

(2016) 01 GUJ CK 0135

In the Gujarat High Court

Case No : Special Civil Application No. 252 of 2009

B.M. Rajvanshi

APPELLANT

Vs

State of Gujarat and Others

RESPONDENT

Date of Decision : 20-01-2016

Acts Referred:

Constitution of India, 1950 — Article 226

Citation : (2016) 01 GUJ CK 0135

Hon'ble Judges : Abhilasha Kumari, J.

Bench : Single Bench

Advocate : A.S. Supehia for I.S. Supehia, Advocate, for the Appellant; V.S. Pathak, Learned Assistant Government Pleader, for the Respondent

Final Decision : Allowed

Judgement

Abhilasha Kumari, J.—1. This petition under Article 226 of the Constitution of India has been preferred, inter-alia, with a prayer to quash and set aside the adverse remarks for the period from 01.04.2004 to 31.03.2005 made by the Accepting Officer, as communicated by the letter dated 09.11.2005 and to restore the remarks of the Reviewing Officer. A further prayer is made to direct the respondents to reconsider the case of the petitioner for promotion to the post of Deputy Superintendent of Police as on 06.11.2007 (when the Departmental Promotion Committee met) and to promote him, if found fit, with effect from 15.05.2008, with all consequential benefits.

2. The brief factual background of the case is to the effect that at the time of the filing of the petition, the petitioner was serving as a Police Inspector, L.I.B. and In-charge Deputy Superintendent of Police, at Rajpipla, District Narmada. Earlier, the petitioner had filed a petition, being Special Civil Application No. 8654 of 2008, inter-alia, praying for promotion to the post of Deputy Superintendent of Police from the year 2003. In the affidavit-in-reply filed by one Shri Nikhil R. Bhatt, Under Secretary, Home Department, Government of Gujarat, on 22.08.2008, it was stated that the Departmental Promotion Committee (DPC)

that had met on 06.11.2007, had found the petitioner unfit for promotion on opening the sealed cover on 02.05.2008, mainly because of one adverse remark for the year 2004-05, which was retained on 09.06.2006. Special Civil Application No. 8654 of 2008 is still pending adjudication. However, the petitioner has approached this Court by preferring the present petition in order to challenge the above-mentioned adverse remarks.

3. Mr. A.S. Supehia, learned counsel for Mr. I.S. Supehia, learned counsel for the petitioner, has made two-fold submissions. The first contention raised by learned counsel for the petitioner is that the adverse remarks for the period 01.04.2004 to 31.03.2005 were communicated to the petitioner on 09.11.2005, which is after a period of about twenty-five weeks from the assessment period of one year. It is submitted that as per the Government Resolution dated 31.03.1989, the adverse remarks have to be communicated to the concerned employee, within six weeks from the end of the assessment year. It is further submitted that the same stipulation is found in the Circular dated 01.05.2004, issued by the State Government, wherein it is reiterated that the adverse remarks have to be communicated within a period of six weeks from the assessment year in question. Learned counsel for the petitioner has submitted that the delay in the communication of the adverse remarks would, therefore, be fatal and the adverse remarks are required to be set aside on this ground alone.

3.1 In support of the above submission, reliance has been placed upon a judgment of this Court in the case of I.H. Mehta v. State of Gujarat reported in , 2001(2) GLR 1305. Reliance has also been placed upon an unreported judgment of this Court in Sureshbhai Motibhai Patel v. State of Gujarat passed in Special Civil Application No. 485 of 2004, decided on 01.08.2012. The third judgment cited on behalf of the petitioner on this point is rendered in the case of M.M. Suhandha v. State of Gujarat And Anr. reported in 2002(1) GLH 489.

3.2 The second contention raised on behalf of the petitioner is that, as per the Government Resolution dated 31.03.1989, the remarks such as "Theek" (Ordinary), "Sararash" (Average), "Sadharan" (Ordinary), "Samanya" (Ordinary), "Nibhai lae sakay teva" (can be tolerated) are not to be used while recording adverse remarks by the Reporting Officer. The word "Samanya" (Ordinary) has been used in the case of the petitioner, which does not amount to an adverse remark. It is further submitted that as per the Circular dated 06.07.2004, there can be only four gradings in the case of assessment for any particular year, namely, "outstanding", "very good", "good" and "unfit". It is submitted that the adverse remark against the petitioner is "Samanya" (Ordinary), therefore, it cannot be considered an adverse remark as per the Government Resolution dated 31.03.1989 and Circular dated 06.07.2004. It, therefore, deserves to be set aside on this ground alone.

4. The petition has been resisted by Ms. V.S. Pathak, learned Assistant Government Pleader, by submitting that the instructions in the Government Resolution dated 31.03.1989 regarding the grading of the concerned employee

and the aspect that remarks such as "Theek" (Ordinary), "Sararash" (Average), "Sadharan" (Ordinary), "Samanya" (Ordinary), "Nibhai lae sakay teva" (can be tolerated) are not to be used while recording adverse remarks, have now been modified by the Government Resolution dated 02.02.2005, wherein such remarks have been considered as adverse remarks. It is submitted that insofar as this aspect is concerned, the adverse remarks against the petitioner are not liable to be expunged.

4.1 Regarding the delay in the communication of the adverse remarks, learned Assistant Government Pleader has submitted that at the relevant point of time, the petitioner was serving in Vadodara City, which is a highly sensitive and disturbed area. The Superior Officers of the petitioner were occupied in the activity of restoring law and order connected to other departments. As the Officers of the Police Department are looking after law and order problems, V.V.I.P. Bandobast etc., there is bound to be some delay in routine correspondence as well. A short delay in the communication of the adverse remarks has occurred and the contention of the petitioner that the remarks ought to be set aside on this ground may not be accepted.

4.2 Learned Assistant Government Pleader has submitted that the petitioner has a right to be considered for promotion but no absolute right for promotion can be claimed by him.

4.3 In support of the above proposition, reliance has been placed upon a judgment of the Supreme Court in the case of Hardev Singh v. Union of India And Another reported in , (2011) 10 SCC 121.

4.4 On the above grounds, it is submitted that the petition be rejected.

5. This Court has heard learned counsel for the respective parties, perused the averments made in the petition, contents of the documents on record and the judgments cited by the learned counsel for the respective parties.

6. The second contention raised by the learned counsel for the petitioner regarding the options available to the Reporting Officer and Reviewing Officer to asses and grade the employee in the manner stipulated in the Government Resolution dated 31.03.1989 and Circular dated 06.07.2004, may be considered first.

7. It is true that in the Government Resolution dated 31.03.1989, it is stated that remarks such as "Theek" (Ordinary), "Sararash" (Average), "Sadharan" (Ordinary), "Samanya" (Ordinary), "Nibhai lae sakay teva" (can be tolerated) are not to be used while assessing an Officer. In the Circular dated 06.07.2004, it is stated that the grading is to be done on four counts only which are, "outstanding", "very good", "good" and "unfit".

8. In the affidavit-in-reply filed on behalf of the respondent, it is stated that the Government Resolution dated 31.03.1989 has been modified by Government Resolution dated 02.02.2005. A perusal of the Government Resolution dated

02.02.2005 makes it clear that remarks such as "Theek" (Ordinary), "Sararash" (Average), "Sadharan" (Ordinary), "Samanya" (Ordinary), "Nibhai lae sakay teva" (can be tolerated) have been considered to be adverse remarks and would have to be communicated to the concerned employee.

9. In this view of the matter, the second contention raised by the learned counsel for the petitioner cannot be accepted.

10. The only issue that now remains for adjudication is whether the delay in the communication of the adverse remarks, which in the present case, is of about twenty-five weeks, would vitiate the adverse remarks and whether they ought to be quashed and set aside on this ground alone.

11. In order to decide this issue, it may be fruitful to advert to a judgment of the Supreme Court in the case of State of Haryana v. Shri P.C. Wadhwa, IPS, Inspector General of Police And Another reported in , AIR 1987 SC 1201. The relevant paragraph of the judgment is extracted hereinbelow:

"14. The whole object of the making and communication of adverse remarks is to give to the officer concerned an opportunity to improve his performances, conduct or character, as the case maybe. The adverse remarks should not be understood in terms of punishment, but really it should be taken as an advice to the officer concerned, so that he can act in accordance with the advice and improve his service career. The whole object of the making of adverse remarks would be lost if they are communicated to the officer concerned after an inordinate delay. In the instant case, it was communicated to the respondent after twenty seven months. It is true that the provisions of Rules 5, 6, 6A and 7 are directory and not mandatory, but that does not mean that the directory provisions need not be complied with even substantially. Such provisions may not be complied with strictly, and substantial compliance will be sufficient. But, where compliance after an inordinate delay would be against the spirit and object of the directory provision, such compliance would not be substantial compliance. In the instant case, while the provisions of Rules 5, 6, 6A and 7 require that everything including the communication of the adverse remarks should be completed within a period of seven months, this period cannot be stretched to twenty seven months simply because these Rules are directory, without serving any purpose consistent with the spirit and objectives of these Rules. We need not, however, dilate upon the question any more and consider whether on the ground of inordinate and unreasonable delay, the adverse remarks against the respondent should be struck down or not, and suffice it to say that we do not approve of the inordinate delay made in communicating the adverse remarks to the respondent."

12. In the above judgment, though the Supreme Court has held that the Rules under consideration in that case pertaining to the communication of adverse remarks were directory and not mandatory, however, it was held that this does not mean that directory provisions need not be complied with even substantially.

13. As held by the Supreme Court, the very object of making and communicating the adverse remarks is to give to the Officer concerned, an opportunity to improve his performance, conduct or character, as the case may be. Inordinate delay in the communication of the adverse remarks would go against the spirit and object of such directory provisions and would not be a substantial compliance thereof. In the above case, though the Supreme Court did not go into the question of setting aside the adverse remarks on this ground, however it clearly recorded its disapproval of the inordinate delay in communicating the adverse remarks to the respondent therein.

14. In *I.H. Mehta v. State of Gujarat* (supra), this Court, after taking into consideration the judgment in the case of *State of Haryana v. Shri P.C. Wadhwa, IPS, Inspector General of Police And Another* (supra), has quashed the adverse remarks in the case of the petitioner therein, on the ground of inordinate delay. The relevant paragraphs of the said judgment are reproduced hereinbelow:

"8. I have considered the averments made by the petitioner in this petition as well as the submissions made by Mr. Parikh for the petitioner and Mr. Desai for the respondent authorities. I have also taken into consideration the decisions cited by Mr. Parikh in support of his submissions. In 1985 (2) GLR 616, the question of communication of adverse remarks to the employee concerned has been considered by the division bench of this court and it has been observed that the merits or demerits are to be judged on the basis of four factors, as per the rules already referred to hereinabove. In 1992(1) GLH 209, it has been observed by this court that the adverse remarks and the adverse entries in the petitioner's confidential report for the period between 13.10.1986 and 31.3.1987 were communicated to the petitioner after about thirteen months. The Government circulars issued from time to time provided that the adverse remarks should be communicated within six weeks and also that the aggrieved employee should make representation within six weeks from the date of communication of such adverse remarks. In view of grossly belated communication of the adverse remarks, the authority was directed to ignore those adverse entries. The learned single Judge of this court has relied upon the decision of the apex court in case of *State of Haryana versus P.C. Vagha*, reported in , AIR 1987 SC 1201. Mr. Parikh has submitted that the adverse remarks for the period from 1st April, 1984 to 31st March, 1985 has been communicated to the petitioner on 10th December, 1985 and there was gross delay in communication of the adverse report and therefore, considering the decision of this court, such adverse remarks in the confidential report of the petitioner now cannot be considered against the petitioner and the show cause notice was issued by the respondent authority on 24th September, 1986 relying upon the said adverse entry. Said adverse remarks were made absolute by order dated 8th September, 1986 and the petitioner was not permitted to cross the Efficiency Bar. He has, therefore, submitted that in view of the facts of the present case and the law laid down by this court as well as the apex court, the present petitions should be allowed by granting reliefs as prayed for in the present petition as prayed for.

9. Therefore, in light of the decisions cited above and considering the government resolution dated 20.1.1972 and 19.9.1975, the order passed by the respondent authority dated 10th December, 1985 confirming the said adverse entries by order dated 8th September, 1986 and the show cause notice dated 24th September, 1986 are required to be quashed and set aside by allowing this petition. Accordingly, order dated 10th December, 1985 as well as the order dated 8th September, 1986 and the show cause notice dated 24.9.1986 are hereby quashed and set aside and the respondents are directed to consider the case of the petitioner for promotion to the post of Deputy Collector by ignoring the said adverse remarks for the aforesaid period from 1st April, 1984 to 31st March, 1985 and it is also declared that the petitioner is entitled to normal increment from 1st June, 1985 till the date of his retirement. The respondents are directed to consider the case of the petitioner for promotion to the post of Deputy Collector by ignoring his adverse entries as aforesaid as expeditiously as possible, preferably within two months from the date of receipt of certified copy of this order. The respondents are further directed to release normal and regular increments of the petitioner from 1st June, 1985 and to pay all the difference of arrears of such increments within two months from the date of receipt of certified copy of this order. The respondents are also directed to fix the salary of the petitioner after releasing regular and normal increments from 1st June, 1985 and to pay whatever arrears available to the petitioner within two months from the date of receipt of certified copy of this order. Rule is made absolute accordingly with no order as to costs."

(emphasis supplied)

15. In judgment dated 01.08.2012, passed by this Court in Special Civil Application No. 485 of 2004 as well, this Court found that the explanation rendered by the respondents for the late communication of the adverse remarks was not at all justified. It was held that the adverse entries would not come in the way of the petitioner for getting the higher pay-scale. This is what the Court held:

"6. In view of above, the petition is required to be allowed on the ground that adverse remarks were communicated without any justification at a very late stage and considering the averments made in the affidavit, there is no justification for communicating the same to the petitioner at such a late stage. The petition is accordingly allowed. The order impugned in the present petition is quashed and set aside. Respondents are directed to give benefit of higher pay-scale to the petitioner with effect from 14th July, 2000 instead from 14th July, 2001. If any amount is required to be paid to the petitioner in this behalf, the same maybe paid within a period of three months from today. Rule is made absolute accordingly with no order as to costs."

(emphasis supplied)

16. In a recent judgment of this Court, in the case of M.M. Suhandha v. State of

Gujarat And Anr (supra), it is held as below:

"8....Taking stock of the entire situation, cumulatively, it needs to be held that the adverse remarks communicated after a period nearly 40 weeks from the stipulated period, they are required to be set aside. Resultantly, the decision of the respondents of the adverse remarks made against the petitioner in his Confidential Report for a specific period from 21.1.1999 to 9.8.1999 which was communicated to him on 20.3.2001, is treated as illegal and having no effect in the eyes of law. Similarly, order made by the respondents as communicated to the petitioner under the letter dated 1.5.2001 rejecting his representation also is treated as invalid and held as having no effect. The adverse remarks in the petitioners Confidential Report are to be eliminated from the Confidential Report for the period in question."

(emphasis supplied)

17. The only reason for the delay in the communication of the adverse remarks is that the superior officers of the petitioner were busy and preoccupied with the activity of maintaining law and order problems and V.V.I.P Bandobast. These can hardly be considered to be convincing reasons as their very basis is vague and general in nature. Even otherwise this justification goes against the Government Resolution dated 31.03.1989 and 01.05.2004. The Government Resolution dated 02.02.2005 which has modified the Government Resolution dated 31.03.1989 insofar as the method of grading and assessing the Officer under consideration is concerned retains the stipulation that adverse remarks have to be communicated to the person concerned within six weeks. The instructions of the State Government in this regard have not undergone any change and have remained the same. It was, therefore, incumbent upon the respondents to follow the instruction contained in the above-mentioned Government Resolutions instead of making excuses that they were busy in solving law and order problems and in the V.V.I.P. Bandobast. The justification, if it can be termed as such, is absolutely without merit and cannot be accepted.

18. The judgment cited by the learned Assistant Government Pleader in the case of Hardev Singh v. Union of India And Another (supra) is regarding the proposition that the employee has a right to be considered for promotion but can claim no absolute right to be promoted. This proposition of law is not disputed but will not be relevant in the present case as the issue herein is the late communication of adverse remarks.

19. Taking into consideration the above factual and legal position and as there is no justifiable reason coming forth from the respondents regarding the delay in the communication of the adverse remarks, such delay cannot be condoned and the adverse remarks are required to be eliminated from the Annual Confidential Report of the petitioner for the period in question, on this ground alone.

20. For the aforesaid reasons and taking into consideration the judicial pronouncements referred to hereinabove, the petition deserves to be allowed on

the ground of delay in the communication of the adverse remarks. Hence, the following order is passed:

The adverse remarks for the period from 01.04.2004 to 31.03.2005 made by the Accepting Officer, as communicated to the petitioner by the letter dated 09.11.2005, are hereby quashed and set aside. As a consequence thereof, the respondents are directed to consider the case of the petitioner for promotion to the post of Deputy Superintendent of Police with effect from 15.05.2008, with all consequential benefits.

21. The petition is allowed in the above terms. Rule is made absolute, accordingly. There shall be no orders as to costs.