

(2009) 03 CAL CK 0080

Calcutta High Court

Case No: Writ Petition No. 7849 of 2002

Vidya Dharam Kumar

APPELLANT

Vs

Union of India

RESPONDENT

Date of Decision: March 6, 2009

Citation: (2009) 3 CALLT 703

Hon'ble Judges: Debasish Kar Gupta, J

Bench: Single Bench

Advocate: Achin Kumar Mujumdar, for the Appellant; Ramesh Chandra Ghosh and Mr. Amiya Kumar Das, for the Respondent

Judgement

Debasish Kar Gupta, J.

This writ application is filed by the petitioner asking for a writ of mandamus for directing the respondent authorities to act strictly in accordance with law in the matter of preparing the merit list for appointment to the post of Assistant Sub-Inspector, Railway Protection Force in South Eastern Railway by way of promotion.

2. The fact of the case in a nutshell is this the petitioner was a Constable of Railway Protection Force, South Eastern Railway. While he was posted at Santragachi under Kharagpur Division, a notice was issued under memo No. SHM/E 33-37/3545 dated May 22, 2001 advising the concerned respondents to ask the Constable and Head Constables under their supervision to submit willingness to appear in the selection test for preparation of merit list for appointment of Assistant Sub-Inspectors under Rule 72 of the Railway Protection Force Rules, 1987. Pursuant to the notice, the petitioner submitted his willingness to appear in the above selection test. From the notice issued under Memo No. SHM/E 33-74/481 dated June 29, 2001, the petitioner came to know that the selection test for preparing the above merit list would be held on July 1 and 2, 2001. Pursuant to the above notice the petitioner took part in the above selection test which was followed by viva-voce test. Thereafter, the force office order No. 307 of 2001 dated August 8, 2001 was published by the Security

Commissioner-cum-staff officer to Chief Security Commissioner, Railway Protection Force, South Eastern Railway with the approval of the Chief Security Commissioner, Railway Protection Force showing the list Head Constables and Constables who had been qualified for promotion to the rank of Assistant Sub-Inspector, Railway Protection Force, South Eastern Railway.

3. The name of the petitioner did not find place in the above merit test. The petitioner made a representation dated August 28, 2001 to the respondent No. 2 for reconsideration of his name for promotion to the post of Assistant Sub-Inspector, Railway Protection Force, South Eastern Railway. The above representation was followed by another representation dated February 2, 2002. The respondent No. 4 informed the petitioner by a communication under Memo No.SRC/E-33-202/1476 dated May 6, 2002 that the marks secured by the petitioner in the selection test (written test and viva-voice) fell short of qualifying level for inclusion of his name in the merit list for promotion to the post of Assistant Sub-Inspector, Railway Protection Force, South Eastern Railway.

4. According to the petitioner it is evident from the force order No. 68 2002 dated March 5, 2002 passed by the Security Commissioner-cum-Staffs Officer to Chief Commissioner Railway Protection Force that 29 Head Constables Constables were promoted to the post of Assistant Sub-Inspector Railway Protection force, South Eastern Railway under unreserved category.

5. According to the petitioner, there should have been four more vacancies for promotion to the post of Sub-Inspector, Railway Protection Force, South Eastern Railway, in accordance with the promotions for Rule 70 of the said 1 Rules. Because the name of the petitioner appeared against serial No. 3 of the above panel. The attention of this Court is drawn on behalf of the petitioner towards Rule 7 of the Railway Protection Force Rules, 1987 (hereinafter referred to as the said rules). It is submitted on behalf of the petitioner that in accordance with the provision of Sub-rule (4) read with sub-rule (2) of Rule" 70 of the said Rule, the size of a panel should ordinarily be such as should provide for all vacancies including the anticipated vacancies for coming twelve months from date on which the Promotion Committee was constituted plus 10% of such total vacancies. According to the petitioner, if the final select" list were prepared strictly in accordance with the provisions of the said rules, the name of the petitioner would have been appeared in such final selection list.

6. It is also submitted on behalf of the petitioner that in accordance with the provisions of Rule 71 of the said Rules, 60 marks should have been allotted for written test while 40 marks should have been allotted for viva-voce test. The viva-voce test should contain (a) personality test (20 marks) and (b) record of service (20 marks). It is also submitted on behalf of the petitioner that in accordance with the provisions of Rule 108 the annual confidential report should be taken into consideration for allotment of marks in addition to the allotment of marks under

Rule 239 of the said rules taking into consideration the rewards and awards. It is the case of the petitioner that had the marks were allotted in the viva-voce test taking into consideration the above provision, four more names would have been added to the final selection list and the name of the petitioner should have been included in that list.

7. According to the petitioner, since there was no communication of adverse remarks to the petitioner, the remarks of the annual confidential report of the petitioner should have been taken into consideration in accordance with the provisions of Rule 239 of the said Rules for inclusion of his name in the final selection list. According to the petitioner the statutory provisions were violated in preparing the final selection list under reference.

8. Relying upon an unreported decision dated February 14, 2001 of a single bench of this Court in the matter of Himanshu Sekhor Battabal v. Union of India (in re: Civil Order No. 9900(W) of 1992), it is submitted on behalf of the petitioner that in a similar case the Court disposed of the writ application with an observation that in preparing the select list Rules 71, 72, 108 and 239 of the said rules should be followed. Relying upon another unreported judgment dated October 12, 1999, delivered in the matter of Purushottam Yadav v. Union of India (in re: Civil Order No. 9835(W) 1996), it is submitted on behalf of the petitioner that in a similar circumstances the Court, after observing that the selection committee was following different procedures in " case of selection of different candidates, directed the respondent authorities to consider the case of that writ petitioner for inclusion of his name in the select list for being promoted to the post of Assistant Sub-Inspector afresh. Relying on a decision of the Central Administrative Tribunal (Calcutta) in the matter of Dr. Sudarshan Mondal & Ors. v. Union of India, reported in 2007(2) (CAT) 48, it is submitted on behalf of the petitioner that those remarks which had adversely affected the employees' carrier, should have been considered as adverse remarks. Such remarks should be communicated to the concerned employee.

9. On the other hand, relying upon the relevant records of this case, it is submitted on behalf of the respondents that the selection process for appointment of Assistant Sub-Inspector. Railway Protection Force, South Eastern Railway under reference was conducted in accordance with the provisions of Rule 72 of the said Rules. In doing so, the respondent authorities took into consideration the provisions of Rule 70.4 read with Rule 70.2 of the said Rules.

10. It is further submitted on behalf of the respondents that initially a broad sheet was prepared containing names of all the eligible candidates who had participated in the selection test. The petitioner obtained 65 marks. In the panel of selected candidates under unreserved category the name of the petitioner appeared against serial No. 30. It is further submitted on behalf of the respondents that 26 vacancies were filled up under unreserved category. Therefore, the petitioner was not eligible to be appointed since his name appeared against serial No. 30.

11. Drawing the attention of this Court towards the records it is submitted that in conducting the selection process, the provisions of Rule 72 of the said Rules were followed for allotment of marks in respect of viva-voce test. The provisions of Rule 70 read with Rules 108 and 239 were also followed. It is ultimately submitted that there was no procedural impropriety so far as the decision making process was concerned.

12. It is also submitted that the merit list for appointment of Assistant Sub-Inspector, Railway Protection Force, South Eastern Railway was prepared by the Selection Committee. The Selection Committee was a body of experts. Therefore, there is hardly any scope for a writ Court to interfere with the decision of the Expert Committee. It is necessary to point out here that xerox copies of the relevant records are kept on record for the proper and complete adjudication of the issues involved in this writ application taking into consideration the materials available on record.

13. Having heard the learned counsels for both the parties and after taking into consideration the facts and circumstances of this case as also the records relating to the selection process which have been produced before this Court in course of hearing, I find that admittedly the respondent authority initially prepared a broad sheet of selected candidates for promotion to the post of Assistant Sub-Inspector, Railway Protection Force, South Eastern Railway.

Admittedly the petitioner obtained 65 marks in the selection test (written test+ viva voce). It is not in dispute that the name of the petitioner appeared-; against serial No. 30 in that broad sheet. The break-up shown in the broach sheet with regard to the obtaining of 65 marks by the petitioner was as follows.

39. For written test and outdoor test out of 60 marks, 14 marks for record of service out 20 marks and 12 marks for viva voce test out of 20 marks. The petitioner was declared qualified for inclusion of his name in the broad sheet in order of merit and he obtained 30th position under unreserved category. It is also not in dispute that the 26 vacancies for the promoted post under reference were filled up by obtaining the eligible candidates on the basis of their respective positions in the merit list. It further appears from the statements made in paragraph 8 of the affidavit-in-opposition affirmed on behalf of the respondents that the respondent authority earmarked 29 vacancies under unreserved category for filling up the post under reference. It further appears from the communication issued by the respondent No. 2 under his Memo-No. RPF/EB/(S)/I/ASI/XVII/6446 dated June 21, 2001 (annexure R-I at page 15 of the above affidavit-in-opposition) that the above vacancies was reduced to 26. Neither any statement is available from the above affidavit-in-opposition affirmed on behalf of the respondents nor any record is produce before this Court in course of hearing for disclosing reasons to fix the number of vacancies to 29 initially or for reducing the same to 26.

14. It is an admitted fact in this case that the selection process for appointment of Assistant Sub-Inspectors, Railway Protection force, South Eastern Railway was conducted in accordance with the provisions of the said Rule 1987. It is an admitted position that the case of the petitioner for such promotion was considered in terms of the said Rules, 1987. But the grievance of the petitioner, amongst others, was that the vacancies were not determined in accordance with provisions of Rule 70.4 of the said Rule, 1987. In order to adjudicate the above issue, the provisions of sub-Rule of Rule 70.4 of the said Rule are quoted below:

70. 4. The size of a panel drawn up in accordance with sub-rule (2) shall ordinarily be such as shall provide for all existing vacancies and vacancies anticipated within the next twelve months from the date on which Departmental Promotion Committee is constituted plus ten percent. Of such total and limited to percentage, if any, specified in Schedule IV against that category.

15. In accordance with the above provision the panel of selected candidates should have been prepared taking into consideration the existing vacancies as also the anticipated vacancies of next 12 months + 10% of such total vacancies. At the cost of repetition it is observed that apart from the statements made in paragraph 8 of the affidavit-in-apposition affirmed on behalf of the respondents, no preponderating evidence was placed before this Court to dislodge the claim of the petitioner. The copies of the records relating to the selection procedure under reference are produced before this Court in course of hearing did not contain preponderating evidence to show that the vacancies were restricted to 29 initially and reduced to 26 under unreserved category in accordance with the provisions of Rule 70.4 of the said Rule, 1989.

16. The settled principles of law with regard to the consideration of the cases of eligible candidates in terms of the provisions of a statutory rule has to be followed strictly. In this regard the relevant portions of the decision of [Syed Khalid Rizvi and Others and Ramesh Prasad Singh and Others Vs. Union of India \(UOI\) and Others](#), reported in [Syed Khalid Rizvi and Others and Ramesh Prasad Singh and Others Vs. Union of India \(UOI\) and Others](#), are quoted below:

31. No employee has a right to promotion but he has only the right to be considered for promotion according to rules. Chances of promotion are not conditions of service and are defeasible. Take an illustration that the Promotion Regulations envisage maintaining integrity and good record by Dy. S.P. of State Police Service as eligibility condition for inclusion in the select-list for recruitment by promotion to Indian Police Service. Inclusion and approval of the name in the select-list by the UPSC, after considering the objections if any by the Central Government is also a condition precedent. Suppose if "B" is far junior to "A" in State Services and "B" was found more meritorious and suitable and was put in a select-list of 1980 and accordingly "B" was appointed to the Indian Police Service after following the procedure. "A" was thereby superseded by "B". Two years later "A" was found fit

and suitable in 1984 and was accordingly appointed according to rules. Can "A" thereafter say that "B" being far junior to him in State Service, "A" should become senior to "B" in the Indian Police Service. The answer is obviously no because "B" had stolen a march over "A" and became senior to "A". Here maintaining integrity and good record are conditions of recruitment and seniority is an incidence of service. Take another illustration that the State Service provides - rule of reservation to the scheduled castes and scheduled tribes. "A" is a general candidate holding No. 1 rank according to the roster as he was most meritorious in the State service among general candidates. "B" scheduled castes candidate holds No. 3 point in the roster and "C" scheduled tribe holds No. 5 in the roster. Suppose Indian Police Service Recruitment Rules also provide reservation to the Scheduled Castes and Scheduled Tribes as well. By operation of the equality of opportunity by Articles 14, 16(1), 16(4) and 335, "B" and "C" were recruited by promotion from State Services to Central Services and were appointed earlier to "A" in 1980. "A" thereafter in the next year was found suitable as a general candidate and was appointed to the Indian Police Service. Can "A" thereafter contend that since "B" and "C" were appointed by virtue of reservation, though were less meritorious and junior to him in the State service and gradation list would not become senior to him in the cadre as IPS officer. Undoubtedly "B" and "C" by rule of reservation, had stolen a march over "A" from the State Service. By operation of rule of reservation "B" and "C" became senior and "A" became junior in the Central Services. Reservation and roster were conditions of recruitment and seniority was only an incidence of service. The eligibility for recruitment to the Indian Police Service, thus, is a condition of recruitment and not a condition of service. Accordingly we hold that seniority, though, normally an incidence of service, Seniority Rules, Recruitment Rules and Promotion Regulations form part of the condition of recruitment to the Indian Police Service by promotion, which should be strictly complied with before becoming eligible for promotion and are not relaxable.
(Emphasis supplied)

17. Since the respondent authority considered the case of appointment of the petitioner to the post under reference of promotion in accordance with the provisions of the said Regulation 1987, a duty was cast upon the authority to determine the vacancy position of the post under reference strictly in accordance with the provisions of Rule 70.4 of the said Rule, 1987. But in spite of giving sufficient opportunity to the respondents to support the " " decision making process by way of filing affidavit-in-opposition as also by producing the record before this Court, the respondent authority failed to rebut the presumption of procedural impropriety in fixing the number of vacancies in accordance with the statutory provision of Rule 70.4 of the said Rule, 1987.

18. Procedural reasonableness has been recognised an element of principles of natural justice as a settled principles of law as decided in the matter of [Dr Rash Lal](#)

[Yadav Vs. State of Bihar and Others](#), are quoted below:

6. The concept of natural justice is not a static one but is an ever expanding concept. In the initial stages it was thought that it had only two elements, namely, (i) no one shall be a judge in his own cause and (ii) no one shall be condemned unheard. With the passage of time a third element was introduced, namely, of procedural reasonableness because the main objective of the requirement of rule of natural justice is to promote justice and prevent its miscarriage. Therefore, when the legislature confers power in the State Government to be exercised in certain circumstances or eventualities, it would be right to presume that the legislature intends that the said power be exercised in the manner envisaged by the statute. If the statute confers drastic powers it goes without saying that such powers must be exercised in a proper and fair manner. Drastic substantive laws can be suffered only if they are fairly and reasonably applied. In order to ensure fair and reasonable application of such laws Courts have, over a period of time, devised rules of fair procedure to avoid arbitrary exercise of such powers. True it is, the rules of natural justice operate as checks on the freedom of administrative action and often prove time-consuming but that is the price one has to pay to ensure fairness in administrative action. And this fairness can be ensured by adherence to the expanded notion of rule of natural justice. Therefore, where a statute confers wide powers on an administrative authority coupled with wide discretion, the possibility of its arbitrary use can be controlled or checked by insisting on their being exercised in a manner which can be said to be procedurally fair. Rules of natural justice are therefore, devised for ensuring fairness and promoting satisfactory decision-making. Where the statute is silent and a contrary intention cannot be implied the requirement of the applicability of the rule of natural justice is read into it to ensure fairness and to protect the action from the charge of arbitrariness. Natural justice has thus secured a foothold to supplement enacted law by operating as an implied mandatory requirement thereby protecting it from the vice of arbitrariness. Courts presume this requirement in all its width as implied unless the enactment supplies indications to be contrary as in the present case. This Court in *A.K Kraipak v. Union of India* after referring to the observations in *State of Orissa v. Dr. (Miss) Binapani Dei* observed as under (SCC p.272, para 20)

The aim of the rules of natural Justice is to secure justice or to put it negatively to prevent miscarriage of justice. These rules can operate only in areas not covered by any law validly made. In other words they do not supplant the law of the land but supplement it.

These observations make it clear that if the statute, expressly or by necessary implication omits the application of the rule of natural justice, the statute will not be invalidated for this omission on the ground of arbitrariness.

(Emphasis supplied)

19. I do not find substance in the submissions made on behalf of the respondents that the selection process under reference was conducted by a body of experts and the Court in course of judicial review should not interfere with the decision of the body of that expert. It is true the Court must be slow to interfere with the decision of the expert body. But at the same time while examining the allegation of procedural impropriety in decision making process of the body of experts, the Court must see that the adherence to the statutory-rules is ensured by the action of the body of experts. In this regard the settled principles of law as decided in the matter of [Km. Nelima Misra Vs. Dr. Harinder Kaur Paintal and others](#), reported in [Km. Nelima Misra Vs. Dr. Harinder Kaur Paintal and others](#), are quote below:

32. It is not unimportant to point out that in matters of appointment in the academic field the Court generally does not interfere. In the *University of Mysore v. CD. Govinda Rao*, this Court observed that the Courts should be slow to interfere with the opinion expressed by the experts in the absence of malafide alleged against the experts. When appointments are based on recommendations of experts nominated by the Universities, the High Court has got only to see whether the appointment had contravened any statutory or binding rule or ordinance. The High Court should show due regard to the opinion expressed by the experts constituting the Selection Committee and its recommendation on which the Chancellor has acted. See also the decisions in *J.P. Kulshreshtha v. Chancellor, Allahabad University*, *Raj Bhavan and Dalpat Abasaheb Solunke v. B.S. Mahajan*.

(Emphasis supplied)

20. The above discussions leads me to the conclusion that the case of the petitioner for appointment to the post of Assistant Sub-Inspector, Railway Protection Force, South Eastern Railway required consideration afresh by the respondent authority strictly in accordance with the provisions of the said Rules, 1987. At this stage is necessary to point out that the instant writ application was filed on month of June 2002 that is before expiry of the panel under reference, the period of validity of the panel being one year as prescribed in Rule 70.8 of the said Rules, 1987. Therefore, the petitioner is entitled to get relief in this writ application.

21. Since the above issue has already been decided in favour of the petitioner, it is riot necessary at this stage to go into the other aspects of the matter. I, therefore, direct the respondent No. 2 to consider the case promotion of the petitioner to the post of Sub-Inspector, Railway Protection Force, South Eastern Railway afresh on the basis of the position in the panel of selected candidates under reference (serial No. 30) afresh strictly in accordance with the provisions of the said Rule, 1987 by passing the specking order within the six weeks from the date of communication of this order. The respondent No. 2 is further directed that in the event his decision goes in favour of the petitioner and the petitioner is promoted to the above post, then the respondent No. 2 will further consider the question of giving notional benefit to such promotion with effect from the date of promotion of the last promote of the

panel under reference.

22. This writ application is, thus, disposed of accordingly.

There will be, however, no order as to costs.

Urgent xerox certified copy of this judgment, if applied for, be given to the parties, as expeditiously as possible, upon compliance with the necessary formalities in this regard.