

\$~6

* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

Decided on : 09.02.2016

+ **LPA 507/2010**

PUNJAB NATIONAL BANK

..... Appellant

Through : Sh. Rajesh Kumar and Sh. Gaurav
Kumar Singh, Advocates.

versus

RAJINDRA KUMAR

..... Respondent

Through : Sh. Ashok Bhalla, Advocate.

CORAM:

HON'BLE MR. JUSTICE S. RAVINDRA BHAT

HON'BLE MS. JUSTICE DEEPA SHARMA

MR. JUSTICE S. RAVINDRA BHAT (OPEN COURT)

%

1. The appellant Punjab National Bank (hereafter "PNB") appeals against the judgment and order of the learned Single Judge whereby it was directed to promote the respondent (hereafter referred to as "the petitioner") with effect from the date his juniors were promoted. The issue concerned giving correct interpretation to Clause 9.2 of the Circular [hereafter "Clause 9.2"] issued by the PNB on 01.01.1998, inviting applications for promotion to the post of Junior Management Grade Scale-I [JMG-I] and Middle Management Grade Scale-II [MMG-II].

2. The admitted facts are that the PNB issued its promotion policy on 21.03.1991. The petitioner, who had joined the services of PNB in JMG-I in September 1986, had applied for promotion pursuant to the Circular/advertisement dated 01.01.1998. The petitioner belongs to a reserved category. He claims benefit of Clause 9.2. The correct

interpretation of this condition became the bone of contention before this Court in the writ proceedings. Clause 9.2 reads as follows:

“Promotion by selection method

9.2(a) Promotion by selection within Group A (Class I)

In promotions by selection to posts within Group A (Class I) which carry an ultimate salary of Rs.5700/- there is no reservation, but the Scheduled Castes/Scheduled Tribes Officers, who are senior enough in the zone of consideration for promotion so as to be within the number of vacancies for which the select list has to be drawn up, would be included in that list provided they are not considered unfit for promotion”.

3. The promotion to the post of MMG-II is through two means – Channel-1 – is to the extent of 30% vacancies and envisions promotion on the basis of seniority-cum-interview. The eligibility prescribed for this Channel is 10 years in the feeder post. This Court is not concerned with that Channel. Channel-2, on the other hand – which deals with balance 70% vacancies envisions candidates’ participation in a written test (with a maximum of 100 marks); Performance (max. 45 marks); Interview (max. 40 marks) and Qualification (max. 15 marks). The petitioner’s grievance was that though he had cleared the written test, he was not considered and promoted. PNB, on the other hand, interpreted Clause 9.2 such as to mean that benefit of reservation was inapplicable to reserved category candidates and that the “concession” meant that the concerned SC (reserved) category candidate had to be in the select list. More importantly, it also contended that in view of the judgment of the Supreme Court in *S. Vinod Kumar v. Union of India* 1996 (6) SCC 580, the promotion claimed by the petitioner could not be given.

4. The learned Single Judge, after considering the submissions of the parties and the core reasoning in *Vinod Kumar (supra)*, was of the opinion that PNB's decision was untenable. The impugned judgment bases itself upon an interpretation of the Office Memoranda dated 22.07.1997 and 13.08.1997 in so far as it pertains to reservation for the benefit of SC/ST officers in promotional cadres in the Central Government. These Office Memoranda took into consideration the amendment to the Constitution by which Article 16(4A) was inserted with effect from 17.06.1995 in the light of the decision in *Indra Sawhney v. UOI* 1992 Supp (3) SCC 217. The Single Judge also considered the judgment of the Madras High Court dated 09.12.2009, as is evident from para 33 of the impugned judgment, which was in turn based upon the amendment to Article 16, on the insertion of Article 16(4A) and consequently declared that the grant of benefit of promotion to the petitioner was wrongful. He thereafter opined that PNB was not even granting the relaxed criteria of 40 marks out of 100 in the Select list. In these circumstances, learned Single Judge directed as follows:

“.....The petitioner though competed in the General Category next year and was selected in the Scale-II, but he is seeking his promotion from the date his juniors were promoted. Though, the decision taken in the year 1998 by the respondent-bank, affected large number of SC/STs officers throughout the India. Lot of water has already been flown. Since the other aggrieved officers are also not before this Court, therefore, this Court is not giving any opinion qua others. Therefore, this Court is of the view that benefit to the officers of reserved categories was continued throughout which was even clarified by large number of communications starts from 13.08.1997 onwards.

35. *Therefore, keeping the above discussion into view the instant writ petition is allowed with all consequential benefits.*

The respondent-bank is directed to promote the petitioner with effect from the date his juniors were promoted with his all dues, arrears and consequential benefits thereon. Further, it is directed that this order shall be complied within two months from today and the compliance report in this regard shall be filed by the Chairman-cum-Managing Director, Punjab National Bank under his signatures, to the Registrar General of this Court, which shall be brought to the notice of this Court accordingly. It is further clarified that if the respondent-bank fails to comply with this order within the stipulated time, then the petitioner shall be entitled to 8% interest thereon.”

5. Learned counsel for PNB urges that the impugned judgment is erroneous. He submits that the decision of PNB was justified, given the law declared by the Supreme Court in *Vinod Kumar (supra)*. It was further stated that in the subsequent amendment to the Constitution (82nd Amendment Act, 2000, enforced on 08.09.2000), the general standards of efficiency contained in the main Article were amended. By a proviso, the Parliament provided that, “*relaxation in qualifying marks in any examination or lowering the standards of evaluation, for reservation in matters of promotion to any class or classes of services or posts..... was permissible*”. This amendment was taken note of subsequently by *Rohtas Bhankhar and Ors. v. Union of India and Anr.* 2014 (8) SCC 872 where the law declared in *Vinod Kumar (supra)* was overruled.

6. Learned counsel for PNB submitted that the impugned judgment is unsustainable in as much as it is based almost entirely on the Division Bench of the Madras High Court. Learned counsel points out that the said judgment was a subject matter of appeal by Special Leave, in *Chairman and Managing Director, Central Bank of India and Ors. v. Central Bank of India SC/ST Employees Welfare Association and Ors.* 2015 (1) Scale 169

(hereafter “*CBI-I*”). The Court then held that in the said ruling there is no extant reservation policy for promotional post of the kind this Court is concerned with in public sector banks. The declaration of law in the said judgment, it was submitted, contained certain errors in as much as conclusive or operating portion was inconsistent with the reasoning. This was subsequently corrected in a review proceeding, *Chairman and Managing Director, Central Bank of India and Ors. v. Central Bank of India SC/ST Employees Welfare Association and Ors.* 2016 (1) Scale 236 (hereafter “*CBI-II*”).

7. It is, therefore, submitted that the matter would have to be re-visited by the PNB taking into consideration the existing policy, i.e. after the Constitution Bench judgment in *Rohtas (supra)*. In short, learned counsel submitted that the concession under Clause 9.2, though not a reservation, would have to be worked out.

8. Learned counsel for the writ petitioner did not dispute that the decisions in *Rohtas (supra)*; *CBI-I* and *CBI-II* now cover the field. Therefore, the ultimate directions issued by the learned Single Judge cannot be sustained. He, however, pointed out that this Court should issue clear instructions as to the interpretation of Clause 9.2 to enable appropriate review of the promotions.

9. In the light of the submissions made by the learned counsel for the petitioner, this Court has heard both parties. The PNB’s position is that for working out the benefit of concession of Clause 9.2, the previous decisions of the Supreme Court in *National Federation of SBI and Anr. v. UOI and Ors.* 1995 (3) SCC 532 and *Pragjyotish Gaonlia Bank and Anr. v. Brijlal Dass* 2009 (3) SCC 323 are to be taken into account.

10. Learned counsel for the respondent/writ petitioner emphasized that the objective of concession should not be lost sight of. He urged that the matter can be best exemplified by correct approach, i.e. by contrasting it with the open/unreserved category candidates. Whereas in the case of open/unreserved category candidates, Channel-2 promotion would mean that selection and promotion would be based upon an overall assessment of the merit taking into account all elements, namely result in the written test, performance, interview and qualifications; in the case of reserved category (SC) candidates, Clause 9.2 would mean the determination of fitness alone and no other relevant criteria. This, according to learned counsel, entails first, scrutiny as to whether in the written test, the concerned SC candidate qualified so as to be included in the “zone of consideration”, i.e. the number of vacancies. If he did, he could be included within the number of vacancies and be selected on the basis of seniority alone. In other words, for inclusion in the list, the performance in the written test would not be the determinative criteria, rather it would seniority.

11. Learned Single Judge’s ruling – based upon the Division Bench of the Madras High Court, is, as is apparent from the above discussion, unsustainable. The impugned judgment, in effect, equates concession under Clause 9.2 with reservation. Parliament amended the Constitution so as to overbear the declaration of law in *Indra Sawhney (supra)* (which in turn had stated that there could be no reservation in promotion) in that by inserting Article 16(4A), reservation for SC/ST candidates in promotional posts were permitted. This amendment was brought into force on 17.06.1995. *Vinod Kumar (supra)* which was relied upon by the petitioner in the first instance, had overlooked the amendment to the Constitution whereby Article 16(4A)

was inserted. *Rohtas (supra)*, therefore, held as follows:

“8. We do not think it is necessary for us to deal with the width and scope of Article 16(4-A) any further. In so far as *Kuldeep Singh*¹ is concerned, we find that the matter was decided by this Court having regard to the constitutional provision contained in Article 16(4-A). The view taken by this Court in *Kuldeep Singh*² is in accord with the constitutional scheme articulated in Article 16(4-A). On the other hand, in *S. Vinod Kumar*³, the Court failed to consider Article 16(4-A). As a matter of fact, Article 16(4-A) was inserted in the Constitution to undo the observations in *Indra Sawhney*⁴ that there cannot be a dilution of standards in matters of promotion.

9. We are in respectful agreement with the decision in *Kuldeep Singh*⁵ and approve the same. Ordinarily, we would have sent the matter to the regular Bench for disposal of the matters but having regard to the nature of controversy and the fact that the Central Administrative Tribunal, Delhi (for short “the Tribunal”) has followed *S. Vinod Kumar*⁶ which is not good law and resultantly the 1997 OM is also illegal, in our view, the agony of the appellants need not be prolonged as they are entitled to the reliefs.”

12. As a result, PNB’s position was quite clearly untenable. The declaration in *Rohtas (supra)* is decisive that *Vinod Kumar (supra)* was incorrectly decided in the first instance. That takes us to the next question as to whether there was in fact a reservation as was understood by the learned Single Judge by virtue of Clause 9.2. Here too, the authorities of the Supreme Court in *CBI-I* and *CBI-II* are decisive. In *CBI-I*, it was held as follows:

¹ *UT, Chandigarh v. Kuldeep Singh* (1997) 9 SCC 199

² *supra* note 1

³ *S. Vinod Kumar v. Union of India* (1996) 6 SCC 580

⁴ *Indra Sawhney v. Union of India* 1992 Supp (3) SCC 217

⁵ *supra* note 1

⁶ *supra* note 3

“32. We have already noticed above that in matters of promotion within Group-A posts, which carry an ultimate salary of ₹5,700/- per month, there was no provision for any reservation. On a conjoint reading of these two Office Memorandums, in the absence of any other provision or Rule evidencing such a reservation in the matter of promotions, it cannot be said that there was reservation in promotion within Group-A posts upto the ultimate salary of ₹5,700/- per month. The High Court in the impugned judgment has gone by the lofty ideals enshrined in Articles 15 and 16 of the Constitution as well as the fact that in these Banks there is no adequate representation of SC/ST category of officers in Group-IV and above. That may be so. It can only provide justification for making a provision of this nature. However, in the absence of such a provision, same cannot be read by overstretching the language of Office Memorandum dated 13-08-1997. It is for the State to take stock of the ground realities and take a decision as to whether it is necessary to make provision for reservation in promotions to the aforesaid post as well.

33. Having said so, one other aspect which has to be necessarily addressed to at this stage calls for our attention. This aspect, which we are going to point out now, has been totally glossed over by the learned Single Judge as well as the Division Bench of the High Court in their respective judgments.

34. It is provided in Office Memorandum dated 01-11-1990, and we have repeatedly stated above, that there is no reservation in promotion by selection within only those Group-A posts which carry an ultimate salary of 5,700/- per month. In such cases, it is only concession that applies. We have accepted the contention of the appellant Banks in this behalf, as per the discussion contained hereinabove. Significantly, what follows is that reservation is provided in promotion by selection qua those posts which carry an ultimate salary of less than 5,700/- per month (pre-revised).”

13. However, the Court thereafter made certain observations which had

the effect of stating that promotions from Scale-I to Scale-VII permitted reservation to SC/STs. This became subject matter of *CBI-II*. The controversial observations were deleted in the following terms:

“17. In view of the foregoing, the review petitions are allowed by deleting paragraph Nos. 33 to 36 of the judgment and the directions contained therein, as well as the directions contained in paragraph No. 37. Instead, after paragraph No. 32, following paragraph shall be inserted and numbered as 33, and paragraph No. 38 should be re-numbered as 34:

“33. Result of the aforesaid discussion would be to allow these appeals and set aside the judgment of the High Court. While doing so, we reiterate that it is for the State to take stock of the ground realities and take a decision as to whether it is necessary to make a provision for reservation in promotions from Scale I to Scale II and upward, and if so, up to which post. The contempt petition also stands disposed of.

34. In the peculiar facts of this case, we leave the parties to bear their own costs.”

18. All the interlocutory applications for impleadment/intervention also stand disposed of.”

As a result, clearly the resultant position is that as on the date when the petitioner's claim was made before the Court, there subsisted a policy in PNB which allowed for concession in promotion.

14. The impugned judgement, therefore, cannot be upheld and has to be set aside. That brings us to the procedure and mechanism to be followed by PNB in preparing the select list for SC/ST candidates. This Court is conscious that the interpretation to be placed would have to be uniform and indicate a non-discriminatory criteria *vis-a-vis* Channel-1 and Channel-2.

The appropriate manner of preparing the select list in such eventualities was first considered in *National Federation (supra)* and subsequently in *Pragjyotish (supra)*. For the purposes of this decision, it would be sufficient to notice the relevant discussion in the latter judgment, i.e. *Pragjyotish (supra)* which states as follows:

“25. The said provision has been very elaborately explained by a three Judge Bench of this Court in National Federation of SBI v. Union of India⁷. As has been explained in the said judgement, the zone of consideration is the list of selected candidates chosen in order of seniority to be considered for the purpose of filling up the available vacancies and merely by coming within the zone of consideration a Scheduled Caste or Scheduled Tribe candidate would not be entitled to automatic selection. The concession relating to reservation does not mean that any of the vacant posts were required to be kept reserved for such Scheduled Caste or Scheduled Tribe candidate. It is only when such a candidate came within the number of vacancies that such a concession would be applicable to him/her for appointment without going through the selection process.”

15. The difference between Channel-1 (30%) and Channel-2 promotions (70%) lies not merely in the eligibility criteria – for the former, it is 10 years and for the latter, it is 7 years. In Channel-1, promotion amongst eligible candidates is to be made on the basis of an overall assessment of performance (previous service records), interview and qualifications. In the latter Channel-2, almost 50% of the selection process is determined by the result of the written test (max. 100 marks). The other considerations/parameters are performance (past record), interview and qualifications, remain the same. The weightage given is of course relatively

⁷ Arising out of SLP (Crl) No.6853 of 2006. From the Judgement and Order dated 22.11.2006 of the High Court of Calcutta at Calcutta in CRR No.2058 of 2006.

different for Channel-2. According to this Court, the correct method of preparing the select list for SC/ST officers by virtue of Clause 9.2 is as follows:

- (a) Determination of fitness in the case of Channel-1, merely the record, i.e. the candidate should not be unfit; in the case of Channel-2, it would be performance of the candidate in the written test – she or he should obtain minimum prescribed for SC/ST candidates;
- (b) If the SC/ST candidate is senior enough and falls within the “zone of consideration” applicable to either criteria – (here the criteria for zone of consideration for Channel-1 and Channel-2 are different), the candidate would be selected. In other words, PNB would have to prepare the list of SC/ST candidates. In contrast to preparing the Select list based on pure merit for open category candidates, here, all that the employer is to see that the SC candidate in Channel-2 merely qualifies in the written test. The second important step is to see whether the candidate is senior enough to fill “number of vacancies”. In this case, there is no dispute that the zone of consideration was the 685 vacancies in Channel-2. If such qualified SC/ST candidate is senior enough to figure in the list of 685, based upon his seniority alone – having cleared the threshold of qualifying in the written test, he would be placed in the final select list. This position was not disputed by either parties.

16. In the light of the above findings, the impugned judgement and order of the learned Single Judge is set aside. PNB shall conduct a review to

determine the Petitioner's eligibility for inclusion in the manner indicated above and in consonance with the judgments of the Supreme Court [especially *National Federation (supra)* and *Pragjyotish (supra)*] within eight weeks from today. In case the petitioner's name is to be added in the select list, all consequential benefits from the date he would have been entitled to such promotion shall be granted. This would include differential pay.

17. The appeal is allowed in the above terms.



S. RAVINDRA BHAT
(JUDGE)

DEEPA SHARMA
(JUDGE)

FEBRUARY 09, 2016/ajk