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Court : Central Administrative Tribunal CAT Hyderabad

Decided On : Jul-02-2009

Judge : The Honourable Mrs. Bharati Ray Member (Judl.) &Amp; the Honourable Mr. Hriday Narain Member (Admn.)

Appeal No. : O.A. 271 of 2008

Appellant : K. Sankarudu

Respondent : The General Manager, South Central Railway and Another

Advocate for Def. : Mr. N.R. Devaraj

Advocate for Pet/Ap. : Counsel for the Applicant : M.V. Krishna Mohan. Counsel for the respondents : N.R. Devaraj.

Judgement :

Mrs. Bharati Ray, Member (J)

This application has been filed by the applicant seeking for the following relief :

To call for the records pertaining to the Panel No. 274 DT. 4-01.2008, and consequently set aside the letter No. P/Gaz/148/W.P./26008/05/ KS dated 9-04-2008 after declaring the same as arbitrary, illegal and unjust and consequently direct the respondents to empanel the applicant for promotion to the post of Assistant Engineer in pursuance of the above said selection.

2. It is the case of the applicant that he was initially appointed as Tracer in Guntakal division and was promoted to the post of Sr. Draftsman, Design Assistant and Section Engineer (Designs). He was further promoted to the post of Sr. Section Engineer (Construction) in the office of the Chief Administrative Officer, South Central Railway, Secunderabad on 18th June, 2003. In order to fill up 24 vacancies (07 SC; 04ST; 13UR) of Assistant Engineers in Civil Engineering Department in scale Rs. 7500-250-12000 against 70% Departmental Selection of Group 'B' Selection was conducted in the year 2007. A notification calling for the willingness from the eligible employees to appear for the selection was issued on 05.03.2007. It is contended by the applicant that as per Recruitment Rules pertaining to the post of Assistant Engineers in the Civil Engineering Department, the selection consists of written test and viva-voce 30% of the said posts are filled by direct recruitment. Written examination was held on 21.06.2007 and supplementary examination was held on 31.07.2007. Results of the said examination was announced by letter dated 6.08.2007 publishing the names of the candidates who have qualified in the said written examination. It is the contention of the applicant that among 27 candidates qualified in the written examination the applicant was shown at Sl. No. 4. Viva-voce test was held on 24.12.2007.

3. It is the grievance of the applicant that although he fared well in viva-voce he could not find place in the panel prepared by the respondents for promotion to the post of AENs vide letter dated 4.01.2008. It is also the contention of the applicant that he got highest marks in the written examination. It is further stated by the applicant that without any reason the respondents have kept two posts of unreserved category unfilled. When the applicant has secured highest marks he could be accommodated in one of the unfilled vacancy. Applicant submitted representation to the respondents ventilating his grievance but the same was not replied by the respondents. He therefore approached this Tribunal earlier in OA 40/2008 which was disposed of on 23.01.2008 with a direction to the respondents to consider the representation of the applicant and to pass appropriate orders in accordance with the law and communicate the same to the applicant within 20 days from the date of receipt of the order.

4. In pursuance to the order of the Tribunal the General Manager (P) South Central Railway vide its order dated 9.04.2008 informed the applicant that as he could not secure requisite qualifying marks i.e. 30 out of 50 under headings viva-voce and Record of Service put together, the selection committee did not recommend his name for empanelment. Copy of the order is enclosed at page 34 of the OA. Questioning the said order of General Manager(P) the applicant has approached this Tribunal seeking for the aforesaid relief.

5. Respondents have filed a counter reply to contest the OA. Respondents have not denied the contention of the applicant in regard to the notification issued on 05.03.2007 calling for the willingness from the eligible employees to appear for the selection and that they have conducted written test and supplementary test and viva-voce to fill up 24 vacancies of AEN in Civil Engineering Department against 70% quota. It is the case of the respondents that all the 27 employees were interviewed on 24.12.2007. The applicant was at Sr. No. 4 in the list of candidates who qualified in the written test and on finalisation of viva-voce the selection committee recommended the names of 15 employees who are fund suitable for empanelment. The General Manager approved the recommendations of the selection committee and accordingly the panel consisting of 15 names was published on 04.01.2008. So far as the case of the applicant is concerned, the respondents have stated in the counter reply that applicant has not secured requisite qualifying marks in viva-voce and record of service put together. Therefore he was not found fit by the selection committee. Had he secured requisite qualifying marks in viva-voce and record of service put together, his name would have been recommended by the selection committee for empanelment promotion as he is at serial number 04 in the seniority. According to the respondents as per the extant instructions the written examination is conducted for 150 marks. To qualify in the examination one has to secure minimum 90 marks and after qualifying in the written examination the candidate would be called for medical examination and later to viva-voce. It is, therefore, stated by the respondents that qualifying in the medical examination is pre-requisite for Group 'B' selection. In para-7 they have stated the marks allotted for viva- voce and record of service as under :

Viva-voce --- 25 marks

Record of Service --- 25 marks

Total --- 50 marks

6. It is stated by the respondents that since the applicant could not secure 30 marks out of 50 marks as mentioned above he was not found fit for promotion. Therefore the Selection Committee did not recommend his name.

7. A rejoinder has been filed by the applicant. Respondents have filed additional affidavit and applicant has filed additional rejoinder.

8. We have heard Mr. M.V. Krishna Mohan for the applicant and Mr. N.R. Devaraj learned counsel for the respondents and have gone through the pleadings and material papers available on record. We have also gone through the judgments relied upon by the learned counsel for both the parties.

9. Learned counsel for the respondents has drawn our attention to Annexure A-2 of the additional counter reply filed by the respondents to show paragraph 205 of Indian Railway Establishment Manual under which the procedure to be adopted by the Selection Board wad laid down, the relevant part of which is extracted herein below :

205. Procedure to be adopted by Selection Boards - Selection should be made primarily on the basis of overall merit, but for the guidance of Selection Boards the factors to be taken into account and their relative weight are laid down below :-

Factors Maximum Qualifying

Marks Marks

(a) (i) Professional ability ... 50 30

(ii) Record of Service ... 25 15

(iii) Personality, address,

leadership and academic/

technical qualification 25 15

Total ... 100 60

10. Mr. N.R. Devaraj, learned counsel for the respondents stated that the Ministry of Railways revised the Indian Railway Establishment Manual with a view to simplify and bring it up-to-date during May'90 (Revised Edition-1989). The paragraph 201 to 209 were recast and the Paragraph 205 of Indian Railway Establishment Manual 1968 was numbered as paragraph 204.1 (Selection Procedure) in the revised edition-1989. Paragraph 204.1 which deals with selection procedure, prescribed minimum 30 qualifying marks for professional ability out of the maximum 50 marks. Qualifying marks for viva-voce i.e. Personality, address, leadership and Academic and Technical qualifications is 15 out of 25 marks. In para-6 of the additional counter reply para 204.1 is extracted and the same is reproduced herein below :

204.1. Selection Procedure - The selection is based on a written test to adjudge the professional ability, viva-voce and assessment of record of service by the Selection Committee. The marks allotted and the qualifying marks under the different heads are as follows :-

Prescribed papers

Max. Marks

Qualifying Marks

Remarks

One paper on

Professional subject and Estt. and Finan- cial Rules

150

90

Out of 150 marks, the professional subject will carry atleast 100 marks

RECORD OF SERVICE and VIVA-VOCE

Max.Marks

Qualifying Marks

(i) Viva-voce

25

(ii)Record of service

25

30

(including atleast 15 marks in the record of service)

11. It is therefore contended by the learned counsel for the respondents that revised procedure issued in 1991 after reviewing the position from time to time, wherein the minimum qualifying marks for viva voce is no more in force, and the same is in line with the direction given by the Apex Court in the judgment relied by the applicant in this OA. In this context it is required to mention that applicant has relied upon the judgment of the Hon'ble Supreme Court in the case of K. Prabhakara Rao vs. Union of India and Ors. reported in AIR 2002 SC 205. The order of the Hon'ble Supreme Court is extracted herein below :

1. The appeal is directed against an order of the Central Administrative Tribunal, Madras. The appellant had applied for the post of Assistant Personnel Officer under the Railway Administration. He qualified in the written test, and was called for interview, but as he could not secure the minimum percentage of marks required in the viva-voce test, as per paragraph 205 of the Indian Railway Establishment Manual, he was not given the appointment. Two other persons, who had also applied for the same post along with the appellant, being unsuccessful in getting into the service, had approached the Central Administrative Tribunal,

Ernakulam Bench. The Ernakulam Bench of the Tribunal followed the earlier judgment of the said Tribunal in O.A. 389/1989 and allowed the OAs. In OA 389/1989, the Tribunal at Ernakulam bench came to the conclusion that the fixation of minimum percentage of marks for viva-voce test under paragraph 205 of the Indian Railway Establishment Manual cannot be sustained in law, and accordingly the same is illegal. Against the said judgment of the Ernakulam Bench of the Tribunal in O.A. 389/1989, the Union of India had approached this Court in Special Leave Petition, but that stood dismissed. The two other persons similarly placed as the appellant having approached the Tribunal at Ernakulam Bench, the same was registered as OA 149/1992 and OA 837/1991. Both these applications were allowed by order dated 13th April, 1992 and the Tribunal followed the earlier judgment of the Tribunal in OA 389/1989. Against the judgment of the Tribunal, Ernakulam Bench dated 30th April, 1992 the Railway Administration had approached this Court in Special Leave Petition, which appears to have been dismissed by this Court on merits, but notwithstanding the same, the Madras Bench of the Tribunal not having followed the said decision of the Ernakulam Bench of the Tribunal, and having dismissed the O.A., this appeal has been preferred.

2. The sole question that arises for consideration is whether the fixation of the minimum percentage of marks in the viva-voce test as per paragraph 205 of the Indian Railway Establishment Manual can be held to be in accordance with law or not. So far as this question is concerned, the two judgments of the Ernakulam Bench of the Tribunal have been upheld by this Court by dismissing the SLP filed by the Union of India. The appellant being similarly situated as the applicant in O.A. 149/1992 and O.A. 837/1991, and in fact, in the merit list having occupied higher position than them it would not be reasonable to deny the relief to him, which has been given to the applicant in OA 149/1992 and OA 837/1991. In that view of the matter, we set aside the impugned order of the Tribunal at Madras and direct that the case of the appellant be considered, as if there is no qualifying marks in the viva-voce test, as indicated in paragraph 205 of the Indian Railway Establishment Manual, Chapter 2. The decision of the Railway Administration be communicated to the appellant at an earlier date.

3. The appeal is accordingly allowed.

12. Learned counsel for the respondents has placed reliance on the judgment of the Apex Court in the case of Union of India and Another vs. N. Chandrasekharan and another decided on 29.01.1998 and reported in AIR 1998 SC 795. It is the contention of the learned counsel for the respondents that in the said judgment the Apex Court has inter-alia held that where selection is made on the basis of written as well as viva voce test, the final result is determined on the basis of the aggregate marks. If any minimum marks either in the written test or in viva voce test are fixed to determine the suitability of a candidate, the same has to be respected. He, therefore, submitted that in view of the above law laid down by the Apex Court there is nothing wrong in prescribing minimum marks. The learned counsel for the respondents further submitted that the judgment relied upon by the applicant is not in rem.

13. The learned counsel for the applicant, on the other hand, submitted that the judgment relied upon by the learned counsel for the respondents was passed by the Hon'ble Supreme court way back in 1998 whereas the judgment relied upon by the learned counsel for the applicant is passed in the year 2005. Moreover the same is directly on the issue involved in the case of the applicant. Therefore the same will apply in the case of the applicant. It is the contention of the learned counsel for the applicant that the Hon'ble Supreme Court in the case of K. Prabhakara Rao vs. UOI and Ors. followed its earlier decision whereby the decision of Ernakulam Bench of Tribunal in OA 389/1989 was upheld as can be seen from the order extracted in para-11 ibid i.e. 'fixation of minimum percentage of marks for viva-voce test under paragraph 205 of the Indian Railway Establishment Manual cannot be sustained in law and accordingly the same is illegal.' Learned counsel for the applicant therefore submitted that, that being the legal position, by prescribing qualifying marks 30 for viva-voce and record of service put together out of 50 marks wherein atleast 15 marks should be for record of service under Para 204.1 and without prescribing qualifying marks in total aggregate respondents have indirectly prescribed a minimum marks for viva-voce which is not in accordance with the decision of the Ernakulam Bench of the Tribunal which was upheld by the Hon'ble Supreme Court as mentioned above.

Therefore the selection made following the paragraph 204.1 is not in order. Therefore, the applicant who has secured highest marks in written examination than others who are found suitable and secured qualified marks in record of service and also got 60% in aggregate, cannot be declared unfit.

14. To decide this issue we have called for relevant record in regard to selection procedure and the same was produced by the learned counsel for the respondents on the date of final hearing. From the record we find that applicant Mr. K. Shankarudu secured 100.5 marks in written examination, 10 marks in viva voce and 16.50 in Record of Service and in total he has secured 127.0 but is found not suitable. There are two other candidates who have secured more marks than the applicant in written examination (at sr.no. 2 and 7, 128.6 and128.7 respectively in the list) and were found not fit. Out of those two, one was absent in viva-voce and other one could not secure 15 marks in record of service. We have also noted that persons who were found fit in the selection secured lesser marks than the applicant and other two candidates in the written examination.We have also noted that applicant got more than 60% marks in written examination and record of service and also in aggregate. Therefore, the question that falls for consideration is whether the respondents are justified in declaring the applicant unfit because he could not secure 30/50 marks in viva voce and record of service put together. The selection committee recommended selection of 14 candidates in the panel based on their performance in the written test, viva-voce and the CRs. However, the panel has been treated as provisional. In view of the above, there is no dispute that applicant has been found 'not suitable' because he has not secured 30 out of 50 marks in viva voce and record of service put together. Had there been prescription of 60% qualifying marks in written test and record of service separately and 60% in total aggregate, the applicant would have been found suitable. We,therefore, find force in the contention of the learned counsel for the applicant that indirectly minimum marks for viva-voce has been fixed under para 204.1 of IREM which is wrong and not in accordance with the decision of the Hon'ble Supreme Court (supra). We are also inclined to accept the contention of the learned counsel for the applicant that the decision of the Apex Court (K. Prabhakara Rao vs. Union of India and Ors.) relied upon by the learned counsel for the applicant is not only later judgment but also directly on the issue/ rule and

instructions involved in the case in hand.

15. In this context it is required to mention that a careful reading of judgment of the Apex Court relied upon by the applicant in the case of K. Prabhakara Rao Vs. UOI and Ors. as extracted above would show that the applicant before the Ernakulam Bench of the Tribunal applied for the post of Assistant Personnel Officer in the Railways and qualified in the written test but could not secure minimum 30% marks as per paragraph 205 of the Indian Railway Establishment Manual and was not given appointment. His application was allowed by the Ernakulam Bench following its earlier judgment in OA No. 389/1989 where the Ernakulam Bench held that the fixation of minimum percentage of marks for viva-voce test under paragraph 205 of the Indian Railway Establishment Manual cannot be sustained in law. Against the judgment of the Ernakulam Bench of the Tribunal the UOI approached the Apex Court in SLP which stood dismissed. Two other persons similarly placed approached the Tribunal at Ernakulam Bench through OA 149/1992 and OA 837/1991 which were allowed by the Tribunal following its earlier judgment in OA 389/1989. The matter was taken up by the railway administration to the Hon'ble Supreme Court and the SLP was dismissed on merits. However, when the case of K. Prabhakara Rao came up before the Madras Bench of the Tribunal the same was dismissed by the Madras Bench. The applicant before the Madras Bench approached the Hon'ble Supreme Court and the same was allowed with the following order:

"2. The sole question that arises for consideration is whether the fixation of the minimum percentage of marks in the viva-voce test as per paragraph 205 of the Indian Railway Establishment Manual can be held to be in accordance with law or not. So far as this question is concerned,the two judgments of the Ernakulam Bench of the Tribunal have been upheld by this Court by dismissing the SLP filed by the Union of India. The appellant being similarly situated as the applicant in O.A. 149/1992 and OA 837/1991, and in fact, in the merit list having occupied higher position than them it would not be reasonable to deny the relief to him, which has been given to the applicant in OA 149/1992 and OA 837/1991. In that view of the matter, we set aside the impugned order of the Tribunal at Madras and direct that the case of the appellant be considered, as if there is no qualifying

marks in the viva-voce test, as indicated in paragraph 205 of the Indian Railway Establishment Manual, Chapter 2. The decision of the Railway Administration be communicated to the appellant at an earlier date."

16. In view of the above, we are of the view that there is no reason to say that the judgment of the Ernakulam Bench of the Tribunal which has been upheld by the Hon'ble Supreme Court is not in rem. In fact, the case of the applicant herein is similar to the petitioner before the Apex Court in the case of K. Prabhakara Rao. vs UOI inasmuch as the applicant herein also secured higher marks in the written examination than the others who were found suitable. More over he secured more than 60% marks in written test, record of service and aggregate. Therefore, in all angles, application deserves to be allowed. The respondents shall take necessary steps to review para 204.1 in view of the judgment of the Hon'ble Supreme court in the case of K. Prabhakara Rao vs. UOI and Ors. and take necessary steps without further delay.

17. The 2nd part of the impugned order dated 09.04.2008 issued by the General Manager(P) is hereby quashed and set aside. The respondents are directed to include the name of the applicant in the appropriate place in the panel published on 04-01-2008 and grant promotion to the applicant to the post of Assistant Engineer with effect from the date the first person who is in the top of the panel joined the post and grant all consequential benefits. The respondents shall fix his pay and pension accordingly as per rule and pay the arrears. Respondents shall complete the entire exercise within a period of three months from the date of receipt of a copy of this order failing which the respondents shall pay interest @ 10% per annum on the total amount of arrears to be paid to the applicant from the date of filing of the OA till the date of actual payment

18. OA is allowed to the extent indicated above with no order as to costs.

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