

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY,
NAGPUR BENCH, NAGPUR.**

WRIT PETITION NO.2683 OF 2008

1. Central Provident Fund Commissioner,
HUDCA Vishala,
Bhikaji Cama Palace,
New Delhi – 110006
2. Regional Provident Fund Commissioner-1,
Bhavishya Nidhi Bhawan,
Bandra (East), Mumbai
3. Regional Provident Fund Commissioner,
Sub-Regional Office,
Plot No.2, Town Centre,
Commercial Area,
CIDCO, Aurangabad-3.

...PETITIONERS

VERSUS

Suresh Sitaram Modani,
Resident of – C/o. T.N. Palat,
Vaibhav Bhavan,
Untkhana Chowk,
Nagpur - 9

...RESPONDENT

Shri H.N. Verma, Advocate for the petitioners.
Shri S. Ramaswamy, Advocate for the respondent.

**CORAM : A.S. CHANDURKAR AND
URMILA JOSHI-PHALKE, JJ.**

RESERVED ON : AUGUST 02, 2022.

PRONOUNCED ON : AUGUST 18, 2022.

JUDGMENT (Per Urmila Joshi-Phalke, J.)

Heard learned counsel for the parties.

2. The order passed by the Central Administrative Tribunal in Original Application No.2218/2004 by which the petitioners are directed to promote the respondent as Enforcement Officer/Assistant Accounts Officer/ Superintendent (hereinafter referred to as “EO/AAO/Supt.” for short) and to award benefit of seniority and pay fixation, is under challenge in this petition.

3. The respondent-Suresh Sitaram Modani was appointed as a Lower Division Clerk in the office of Central Provident Fund Commissioner on 30/07/1990. He was promoted as Upper Division Clerk on 21/04/1994. On 18/04/2001, the respondent was again promoted as Assistant. The petitioner No.1 i.e. the Commissioner of Central Provident Fund issued a Notification on 01/11/2000 for conducting exam for the post of EO/AAO/Supt. The said letter was circulated amongst various offices including office of Regional Provident Fund Commissioner i.e. petitioner No.2 vide Circular dated 10/11/2000. As per the said circular, departmental exam was scheduled from 8th to 12th January, 2001 for promoting the employees as EO/AAO/Supt. However, due to some administrative reasons, said exam could not be

held. Again in the year 2003, a letter dated 10/03/2003 was issued notifying the departmental exam for filling up the posts from the examination quota. The vacancy position was notified jointly for the State of Maharashtra and Goa. Vide said Notification three posts were reserved for General category, four posts for Scheduled Caste category and three posts for Scheduled Tribe category. Thus, total ten posts were notified. Subsequently, some vacancies had arisen hence revised position was notified on 09/05/2003 segregating the vacancies of Maharashtra and Goa. As per the said Notification, for Maharashtra two posts for General category, four posts for Scheduled Caste category and three posts for Scheduled Tribe category were notified whereas for Goa one post for General category was notified. Again revised Notification was issued on 20/10/2003 to show the vacancy position. As per the revised Notification total 11 posts were notified out of which four were reserved for the General category, four for Scheduled Caste category and three for Scheduled Tribe category. Thus, as per the vacancy position only four posts were reserved for the General category.

4. As per the contention of the petitioner, respondent had appeared for the said examination and passed the departmental examination and was at serial No.5 in the merit list. But as only four vacancies were notified for the General category, the candidates who

were at serial Nos.1 to 4 were promoted. Being aggrieved by the said order, the respondent had filed representations on 24/11/2003 and 12/02/2004. Subsequently, he filed Original Application No.2218/2004 before the Central Administrative Tribunal, Nagpur. The Tribunal after hearing both sides was pleased to allow the application and directed the present petitioners to promote the respondent and to grant all benefits of seniority, pay fixation, etc.

5. Being aggrieved with the said order, present petition is filed by the petitioners on the ground that the Presiding Officer of the Tribunal had not considered that only four posts from the General category were notified. The persons who were in merit list at serial Nos.1 to 4 were promoted. The respondent was at serial No.5. Specific condition was mentioned in the result sheet that mere passing of examination would not confer any selection and said promotions would be subjected to vacancy. But the Tribunal had not considered the same and wrongly passed the impugned order in favour of the respondent.

6. In response to the notice, respondent filed a reply and opposed the petition on the ground that he had passed the departmental examination for the post of Enforcement Officer which was held in June, 2003. It was not disputed that the respondent was placed at serial No.5

of the select list. The first four persons had already been accommodated and stands promoted against the then available vacancy. It is further the contention of the respondent that one Shri S.S. Sulakhe was promoted as Enforcement Officer with effect from 21/09/1999. The said Shri Sulakhe was promoted to the post of Enforcement Officer as direct recruit. The said Shri Sulakhe had been shown as a candidate promoted on departmental quota as well as the candidate promoted under the direct recruit quota. The letter dated 28/12/1999 shows that the appointment of Shri Sulakhe was as a direct recruit to the post of Enforcement Officer. Thus, right from 1999, the said person was shown against both the quotas. Shri Sulakhe has accepted his appointment against the said direct recruit quota in the year 1999. Therefore, he ceased to be a person from departmental quota. Non-finalization of seniority list by the petitioners could not be an impediment to grant promotion to the respondent since the post from departmental quota squarely fell vacant against which the respondent could be very well promoted. He contended that the order passed by the Tribunal needs no interference and the petition is devoid of any merit and liable to be dismissed.

7. Heard Shri H.N. Verma, learned Counsel for the petitioners and Shri S. Ramaswamy, learned Counsel for the respondent.

8. Learned Counsel for the petitioners submitted that on 01/11/2000, a Notification was issued for conducting departmental examination for the post of EO/AAO/Supt. It is an admitted position that due to administrative reasons, the examination could not be held, therefore, again on 10/03/2003, a letter was issued by the petitioner for holding the departmental examination for the said posts. Vacancies were notified by the said letter. Respondent appeared for the said examination. He was declared successful in the said departmental examination. He was at serial No.5 in the merit list. As per the Notification issued on 20/10/2003 only four posts were notified from the General category. Respondent appeared for the said examination from the General category. The candidates who are at serial Nos.1 to 4 in a merit list were promoted, as the respondent was at 5th position he was not promoted. In support of this contention, he placed his reliance on the Scheme which was prepared for the Competitive Examination for the post of EO/AAO/Supt. of 2002. He submitted that as per the said Scheme, the vacancies are to be determined by issuing the Notification. A merit list would be prepared. The General candidates who would get at least 40% marks in each paper should be entitled to find place in the merit list in their respective Region/Head Office. The number of candidates to be declared successful in the examination in respect of

each Region/Head Office, should be only to the extent of vacancies notified for that Region/Head Office. He submitted that as only four posts from the General category were notified, four persons who were at serial Nos.1 to 4 in the merit list, were selected and promoted. Admittedly, the respondent was at serial No.5 and, therefore, he was not promoted. He submitted that the order passed by the Central Administrative Tribunal by referring the case of Shri Sulakhe, is erroneous. Said Shri Sulakhe was not made as a party in the application filed before the Central Administrative Tribunal. The observation of the Tribunal that Shri Sulakhe opted for being treated as a direct recruit and not as a promotee, is erroneous and claimed that the order of the Tribunal deserves to be quashed and set aside.

9. On the other hand, learned Counsel for the respondent submitted that the respondent had challenged the process by which only four posts of the General category are notified. No reason was assigned by the petitioners why only four posts were notified. He had questioned that the vacancies which were available at that time, all the vacancies were not notified. He submitted that the respondent was successful candidate, but he was not promoted and no reason is assigned by the petitioners for the same. He placed reliance on the result sheet which showed that he passed in the said examination. He obtained more than

40% marks in all subjects. He also challenged the communication of one Shri Sulakhe by which he was selected from the examination quota. In fact, he was directly recruited as per the advertisement published by the Union Public Service Commission (hereinafter referred to as the “UPSC” for short). The information obtained by him under the Right to Information Act, also shows that Shri Sulakhe was appointed as Enforcement Officer by direct recruitment, therefore, the question of promotion of Shri Sulakhe, is not an impediment to promote the present respondent as Enforcement Officer. He submitted that the Tribunal has rightly considered the same and awarded the benefits, therefore, no interference is called for.

10. Learned Counsel for the respondent has placed his reliance on *R.S. Mittal Vs. Union of India 1995 Supp (2) SCC 230* wherein it is held that although a person on the select panel has no vested right to be appointed to the post for which he has been selected, the appointing authority cannot ignore the select panel or on its whims decline to make the appointment. There has to be a justifiable reason to decline to appoint a person who is on the select panel.

11. Heard both the sides and perused the record.

12. It is not disputed that the respondent had joined service as a Lower Division Clerk in the office of the petitioner at Aurangabad on 30/07/1990. On 21/04/1994, he was promoted as Upper Division Clerk and on 18/04/2001, he was promoted as Assistant. It is also not in dispute that on 01/11/2000, the petitioner No.1 issued a Notification notifying the vacancies for Maharashtra and Goa for promotion to the post of EO/AAO/Supt. By the said circular, petitioners declared the departmental examination for promotion to the post of EO/AAO/Supt. It was declared that the examination would be held from 8th to 12th January 2001. The vacancies notified by the said circular was that eight vacancies were reserved for General category, four vacancies for Scheduled Caste category and three vacancies for Scheduled Tribe category. It is also a part of record that due to some administrative reasons said examination was not held. Again on 10/03/2003, Notification was issued by the petitioners declaring that the departmental competitive examination would be held from 16th to 28th June 2003 for the Regions/Head Office where examination quota vacancies were available as per the revised vacancy position. By the said circular, examination was declared as well as vacancies for the Maharashtra and Goa were also declared. The statement showing the vacancy position for Maharashtra and Goa was declared as three vacancies for General category, four vacancies for Scheduled Caste

category and three vacancies for Scheduled Tribe category. Thus, total 10 vacancies were notified by the said Notification. Again on 09/05/2003, revised Notification was issued segregating the vacancy position of Maharashtra and Goa. As per revised Notification two vacancies for General category, four vacancies for Scheduled Caste category and three vacancies for Scheduled Tribe category, total nine vacancies were notified for Maharashtra and one vacancy from General category was notified for Goa. Again on 20/10/2003, the vacancy position was revised and notified as four vacancies for General category, four vacancies for Scheduled Caste category and three vacancies for the Scheduled Tribe category, total 11 vacancies were notified. Accordingly, examination was held and the respondent relied upon the result sheet. As per the said result sheet, respondent had cleared the said examination and obtained more than 40% marks in all subjects. It is also a matter of record that the respondent was not promoted during the said process.

13. It is the contention of the petitioners that the persons who were at serial Nos.1 to 4 in the merit list, were promoted, as the respondent was at serial No.5 was not promoted. The petitioners had followed due process of law while selecting the candidates for the promotion of EO/AAO/Supt. The petitioners had placed reliance on the Scheme which was notified by them in the year 2002. The scheme was

called as Departmental Competitive Examination Scheme, 2002 and Employees' Provident Fund Departmental Promotion Examination Scheme, 2002. The clause (1) of the said Scheme speaks about Short Title, Application and Commencement of the said Scheme. The clause 1. (i) states that this Scheme may be called the Enforcement Officer/Assistant Accounts Officer/Superintendent Departmental Competitive Examination Scheme, 2002. Clause (3) of the said Scheme speaks about Determination of vacancies. The vacancies in the cadre of Enforcement Officer/Assistant Accounts Officer in each Region and in the cadre of Superintendent in Head Office that may be filled in a year shall be declared while notifying the conduct of the Enforcement Officer/Assistant Accounts Officer and Superintendent examination. In case the vacancies vary, such variation shall be notified before the declaration of the result of the examination. The examination shall however be conducted only in such Regions/Head Office where the vacancies are notified in any year against the examination quota. Clause (5) of the said Scheme is in respect of Preparation of Merit List which states that the examination is a competitive examination. The successful candidates will be arranged in order of merit with reference to the marks obtained by them in the examination. Clause (6) speaks about Details of the examination. Clause (7) is in respect of Medium of examination and Clause (7)(i) states that the general candidates who would secure at

least 40% marks in each paper and candidates belonging to SC/ST communities obtaining 35% marks in each paper shall be entitled to be arranged in the order of merit in their respective Region/Head Office, as the case may be, taking into account the total marks secured by them in the examination. The number of candidates to be declared successful in the examination in respect of each Region and Head Office shall be only to the extent of vacancies notified for that Region/Head Office.

14. Clause (7)(ii) states that the fact that a General candidate has obtained at least 40% marks in each paper and SC/ST candidate obtained 35% marks in each paper would not entitle him/her to claim the right of promotion to the higher post. All candidates who fail to find a place in the merit list of successful candidates to the extent of number of vacancies notified would be deemed to be unsuccessful in that examination.

15. Thus, in view of Clause (7)(ii) merely obtaining 40% marks or 35% marks by SC and ST category candidates in each paper would not entitle them to claim the right of promotion to the higher post. But all depends on the number of vacancies notified. Rest of the candidates who have passed the examination but failed to find a place in the merit list, would be deemed to be unsuccessful in that examination. This fact

is also clarified by the petitioner in the result sheet issued to the candidates. The result sheet issued to the respondent also clarifies that he had obtained more than 40% marks and clear the examination but it is specifically notified on the result sheet that it is subjected to the vacancy. Mere passing an examination does not confer selection. Admittedly, in view of last Notification dated 20/10/2003 only four posts from the General category were notified. The respondent appeared for the examination from the general category. It is an admitted position that, he was at 5th position in the merit list, thus the communication which is filed on record, itself is sufficient to show that as the respondent was in a 5th position and only four posts were notified, the employees who were at serial Nos.1 to 4 were selected from the general category for the promotion of Enforcement Officer. The Office Order dated 03/11/2003 shows that Shri M.B. Rao from the General category, Shri M.G. Vyas from the General category, Shri L.S. Lahamge from the General category and Shri A.M.Dayal from the General category were declared as a successful candidates in the order of merit in the departmental examination and were promoted to the post of EO/AAO. Said office order also shows the names of the candidates who were selected from the Scheduled Caste and Scheduled Tribe categories.

16. The respondent had contended that one Shri Sulakhe was directly appointed to the post of Enforcement Officer as per the result

declared by UPSC. For that purpose, he filed on record an additional affidavit. As per the contention in the additional affidavit, Shri S.S. Sulakhe was appointed to the post of Enforcement Officer in direct quota vide letter dated 28/12/1999. He had accepted the same. His name was recommended for the post of Enforcement Officer by the Commissioner. Subsequent to publish seniority list on 01/04/2009 Shri Sulakhe was shown at serial No.11, who had been recruited under direct recruitment quota in the year 1999. The candidates who have been recruited under direct quota were placed under probation and they have to pass the probationers exam. Shri Sulakhe was also on probation and he cleared the probationers exam and only probationers has to clear the said examination. Thus, Shri Sulakhe was directly recruited from the year 1999 and not a candidate under the examination quota. Thus in the year 2003, examinations were held, there was a clear vacancy under the examination quota. As Shri Sulakhe though appointed under the direct quota has been shown under the examination quota. Though petitioners were aware about the said fact, they have shown Shri Sulakhe under the examination quota in the seniority list as on 01/04/2009. Thus, evidently there was one post vacant for the respondent in the year 2003, which was to be allotted to the respondent as per merit.

17. It appears from the record that Annexure-R-1 is the letter issued by Shri Sulakhe to the Regional Provident Fund Commissioner

dated 28/12/1999 wherein he had mentioned that with reference to the offer of appointment to the post of Enforcement Officer/Assistant Accounts Officer conveying his acceptance of the offer of appointment to the aforesaid post. By the said letter he also informed that he was promoted to the same post through Departmental examination hence he be allowed to give option of seniority at the later stage when the seniority lists of both the quotas i.e. Direct and Examination are finalised. Admittedly, this letter addressed by Shri Sulakhe is in respect of Offer Letter No.MH/PF/ADM-I/DR/99/477 dated 09/12/1999. The respondent had placed his reliance on the result sheet published by UPSC in the Employment News dated 15th to 21st May 1999 which shows that the recruitment of 234 EO/AAO. in the Employees Provident Fund Organization/Ministry of Labour. Said published result further shows that the list is in order of merit of the candidates, who have been recommended for appointment of 234 EO/AAO in Employees Provident Fund Organization/Ministry of Labour, on the result of written test held by UPSC in October, 1998 and interviews held in February-March, 1999. The name of Shri Sulakhe was shown at serial No.29 in the said list. The respondent had also relied upon the information sought under the Right to Information Act which shows that Shri Sulakhe had joined as an Enforcement Officer. He also relied upon one communication, which is the list of the candidates declared successful in the EO/AAO/Supt.

examination held from 26th to 30th November 2001, wherein for the Maharashtra Region name of Shri Sulakhe was shown at serial No.14 from the General category.

18. Learned counsel for the respondent also invited our attention towards the seniority list published by the petitioners of EO/AAO/Supt. who were appointed on regular basis from 04/03/1990 to 31/03/2005 as on 01/04/2009 wherein Shri Sulakhe was shown to be promoted on 21/09/1999 from the examination quota. On the basis of said documents, the respondent had claimed that he was entitled for the promotion to the post of Enforcement Officer as Shri Sulakhe was already recruited from the direct quota. So Shri Sulakhe was not promoted in examination quota and said post was required to be shown as vacant in the year 2003. The Scheme on which the petitioners are relying specifically shows that as per the said Scheme the vacancies in the cadre of Enforcement Officer/Assistant Accounts Officer in each Region and in the cadre of Superintendent in the Head Office, which are to be filled in a year, shall be declared while notifying the conduct of the EO/AAO and Superintendent examination. In case the vacancies vary such variation shall be notified before the declaration of the result of the examination. The examination shall however, be conducted only in such Regions/Head Office, where the vacancies are notified in any year

against the examination quota. Admittedly, the process of selecting either from direct quota or from examination quota regarding the promotion of Shri Subodh Sulakhe was held in the year 1999 to 2001. The communication i.e. the document No.3 is the list of the candidates declared successful in the EO/AAO/Supt. examination held from 26th to 30th November 2001 and shows that Shri Sulakhe was the successful candidate in the Maharashtra region who was shown in a centralized list at serial No.14, whereas present respondent had appeared for the examination in view of the Notification issued on 10/03/2003. The recitals of the said Notification clearly shows that in accordance with the Calender examination for the year 2003-2004, the Departmental Competitive Examination for promotion to the post of EO/AAO/Supt. under the examination quota would be held from 16th to 28th June, 2003 for the Regions and Head Office where examination quota vacancies are available. Thus, this Notification was issued considering the vacancy position available in the Maharashtra in the year 2003-2004. As per the said vacancy position, initially only 10 vacancies were notified. Out of which, three vacancies were for General category. As the vacancy position varied and segregated between Maharashtra and Goa, second Notification was issued on 09/05/2003, by which nine vacant posts were notified in the Maharashtra and one vacancy was shown in Goa. Out of nine posts two vacancies were reserved for the General category in the

Maharashtra. Again the vacancy position was varied and, therefore, another Notification was issued on 20/10/2003 showing total 11 posts are vacant wherein the vacancies against the General category was shown as four, against the Scheduled Caste category it was shown as four and against the Scheduled Tribe category it was shown as three. Thus, total 11 vacant posts were notified in the said Notification. Earlier in the notification dated 09/05/2003 only two posts were notified for the General category and by Notification dated 20/10/2003, two more posts were added in General category. In accordance with the Clause (3) of the Departmental Competitive Examination Scheme, 2002 the vacancies which are to be filled in the said year were declared by the said notification. Therefore, the contention of the respondent that the post of Shri Sulakhe who was selected from the direct quota, was to be shown vacant has no support on the basis of the documents. Admittedly, in accordance with the provisions of the Scheme, the vacancies which were to be filled, were notified by the petitioners. Moreover, the communication of Shri Sulakhe dated 28/12/1999 is itself shows that he was promoted to the said post through Departmental examination and accordingly, he opted for the option of examination quota. Therefore, the contention of the respondent that as he was directly recruited and, therefore, his position was vacant has no support from the documents.

Moreover, the process of filling up the vacancy and promotion of Shri

Sulakhe was prior to the process completed by the petitioner in the year 2003, wherein respondent had appeared and had appeared in the said examination with another candidates. Though the respondent had challenged the position of Shri Sulakhe on the ground that he was a direct recruit and was not selected by promotion, he was not made a party to the original application. It is well settled that when any candidate challenges the seniority or any right conferred on the another candidate then said person should get an opportunity to raise the issue of his right.

19. In view of that matter, the contention of the respondent that he was eligible for the promotion has no substance. The Tribunal has not considered that the respondent had not challenged the Notification. If it is the contention of the respondent that the vacancy shown in the Notification were incorrect, more vacant posts were available then he had to challenge the said Notification. By the Notification dated 20/10/2003, vacancy position was cleared by the petitioners. The respondent appeared and was aware that only four posts from the general category were notified. He had not challenged the said notification. In accordance with the Scheme, the vacancies which were to be filled up were notified by the petitioners. The persons who were at a position of 1 to 4 in the said merit list, were selected. The observation

of the Tribunal that Shri Sulakhe who was promoted as Enforcement Officer on 21/09/1999, has been wrongly shown as departmental candidate in the promotion quota, though he was selected as direct recruit is not correct. It is observed by the Tribunal that no reasons are mentioned by the petitioners for not holding the examination for three years. But the respondent or any other employee had not challenged the aspect that the petitioners had not held the examination for the said three years. On the contrary, respondent accepted the Notification and appeared for the said examination. The observation of the Tribunal that every year vacancies occurred in a particular grade or a cadre owing to retirement, voluntary retirement, dismissal or long deputation, transfer, death etc. appears to be on assumption. It is crystal clear from the record that in accordance with the provision in the Scheme in the year 2003 the vacancies were notified which had occurred in the year 2003-2004. This fact is also clarified in the Notification dated 10/03/2003 which specifically states that in accordance with the Calender examination for the year 2003-2004 the Departmental Competitive Examination for promotion to the post of EO/AAO under Examination Quota will be held from 16th to 20th June 2003. Thus the examination was held in the year 2003 considering the vacancy position for the post of EO/AAO/Supt. In the above circumstance, the order passed by the Tribunal deserves to be set aside. The observation of the Tribunal has no

support from the documents. The ratio of the decision relied upon by the learned Counsel for the respondent cannot be applied to the facts of the present case. In the light of above discussion writ petition deserves to be allowed.

20. We, therefore, pass the following order :

(a) The writ petition is allowed.

(b) The order passed by the Central Administrative Tribunal in the Original Application No.2218/2004 dated 30/01/2008 directing the petitioners to promote the respondent to the post of EO/AAO and to grant him all the benefits of seniority and pay fixation, is hereby quashed and set aside. The Original Application stands dismissed.

21. Rule is accordingly made absolute. There will be no order as to costs.

(URMILA JOSHI-PHALKE, J.)

(A.S. CHANDURKAR, J.)

**Divya*