

D.P. Ghosal and ors. Vs. Union of India (Uoi) and ors.

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Court : Central Administrative Tribunal CAT Kolkata

Decided On : Feb-28-2006

Reported in : (2006)(92)SLJ327CAT

Judge : S a B.N., B Rao

Appellant : D.P. Ghosal and ors.

Respondent : Union of India (Uoi) and ors.

Judgement :

1. 7 (seven) applicants, who are working as O/S Grade I in the Office of CCM/Claims, S.E. Railway, Calcutta, have jointly filed this application challenging the selection process initiated by the respondents for filling up ten newly created posts of Chief Office Superintendent.

2. The applicants belong to unreserved community and at the relevant time they were working as O/S Grade I under the respondents. By a Railway Board letter dated 10.5.98 by way of restructuring, 10 posts of Chief Office Superintendent in scale of Rs. 7450-11500 have been created in Claims Section of CCS Office of S.E. Railway, Calcutta with effect from 10.5.98. The applicants were hopeful to get promotions in the aforesaid higher posts, but to their utter dismay they found that the respondent authorities have called ten persons, who are private respondents in this OA, (all of whom belong to reserved category), in the selection process. The applicants contend that without disclosing the break-up of the vacancies and without calling the applicants, who were seniormost General Category Candidates,

the respondent authorities wanted to fill up all the ten posts by ten reserved category candidates. According to the applicants, all these ten reserved category candidates got accelerated promotions in preference to the General Category Candidates and thereby they have acquired unintended seniority over them in the grade of O/S Grade I although in the basic grade the applicants were senior. The applicants further contend that in terms of the decision of the Hon'ble Apex Court in the case of R.K.Sabharwal and Ors. v. Union of India and Ors. 1995 (1) ATJ 410 : 1995 (3) SLJ 227 (SC) followed by the decision in Union of India v. Virpal Singh Chauhan 1995 (31) ATC 813 : 1996 (1) SLJ 65 (SC) and Ajit Singh Januja and Ors. and finally in Ajit Singh and Ors.

(II) v. State of Punjab and Ors. , the served category candidates, who got accelerated promotions, would not get seniority over the General Category candidates, who were seniors in the basic grade, but were promoted subsequent to the promotion of reserved category candidates because of operation of reservation roster. In other words, even though the reserve category candidates may get promotion by operation of reservation rules earlier in preference to general category candidates, they would not become seniors. The general category candidates would regain their seniority after being promoted afterwards to the concerned grade. The applicants, therefore, claim that the respondent authorities should be asked to prepare two seniority lists - one for Reserved Category candidates and the other for General Category candidates and to give promotions as per reservation quota.

3. The respondent authorities have contested the application. According to them, the post is selection post but as per Railway Board's directive, selection is to be made on the basis of revised norms, i.e.

by consideration of ACRs. dossiers only and accordingly ten seniormost O/S Grade I were called for selection. Incidentally, all these ten persons belong to reserved category. Since they are seniors and the applicants herein are all juniors to them the applicants could not be considered overlooking the senior candidates. They have referred to the latest Railway Board's Order vide RBE No. 33/02 dated 8.3.2002 whereby the earlier circulars of the Railway Board dated 28.2.97 and

15.5.98 were revised consequent on 85th Amendment of the Constitution amending Article 16(4A) with effect from 17.6.95. By this circular the reserved category candidates even though got accelerated promotion, would also be entitled to get consequential seniority. That means grade seniority will be counted and not the basic seniority. The respondents therefore contend that since senior persons cannot be superseded, therefore they were called even against unreserved vacancies and hence there was no illegality committed by them and the OA deserves to be dismissed.

4. An interim order was passed by the Tribunal restraining the respondents from proceeding further with the selection process. The respondents have filed MA 426/2005 praying for vacation of the interim order. Both the OA and MA are being considered together.

5. We have heard the learned Counsel for the parties. Mr. B.C. Sinha, learned Counsel appearing for the applicants has contended that the applicants are all General Category candidates and they were senior in the basic grade, vis-a-vis the private respondents. When ten new higher posts were created, the respondents should have called the senior General Category candidates against unreserved vacancies. But instead, the respondents have called all reserved category candidates to fill up ten higher posts thereby the interest of the General Category candidates has been affected. Moreover, if all the ten reserved category candidates are promoted as Chief O/S against ten posts, there will be cent percent reservation which will be unconstitutional. He has placed reliance on a decision of this Tribunal in OA 1289/2002 Subrata Sarkar v. Union of India and Ors.

6. Learned Counsel for the official respondents, on the other hand, has contended that since this is a selection post and in view of the latest circular of the Railway Board based on the 85th Constitution Amendment, the applicants being junior cannot be considered against these promotional posts and senior persons have been called and as such there is no irregularity. Mr. P.C. Das, the learned Counsel appearing for the private respondents has adopted the arguments of the learned Counsel for the official respondents.

7. We have carefully considered the rival contentions. The undisputed fact is that ten posts of Chief O/S have been created by way of restructuring with effect from 10.5.98, Respondents have mentioned in their reply that out of these 10 posts, 8 are unreserved while 1 post each is reserved for SC and ST. The respondents have stated that according to seniority list, first two ST/SC persons, viz. Shri Hamarai Mandi (ST) and Shri Upendra Nath Mondal (SC) have been called against two reserved vacancies. The applicants who are General Category Candidates as per seniority list are at much below position. Therefore, they could not be called whereas all the senior persons in order of seniority were called. The position of the applicants in the seniority list starts from Sl. No. 13 onwards, whereas the Sl. No. 1 to 12 are all reserved category candidates. The position therefore emerges that out of 10 posts, though 8 are unreserved and 1 each is reserved for SC and ST, 10 reserved category candidates according to seniority have been called ignoring the general category candidates on the ground that their positions were below in the list, thereby the reservation roster has been given a go-by.

8. From the seniority list annexed we find that Sl. Nos. 1 to 8 belong to ST community and 9 to 12 belong to SC community out of 23 persons included in the seniority list of Grade-I OS as on 1.11.2000. This Seniority list was prepared in compliance with Estt. Sl. No. 46/97 and 174/99. The total cadre strength is 32. Out of which 25 are unreserved, 7 SC and 2 ST (sic). But surprisingly there are 11 ST candidates and 4 SC candidates out of 23 persons in position against 32 sanctioned, strength. Therefore, it is quite clear that although the quota for ST was 2, there was such excess ST candidates in the cadre, whereas quota for unreserved category though fixed was 25, but only 8 general category employees are holding the post at the relevant point of time.

There was therefore shortfall of general category candidates, but excess of ST category candidates. It is not the case of the respondents that all these ST category candidates or SC candidates were promoted to the grade earlier than general category candidates, on the basis of their merit and therefore they should be treated as general category and not reserved category candidates. Had this been so, there would be no, difficulty in calling all these reserved category

candidates against 8 unreserved posts of Chief O.S. having been treated as general category candidates.

9. The controversy relating to fixation of seniority between general category, vis-a-vis reserved category candidates has been the subject matter of litigation before the various Benches of Tribunal and High Court. The matter was finally settled by Hon'ble Apex Court by a Constitution Bench decision in the case of R.K. Sabharwal and Ors. v. State of Punjab and Others (1) The object of reservation is to provide adequate representation to the Scheduled Castes/Tribes and Backward Classes in services and as such any mechanism provided to achieve that end must have nexus to the object sought to be achieved. The precise argument is that for working out the percentage of reservation the promotees/appointees belonging to the Scheduled Castes and Backward Classes whether appointed against the general category posts or against the reserve posts are to be counted. In other words if more than 14% of the Scheduled Caste candidates are appointed/promoted in a cadre on their own merit/seniority by competing with the general candidates then the purpose of reservation in the said cadre having been achieved, the Government instructions providing reservations would become inoperative.

(2) Once the posts earmarked for the Scheduled Castes/Tribes and Backward Classes on the roster are filled the reservation is complete. Roster cannot operate any further and it should be stopped. Any post falling vacant, in a cadre thereafter, is to be filled from the category - reserve or general - due to retirement etc. of whose member the post fell vacant. Ajit Singh Januja and Ors. v. State of Punjab and others As such it will be only rational, just and proper to hold that when the general category candidate is promoted later from the lower grade to the higher grade, he will be considered senior to a candidate belonging to the Scheduled Caste/Tribe who had been given accelerated promotion against the post reserved for him. Whenever a question arises for filling up a post reserved for Scheduled Caste/Tribe candidate in a still higher grade then such candidate belonging to Scheduled Caste/Tribe shall be promoted first but when the consideration is in respect of promotion against the general category post in a still higher grade then the general category candidate who has been promoted later shall be considered

senior and his case shall be considered first for promotion applying either principle of seniority-cum-merit or merit-cum-seniority. If this rule and procedure is not applied then result will be that majority of the posts in the higher grade shall be held at one stage by persons who have not only entered service on the basis of reservation and roster but have excluded the general category candidates from being promoted to the posts reserved for general category candidates merely on the ground of their initial accelerated promotions. This will not be consistent with the requirement or the spirit of Article 16(4) or Article 335 of the Constitution.

11. But the dispute did not end there. There was another decision of the Apex Court in the case of Jagdish Lal v. State of Haryana AIR 1997 SC 266 : 1997 (3) SLJ 162 (SC) which was against the general category candidates. In that case it was held that once the reserved category candidate enters into a particular grade even on accelerated basis, he will be entitled to seniority in that grade from the date of entry and not with reference to basic grade. *Ajit Singh II v. State of Punjab* (supra), the Apex Court gave the following further clarifications: We therefore, hold that the roster-point promotees (reserved category) cannot count their seniority in the promoted category from the date of their continuous officiation in the promoted post, vis-a-vis the general candidates who were senior to them in the lower category and who were later promoted. On the other hand, the senior general candidate at the lower level, if he reaches the promotional level later but before the further promotion of the reserved candidate - he will have to be treated as senior, at the promotional level, to the reserved candidate even if the reserved candidate was earlier promoted to that level. We shall explain this further Point 3. We also hold that *Virpal* 1995 (6) SCC 684, and *Ajit Singh* 1996 (2) SCC 715, have been correctly decided and that *Jagdish Lal* is not correctly decided. Points 1 and 2 are decided accordingly.

13. Accordingly, Government implemented the decision of the Apex Court by granting seniority to the general category candidates even though they were promoted subsequent to the reserved category candidates who had been promoted earlier by the operation of reservation roster.

14. This position was sought to be negated by the 85th amendment of the Constitution wherein promotional benefits were also given to the reserved category candidates setting at nought the nine Judge Bench decision in Indra Sawhney's case AIR 1993 SC 477, which held that reservation rule will not apply in the matter of promotion. However, 5 years time limit was given to settle the matter. Based on this amendment the Railway Board issued a circular dated 8.3.02 by deleting the revised para of 319(A) of Indian Railway Establishment Manual Vol.

1,1989 and it was decided that SC/ST Railway Servants shall on their promotion by virtue of rule of reservation/roster, be entitled to consequential seniority also with effect from 17.6.95 in supersession of the decision of Supreme Court in Virpal Singh Chauhan & Ajit Singh Januja's case (supra).

15. It appears that Railway Board also issued a circular on 7.8.02 based on DOPT circular dated 11.7.02 wherein in para 2 it was stated that if an unreserved vacancy arises in a cadre and there is any SC/ST candidates within the normal zone of consideration in the feeder grade, such SC/ST candidate cannot be denied promotion on the plea that the post is not reserved. Such a candidate will be considered for promotion along with other candidates treating him as if he belongs to general category.

16. Apparently relying on this principle, in the case before us all the reserved category candidates, who were senior in the cadre of OS Grade I, were called for consideration for promotion. Unfortunately, none of the applicants, who are general category candidates, came within the first 10 persons in the seniority list and therefore they were not called. If there are 8 unreserved vacancies and if no general category candidate is called and all the 10 (8+2) vacancies are to be filled by reserved category candidates only because they are senior in the feeder grade, it will create an absurd proposition as the reservation roster will become redundant. Reservation has been introduced to give protection to the reserved category candidates so that they may also get promotional avenue out of turn but within their quota. The quota for SC/ST or OBC has been fixed by the Government at certain prescribed percentage. Nowhere Government has modified this

percentage and therefore reserve category candidates can aspire promotion to the next higher grade only against their quota, but there is also an exception where a reserved category candidate is promoted to the next higher grade on the basis of merit by competing with other general category candidates. In that event he will be treated as general category candidate and not a reserved category candidate. In such a case a reserved category candidate will surely get a chance for further promotion on the basis of seniority treating him as if he is a general category candidate.

17. In the instant case neither the official respondents, nor the private respondents who are reserved category candidate, have claimed that they were promoted to the post of O.S. Grade I on the basis of their own merit and therefore they should be treated as general category candidate to get further promotion if they come within the zone of consideration, irrespective of the fact whether the post is reserved or unreserved.

18. Moreover it is the settled law that reservation cannot exceed 50% of the strength of a cadre. By calling 10 reserved category candidates against 10 sanctioned posts there will be cent percent promotions which is also against the law.

19. In this context a decision of this Tribunal Subrata Sarkar. Union of India and Others (supra) may refer wherein similar points were considered and it was held as follows: 15. In view of the above position, we are of the opinion that the respondents have acted wrongly by calling reserved category candidates to the suitability test beyond their quota when admittedly they cannot be treated as general category candidates as they did not come on promotion to the feeder grade on their own merit. We, however, do not make any comment about the selection of Sri Banra as he is not a party before us.

16. For the reasons stated above, we dispose of this application with a direction to the respondents to adhere to the 50% limit of reservation as per law and fill up the vacant post of OS Gr.I as per rules subject to the interim order granted by the Hon'ble Supreme Court referred to above. No costs.

20. It will be profitable to refer to the decision of Apex Court in the case of E.A. Sathyanesan v. V.K. Agnihotri 2004 AIR SCW 4247, decided on 18.12.2003. The Apex Court referred to a Full Bench decision of Punjab and Haryana High Court in the case of Jaswant Singh v. Secy. to Govt. of Punjab, 1990 Lab IC 559, and observed that in Ajit Singh Januja's case this decision was considered and it was held as follows: According to us, the Full Bench was not justified in saying in the case of Jaswant Singh v. Secy. to Govt. of Punjab that non-consideration of Scheduled Caste candidates against general category posts on the basis of their prior promotion will be hit by Articles 14, 15 and 16 of the Constitution. That view shall be deemed to be against the pronouncement of this Court by the nine-Judge Bench in the case of Indra Sawhney as well as the view expressed by the Constitution Bench in the case of R.K. Sabharwal.

Accordingly, the appeals are allowed and that part of the judgment of the Full Bench in the case of Jaswant Singh v. Secy. to Govt. of Punjab is reversed.

21. Therefore, the question of consideration of reserve category candidates against general category posts was already addressed by the Apex Court and it was held that the view was against the pronouncement of the Apex Court in Indra Sawhney's case AIR 1993 SC 477 as also in R.K. Sabharwal's case.

22. We may now refer to the Railway Board's Circular dated 21.11.02 which was issued after the interim order granted by the Apex Court on 11.11.02 in the cases challenging the 85th Constitution Amendment by All India Equality Forum (since pending). The Apex Court neither stayed the Constitutional amendment nor the earlier law declared by it in the aforesaid decisions quoted above. However, it only clarified that the interim order will apply to the number of vacancies available in a cadre to give effect to the promotional policy.

23. Coming to the present case we have already seen that by calling 10 reserved category candidates against 10 posts there will be no representation of general category candidates, although 8 posts are unreserved. In support of the action of the respondents the seniority list has been placed on record. We have already considered the seniority list in the foregoing paragraphs. Now for argument's sake, if the situation is reversed, the situation would not have been the same.

For example, if there were 10 unreserved category candidates in the seniority list, i.e. from Sl. No. 1 to 10, certainly all the 10 candidates would not have been promoted and their promotions would have been restricted to 8 unreserved vacancies only. In order to fill up the reserved vacancies the zone of consideration would have gone down till suitable reserved category candidates are available below Sl No. 10.

Since the quota for reserved category candidate has been fixed to only 2 posts, they cannot get more than their share unless they have occupied the seniority position on their merit and not by dint of operation of reservation rule. That is not the case of either party here and accordingly we hold that the action of the official respondents to call 10 reserved category candidates according to seniority beyond their quota is unjustified. Similarly promotion in excess of 50% of the cadre strength in favour of reserved category candidates is also illegal and bad in law. Therefore, the respondents should conduct the selection by calling appropriate number of general category and reserve category candidates according to the quota keeping in view the legal position that the reservation should not exceed 50% of the cadre strength.

24. The Railway Board's letter dated 7.8.2002 which was issued on the basis of DOPT OM dated 11.7.2002 inter alia stated that if an unreserved vacancy arises in a cadre and there is any SC/ST candidate within the normal zone of consideration in the feeder grade, such SC/ST candidate cannot be denied promotion on the plea that the post is not reserved. Such a candidate will be considered for promotion along with other candidates treating him as if he belongs to general category. In case he is selected he will be appointed to the post and will be adjusted against the unreserved point. We have already referred to this circular. However, we find that this circular relates to reserve category candidates promoted on their own merit. We have also indicated that in the present case the respondents have not mentioned that the private respondents were promoted to the post of O.S. Grade I on their own merit. Furthermore, in a recent clarification issued by DOPT dated 31.1.2005 in respect of the earlier OM dated 11.7.2002 it has been clarified that the above OM dated 11.7.2002 will not be applicable in case of promotions made on non selection basis. In the instant case although the

post of Chief O.S. has been classified as selection post, but the respondents have stated that the selection has to be made on modified method and that is why only 10 candidates according to seniority against 10 posts have been called and selection will be made on the basis of ACR. In other words, promotion will be made on non selection post basis. Therefore, the aforesaid OM dated 11.7.2002 corresponding to Railway Board's circular dated 7.8.02 would not apply and reserved category candidates cannot be considered against unreserved vacancies treating them as general category candidates.

25. Accordingly, we dispose of this OA with a direction to the respondent authorities to adhere to the 50% limit as per law and fill up the vacancies of Chief O.S. as per rules and quota as clarified in R.K. Sabharwal's case subject to the interim order granted by the Hon'ble Supreme Court. Since some of the applicants have retired in the meantime, their cases should also be considered notionally and if they are selected they should also be given promotion and they will also be entitled to get consequential higher pensionary benefits based on revised notional pay fixation. Such exercise be completed by the respondents within three months from the date of communication of the order. The interim order stands vacated.

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