

(1985) 04 KL CK 0003
In the High Court Of Kerala

Chairman, National Insurance Co. Ltd.	APPELLANT
Vs	
S. Narayanankutty	RESPONDENT

Date of Decision : 03-04-1985

Acts Referred:

Constitution of India, 1950 — Article 14, 226

Citation : (1986) 1 LLJ 84

Hon'ble Judges : K. Bhaskaran, C.J.; Padmanabhan, J

Bench : Division Bench

Judgement

K. Bhaskaran, C.J.—Appellants 1 and 2 in the appeal respectively are respondents 3 and 4 in O.P. No. 3014 of 1981, disposed of by the judgment dated 9th January, 1984. The respondent herein (the petitioner in the O.P.) was the Branch Manager of Calicut of the Ruby General Insurance Company which, in consequence of the nationalisation of the private insurance companies, got itself merged with the National Insurance Company Ltd., it being one of the four nationalised general insurance companies allowed to carry on the general insurance business under the supervision and control of the National Insurance Corporation in accordance with the General Insurance Business (Nationalisation) Act, 1972 (57 of 1972), hereinafter referred to as the Act. Thus, the "National" the "Oriental", the "United India" and the "New India" became the four instrumentalities of the Central Government to do the monopoly business of general insurance. A true copy of the scheme framed under S. 16 of the Act is Ext. P-I. In March, 1975 the designation of "Assistant Branch Secretary" was changed into "Officer-in-Charge", which post the respondent-petitioner held till 1st October, 1975, At the time of merger he was to be designated Administrative Officer and he was to be appointed in that rank. Ext. P2 dated 18th August, 1975 is the copy of the letter appointing the respondent-petitioner to be an Administrative Officer. Ext P4 is the copy of the letter the respondent petitioner received from the Regional Manager, Ruby General Insurance Co. Ltd., in reply to his representation on the question of seniority in service. His name not having been included in the list of officers to be included in the cadre of "Administrative

Officers", the petitioner submitted a representation to which he received Ext. P5 letter dated 11th January, 1975 from the Chairman-cum-Managing Director of the National Insurance Company Ltd. (3rd respondent in the O.P.) directing him to make a formal representation in the matter. According to the respondent-petitioner, though he submitted Ext. P6 representation dated 23rd December, 1975 and many reminders thereafter, his grievance remained without being redressed. In September, 1977 a seniority list was published by the Company and that showed respondents 4 to 15, who were juniors to the respondent-petitioner, above him, and the respondent-petitioner very much below in rank in the category of Assistant Administrative Officers compared to many who were placed above though they were juniors to him. Ext. P7 is the respondent-petitioner's representation against the provisional seniority list published in September, 1977 referred to above. On July 5, 1978 the respondent-petitioner received a communication, a true copy of which is Ext. P8, informing him that his appeal (representation) had been rejected by the Appeals Committee of the Board of Directors of the Company. The respondent-petitioner after issuing Ext. P9 lawyer's notice dated 16th May, 1981 filed the writ petition for the issue of:

4(i) a writ of mandamus to respondents 1 to 4 immediately categories the petitioner as Administrative Officer with effect from 1st January, 1973 and give him all corresponding benefits till date;

(ii) In the alternative a writ of mandamus directing respondents 1 to 4 to refix his seniority in the rank of Assistant Administrative Officer taking into consideration the date of his appointment in that category and give him seniority over respondents 5 to 15;

and (iii) Such other merits, orders and directions as the Court might deem fit and proper in the circumstances of the case,

2. The learned Judge, who disposed of the writ petition by the judgment dated 9th January, 1984 found that the first two prayers in the writ petition could not be granted, whatever be the merits, for the simple reason that the respondent-petitioner had not been vigilant in approaching this Court. The learned Judge, however, while] disposing of the writ petition, directed respondents 1 to 4 to promote the respondent-petitioner provisionally in the rank of Administrative Officer in the next available vacancy, in view of the circumstances that he had been continuing in the lower post for more than a decade, and many of his juniors had been allowed to steal a march over him. It was also observed that his claim for regular promotion would be considered by the Committee afresh; and if it decides to take into account the confidential records, all adverse entries should be communicated, and objections obtained and considered, before taking a decision. The learned Judge also stated that the committee would also have to state reasons for not regularising the appointment of the respondent-petitioner in the post of Administrative Officer if it was to come to that conclusion. The learned Judge further thought that it would be useful if the committee stated what it really meant by seniority-cum-merit-cum-suitability. It is aggrieved by

these directions and observations that this writ appeal has been filed by respondents 3 and 4.

3. Sri C.K. Sivasankara Panicker, the counsel for the appellants, submitted that the relief granted by the learned Judge was not sought by the petitioner in (he writ petition; and that it did not arise out of his pleadings. It was his submission that the company used to make promotions on the basis of merit-cum-suitability by a process of selection, and therefore, ad hoc promotions were not feasible. According to Shri Panicker, merit-cum-suitability was a matter of degree, and senior persons could be overlooked. It was his contention that this Court in exercise of the jurisdiction under Article 226 of the Constitution could not sit in judgment over the selection made by the selection committee either on the ground that many of his juniors were included in the list or on the ground that the entries in his confidential report, which had not been communicated to him, had weighed with the selection committee in deciding the issue.

4. As far as it relates to the first contention that the Court could not have granted relief specifically not pleaded or which did not arise strictly within the pleadings, it is a well-recognised principle that where the facts are before Court, in appropriate cases, to further the ends of justice the Court can mould the relief in such a way as it considers fit and necessary. After all, the procedure is meant to advance the cause of justice; not to frustrate it. Inasmuch as the respondent-petitioner had been holding the post of Assistant Administrative Officer for over 10 years and many of his juniors had been allowed to steal a march over him in the select list prepared by the Lower Management Level Committee; and the failure to include the respondent-petitioner in the select list was virtually without his case having been considered, the selection committee practically depending entirely upon the entries in the confidential record that he was unsuitable for promotion which entry was not communicated to him and manifest injustice appears to be writ large on the decision which did not conform to a procedure; either arbitrary or unreasonable, we do not think that a case for interference with the direction given by our learned brother has been made out.

5. The contention that the entry in the confidential records that the respondent-petitioner was not suitable for promotion was not an adverse entry, and therefore, there was no illegality or injustice about his case having been omitted to be considered on the basis of that entry, not communicated to him, could not be accepted. Whatever might have been the position earlier, in view of the enlarged scope and ambit of the operation of Article 14 of the Constitution as interpreted in the decisions of the Supreme Court in *Ajay Hasia and Others Vs. Khalid Mujib Sehravardi and Others*, and *Maneka Gandhi's case*, AIR 1978 S.C. 597 we have no hesitation to hold that the reporting authority has no absolute right to make such entries in the confidential records as would shut out the chance of the officer's case being considered by the Lower Management Level Committee keeping the officer concerned in the dark in regard to the entry that has been made in the confidential report. It is true, as held by Justice Krishna

Iyer in *State of Mysore Vs. C.R. Sheshadri and Others*, that promotion to the next higher grade is not a matter of right: that Court can only issue direction to Government and cannot substitute its own order for that of the Government. In that judgment it was held:

The power to promote an officer belongs to the executive and the judicial power may control or review Government action but cannot extend to acting as if it were the executive. The Court may issue directions but leave it to the executive to carry it out. The judiciary cannot promote or demote officials but may demolish a bad order of Government or order reconsideration on correct principles. If the rule of promotion is one of sheer seniority it may well be that promotion is a matter of course. On the other hand, if seniority-cum-merit is the rule, promotion is problematical. In the absence of positive proof of the relevant service rules, it is hazardous to assume that by efflux of time the petitioner would have spiralled up to Deputy Secretaryship. The latter part of the High Court's order is, therefore, set aside.

6. It is also settled law that absence of adverse complaint against an officer does not entitle him to promotion; and that promotion is made on the basis of positive merit. Absence of adverse remarks is no criterion of the quality of an ; officer.

7. Construing the position under Regulation 5(2). Indian Administrative Service/ Indian Police Service (Appointment by Promotion) Regulations, 1955, the Supreme Court in *Union of India (UOI) Vs. Mohan Lal Capoor and Others*, observed as follows.

The Selection Committee has an unrestricted choice of the best available talent, from amongst eligible candidates, determined by reference to reasonable criteria applied in assessing the facts revealed by service records of all eligible candidates so that merit and not mere seniority is the governing factor. The required number has thus to be selected by a comparison of merits of all the eligible candidates of each year. But in making this selection, seniority must play its role. Seniority would, however, only be one of the several factors affecting assessment of merit as comparative experience in service should be. There could be a certain number of marks allotted, for purpose of facilitating evaluation, to each year of experience gained in the service. When the required number for the list is thus chosen, the respective roles of seniority and exceptional merit should be governed by Regulation 5(3)(see para 22).

(underlining ours).

In the present case, the seniority of the respondent-petitioner had not been evaluated at all, for that matter his case itself does not appear to have been considered by the Lower Management Level Committee as virtually they were prevented from doing so because of, if we may say so, the fatal entry in the confidential report.

8. In *State of Mysore and Another Vs. Syed Mahmood and Others*, the Supreme

Court while construing the provisions of Rule 4(3)(b), Mysore State Civil Services General Recruitment Rules, 1957, held that an officer could not claim promotion as a matter of right by virtue of seniority alone, where the promotion to the higher post was on a seniority-cum-merit basis.

9. *Amar Kant Choudhary Vs. State of Bihar and Others*, was a case in which an employee was not considered by the selection committee for promotion, due to adverse remarks against him in his confidential reports; which were not communicated to him. It so happened that subsequently the adverse remarks were expunged by the State Government. The Supreme Court held as follows:

Where the case of Dy. Supdt. of Police was not considered by the selection committee for promotion to Indian Police Service Cadre and his name was not included in the select list by the selection committee due to some adverse remarks in his confidential rolls which were either not communicated to him or against which the representation made by him remained undisposed of and though those adverse remarks had been expunged by the State Government, they were not removed from the confidential rolls and subsequent confidential roll which contained entire favourable to the employee were not placed before the selection committee in its next meeting, the decision of the selection committee was vitiated.

It was also observed therein (para. 9):

In order to avoid contingency of an officer missing opportunities advancing his prospects in service due to present system of communicating adverse remarks after delay and consideration of representation against them some years later, two systems suggested, first to make remarks in the roll in the presence of officer concerned with right to make representation to higher authorities and second is to serve copy of such remarks on the officer before submission of confidential roll.

In this case, neither of these happened with respect to the entries in the confidential report which stood in the way of his being considered for promotion by Lower Management Level Committee. The decision of the Supreme Court in *Union of India (UOI) Vs. M.E. Reddy and Another*, was relied upon by the counsel for the appellants. In that case, what came up for consideration was the ambit of R. 16(3), All India Services (Death-cum-Retire merit) Rules; it was held that the confidential reports of the officers could certainly be considered by the appointing authority in passing the order of retirement even if they were not communicated to the officer concerned. It was also held that all that was necessary was that Government of India should have before passing the order considered the report of the Review Committee which was based on full and complete analysis of the history of the service of the employees concerned, though the decision of Review Committee was not binding on the Government of India. It was further observed in the judgment as follows (para 18):

It is not an entry here or an entry there which has to be taken into consideration

by the Government but the overall picture of the officer during the long years of his service that he puts in has to be considered from the point of achieving higher standard of efficiency and dedication so as to be retained after the officer has put in the requisite number of years of service.

10. The position here is that there had not been any consideration of the confidential report of the respondent-petitioner as evidently the Lower Management Level Committee proceeded on the assumption that in view of entry that he was not suitable for promotion there was nothing to be considered about him. This approach is really unreasonable and arbitrary. We are, therefore, in agreement with the directions contained in the judgment appealed against. The writ appeal is accordingly dismissed. No costs.

11. The learned Judge has correctly decided that with respect to the first two prayers no relief could be granted by the writ court. In that view, we dismiss the memorandum of cross-objections also.