tax Officers respectively, by placing them in charge under Rule 32 of the Karnataka Civil Services Rules, 1958. Subsequently, on. A representation made by these persons, the 2nd respondent-Principal Secretary, Department of Personnel and Administrative Reforms issued a notification on 6-5-2002, to freeze 252 and 117 direct recruitment vacancies of CTOs and ACCTs in favour of the promotee CTOs and ACCTs, without noticing that by notification dated 9-3-1998, the selection process has already been initiated for 33 posts of direct recruitment vacancies of Commercial Tax Officers and 25 posts of ACCTs. After issue of the appointment order on 28-2-2006 in pursuance of notification dated 9-3-1998, the 1st respondent noticed that there were no direct recruitment quota at all. Therefore, these direct recruitees were posted as ''trainee reserve'' by creating temporary posts, contrary to Recruitment Rules. On a representation by these direct recruitees, realizing the illegality committed by issuing notification dated 6-5-2002 freezing 252 and 117 posts of direct recruitment vacancies in the cadre of CTOs and ACCTs, a draft notification dated 25-8-2009 was issued proposing to defreeze, and invited objections. Objections/suggestions were filed by the petitioners. When no action was taken inspite of the lapse of sufficient time, the direct recruitees approached the Karnataka Administrative Tribunal seeking a writ of mandamus to determine their ranking in the cadre of CTOs and ACCTs and to finalise the seniority list.

3. The respondents filed statement of objections contending that they would consider and publish the seniority list pertaining to the cadre of Assistant Commissioner of Commercial Taxes as on 31-12-2009 and that after duly considering the same, would publish a final seniority list within a period of three months. They contended that these direct recruitees having entered into the cadre only on 26-4-2006, it makes no difference regarding freezing and defreezing of the vacancies prior to their appointment and therefore, direct recruitees cannot claim appointment from the date of vacancies in the concerned quota before their selection. They are entitled to seniority only from the date of entry into service and not from any anterior date. The Tribunal, on consideration of the rival contentions held that when the respondents have stated in their reply statement that they would publish a provisional seniority list pertaining to the cadre of CTOs as on 31-12-2009 inviting objections from the concerned and after duly considering the same, the final seniority list of CTOs would be published within a period of three months. Thereafter review of promotions will be undertaken. It would not be proper to go into the merits or demerits of the contentions of either parties in these applications. Further it was observed that such a direction cannot be issued only in respect of one or two cadres in the Department. Thereafter, proceeded to issue a direction to the respondent to finalise the seniority list pertaining to all the cadres in the Department of

Commercial Taxes within a reasonable time. The Tribunal referred to the various judgments of the Apex Court in order to consider the validity of freezing or defreezing policy but declined to express any opinion. But it set out its judgment rendered in Application No. 5230 of 2007 and connected cases in case of R. Thimmareddy and Others v. State and Others, decided on 7-1-2010 and also extracted the judgments of the Apex Court and held that reiterating the aforesaid views in this case shall not be construed as expression of their opinion on the aspect of defreezing and direct recruitment vacancies in this case. Further the Tribunal held the applicants had no locus standi to question the freezing of direct recruitment vacancies. They observed in the above referred two cases they have already held that the applicants had no locus standi to question the freezing of direct recruitment vacancies as the applicants therein had entered service subsequent to the freezing of direct recruitment vacancies. It further observed that the respondents in this case shall bear in mind the aforesaid views of the Tribunal while finalising the notification dated 28-5-2009 relating to freezing of certain direct recruitment vacancies in the cadre of Assistant Commissioner of Tax, keeping in view the rival contentions of promotees and direct recruitees. Thus, the Tribunal did not pronounce upon the contentious issue and disposed of the matter in the aforesaid manner. It is against the said order these writ petitions are filed.

4. The learned Senior Counsel appearing for the petitioners assailing the impugned order contended that admittedly the direct recruitees applied for appointment as CTOs and ACCTs in pursuance of the notification issued by the Karnataka Public Service Commission on 9-3-1998. Examination was conducted. A provisional list was announced in which their name finds a place. Thereafter litigation commenced. Ultimately, it ended in the Apex Court. It is thereafter they have been appointed to the said post on 26-4-2006. The freezing is done by virtue of an order dated 6-5-2002. That freezing includes the posts, which were notified in the notification dated 9-3-1998 to which they were selected. It is by virtue of pendency of litigation before this Court and Supreme Court, the promotees were placed in charge of the said post under Rule 32 of the KCSR. After freezing, their services have been regularised by issuing notification dated 13-10-2003 and 29-4-2004. On the day these direct recruitees were given appointment, there were no vacant posts available. Therefore, they created temporary posts of ''trainee reserve'' and thereafter, they have been placed in the regular post. Therefore, this Act of freezing has deprived the direct recruitees of their valuable right to the said post. Therefore, it cannot be said that they have no locus standi to challenge the same. Once the Government realised the blunder they had committed, they have issued a notification dated 2-8-2009 for defreezing. Objections were filed. When no further action was taken, the petitioners herein were the affected persons and therefore they have approached the Tribunal. Therefore, it cannot be said that they have no locus standi. He further submits that from the aforesaid facts, it is clear these promotees were appointed in the posts which are earmarked for direct recruitees. In the absence

of direct recruitment vacancies, they were placed temporarily in charge of the said post. They could never be appointed in the said post on a regular basis. Therefore, once the direct recruitees are appointed, in view of the law declared by the Apex Court, the effect of such appointment is, the promotees would be displaced and even if they are to be absorbed in the service, their ranking should be below the direct recruitees. Therefore, he submits that seen from any angle, the action of the respondents is illegal and the petitioners are entitled to the relief sought for.

5. The learned Government Advocate, supporting the order contends that these direct recruitees were born in the cadre only on 26-4-2006 and therefore, they have no right to challenge the order of the Government placing these promotees under Rule 32 of the KCSR or the order of freezing. Now they are in the process of finalizing the defreezing and accordingly, the seniority list will be prepared and therefore no case for interference is made out.

6. Therefore, the short question that arises for consideration in these proceedings is:

Whether the direct recruitees are to be placed above these promotees, who were placed in charge under Rule 32 of the KCSR and subsequently regularized or below them in the seniority list?

The law on the point is well-settled. The Apex Court in the case of A.N. Sehgal and others Vs. Raje Ram Sheoram and others, following the judgment of the Apex Court in the case of V.B. Badami and Others Vs. State of Mysore and Others, dealing with the problem arising out of quota rule of the promotees observed as under:

In working out the quota rule, these principles are generally followed. First, where rules prescribe quota between direct recruits and promotees, confirmation or substantive appointment can only be in respect of clear vacancies in the permanent strength of the cadre. Second, confirmed persons are senior to those who are officiating. Third, as between persons appointed in officiating capacity, seniority is to be counted on the length of continuous service. Fourth, direct recruitment is possible only by competitive examination which is prescribed procedure under the rules. In promotional vacancies, the promotion is either by selection or on the principle of seniority-cum-merit. A promotion could be made in respect of a temporary post or for a specified period but a direct recruitment has generally to be made only in respect of clear permanent vacancy either existing or anticipated to arise at or about the period of probation is expected to be completed. Fifth, if promotions are made to vacancies in excess of the promotional quota, the promotions may not be totally illegal but would be irregular. The promotees cannot claim any right to hold the promotional posts unless the vacancies fall within their quota. If the promotees occupy any vacancies which are within the quota of direct recruits, when direct recruitment takes place, the direct recruits will occupy vacancies within their quota.

Promotees who were occupying the vacancies within the quota of direct recruits will either be reverted or they will be absorbed in the vacancies within their quota in the facts and circumstances of a case.

7. This Court in the case of S. Rangaswamy Naik and Another v. B.R. Ravikanthe Gowda and Others, W.P. Nos. 26731 to 26742 of 2009 and connected matters, decided on 19-4-2013, has held as under:

47. Where the quota rule has broken down and the appointments are made from one source in excess of the quota, but are made following the procedure prescribed by the Rules for the appointment, the promotees should not be pushed down below the direct recruitees from the other service inducted in the service at a later date. However, in order to do justice to the promotees, it would not be proper to do injustice to the direct recruitees. Excess promotees occupying direct recruitment posts have to be pushed down and adjusted in later vacancies within their quota after due regularisation. The result of pushing down the promotees appointed in excess of the quota may workout hardship, but it is unavoidable....

8. From the aforesaid judgment, it is clear that when the statute provides for filling up of vacancies by promotion as well as by direct recruitment on 50-50 ratio, the vacancies have to be filled up strictly according to the Rules. It is settled law that prescription of quota for different posts is Constitutionally valid. If promotions are made to vacancies in excess of the promotional quota, the promotions may not be totally illegal but would be irregular. The promotees cannot claim any right to hold the promotional posts unless the vacancies fall within their quota. If the promotees occupy any vacancies, which are within the quota of direct recruits, when direct recruitment takes place, the direct recruits will occupy the vacancies within their quota. Promotees who were occupying the vacancies within the quota of direct recruits will either be reverted or they will be absorbed in the vacancies within their quota. When a promotee is placed in charge or promoted temporarily to the post to be occupied by the direct recruitee, he is not born in the said cadre because when once a direct recruitee is placed in the said post, he has to make way for direct recruitment. The Karnataka Commercial Tax Department (Recruitment) Rules, 1990 provides the method of recruitment to the post of Commercial Tax Officer. It provides that a 50% of Direct Recruitment in accordance with the Karnataka Recruitment of Gazetted Probationers (Appointment by Competitive Examinations) (Special Provisions) Rules, 1992 and 50% by the promotion from the cadre of Assistant Tax Officer. Therefore, the quota is fixed by a statute. Therefore, the promotees shall not exceed 50% of the posts in the service. The 50% earmarked for direct recruitees cannot be filled up by promotion. But in practice, when recruitees are not available, as the work should not suffer, the promotees are placed in charge of the said posts, who are eligible to occupy the said post. The promotees shall give place to direct recruitees if and when direct recruitees are recruited. Once a notification issued by the KPSC inviting applications for direct recruitment,

examination is conducted and provisional list is announced, because of the litigation, if those persons selected are not appointed, the Government cannot issue an order freezing those vacancies. It would be contrary to the statute, No such power is conferred on the Government. Promotion outside the quota, seniority would be reckoned from the date of the vacancy within the quota rendering the previous service fortuitous. The previous promotion would be regular only from the date of the vacancy within the quota and seniority shall be counted from that date and not from the date of his earlier promotion or subsequent confirmation. Excess promotees occupying direct recruitment posts have to be pushed down and adjusted in later vacancies within their quota or quota meant for direct recruitees, which was made available to them by freezing the said quote after due regularisation. Such service outside promotee quota cannot count for seniority. Any part of ad hoc/or stop gap or even regular service rendered while occupying the direct recruitment quota cannot be counted. If no steps are taken to recruit or candidates are not available and vacancies are continued, it affects the public interest. May be in such circumstances, Government may freeze those vacancies and transfer them to be filled up by the promotees. The contention that the Government has absolute power to abolish posts, freeze and transfer, is without any substance in the facts of this case. The contention that these direct recruitees were not born in the cadre on the day these promotees were placed in charge under Rule 32 of the KCSR or on the date of freezing has no substance. The petitioners are the persons affected and they have locus standi to challenge all these illegal acts including the act of freezing the post. The Tribunal has not applied its mind to the facts of this case, though they have referred to various judgments and declined to pronounce on merits of the case. The Tribunal relied on an earlier judgment rendered by it, the effects of which is not clear and directed the Government to consider these de-freezing in the light of the said judgment without issuing any direction. The approach of the Tribunal is far from satisfactory and the impugned order cannot be sustained. Whatever action the Government has taken during the pendency of the application before the Tribunal and the writ petitions before this Court has to be subjected to the final outcome of the writ petitions. Therefore, when the petitioners succeed in the writ petition, all those actions are set at naught and hereby quashed. Hence, we pass the following order:

(a) The authority shall take immediate steps in furtherance of the proposed notification issued for defreezing and prepare a seniority list expeditiously within 30 days from today.

(b) Notwithstanding the defreezing insofar as the seniority of these petitioners are concerned, it shall be decided in the light of the law declared by the Apex Court referred to supra. In other words the promotees, who are placed in charge under Rule 32 of the KCSR and who are regularised in service in the posts earmarked for direct recruitees subsequently by freezing, shall be placed below these petitioners/the direct recruitees in the seniority list.

(c) The entire exercise shall be done within six months from the date of receipt of a copy of this order.

(d) Petitions are allowed.