
(2009) 10 GAU CK 0022
In the Gauhati High Court
Case No : Writ Petition (C) No. 107 of 2008

(Civ) F.S., Pavanesh Kumar Mahajan, V.S.M. APPELLANT
Vs
Union of India (UOI) and Others RESPONDENT

Date of Decision : 26-10-2009

Acts Referred:

Constitution of India, 1950 — Article 14

Citation : (2010) 4 GLR 770

Hon'ble Judges : Asok Potsangbam, J

Bench : Single Bench

Advocate : Michael Zothankhuma, Vanlalnghaka, Lalrinpuii and Dorothy Lalrinchhani, for the Appellant; S.N. Meitei, Milutpal Barua, I. Choudhury and P.C. Prusty, for the Respondent

Final Decision : Allowed

Judgement

Asok Potsangbam, J.—Heard Mr. Michael Zothankhuma, learned Counsel for the petitioner and Mr. S.N. Meitei, learned CGC, appearing for the respondent Nos. 1, 2, 3, 5 and 6. Also heard Mr. Milutpal Barua, learned Counsel appearing for the respondent No. 4. Mr. I. Choudhury and Mr. P.C. Prusty, learned Advocates appearing on behalf of respondent Nos. 7 and 8 respectively.

2. Facts which are relevant for disposal of this case may be noticed as hereunder :

2(i). It is stated that General Reserve Engineer Force (GREF) consists of personnel from Army and civilian and the services of these employees are governed by the Army Rules as well as Civil Service Rules, wherever it is applicable. Border Road Engineering Service (BRES) is an organized service wherein civil engineers, on the recommendation of the Union Public Service Commission (UPSC), are inducted as member of the service.

(ii). On the recommendation of UPSC, the petitioner was inducted in the year 1983 as a member of BRES group "A" to the post of Assistant Executive Engineer

(Civil) in the GREF. Thereafter, the petitioner was promoted to the grade of Superintending Engineer (Civil) in the GREF of Border Road Organization by an order dated 23.3.2000. It is also stated that the petitioner was awarded Vishisht Seva Medal (VSM) in the year 2003 by the office of the President Secretariat for his outstanding work with reference to his service.

(iii). Next post for promotion from the post of Superintending Engineer (Civil) is the post of Chief Engineer and promotion to this post is governed by Border Road Engineering Service group "A" (Amendment Rules 1988). Eligibility criteria for promotion to the post of Engineer as laid down by the aforesaid Service Rules, requires that a Superintending Engineer (Civil) belonging to BRES needs to serve 8 years regular service in the grade, including service if any, in the non-functional group "A" of Border Road Engineer Service (Civil) out of which 4 years should be in the grade of Superintending Engineer. In addition to the above, an incumbent should have had 2 years experience as a Task Force Commander in the rank of Superintending Engineer (Civil). The composition of DPC for consideration of the said promotion as provided in the Recruitment Rule is as follows :

(i) Chairman/Member, UPSC - Chairman

(ii) Secretary Border Roads Development Board - Member

(iii) Director General Border Roads - Member

The aforesaid position which is not in dispute among the parties in the case, is in terms of the Extant Service Rules.

(iv). It is not in dispute that the Bench-mark prescribed by DoPT vide O.M. No. 35034/7/97-Estt(D) dated 8.2.2002 for consideration of promotion to the post of Chief Engineer is "Very Good". The aforesaid O.M. dated 8.2.2002 has modified and amended the earlier guidelines issued in O.M. dated 10.4.1989, by prescribing higher selectivity in promotion. According to the aforesaid modified O.M. issued by the DoPT, Government of India, DPC is to consider the ACRs of last 5 years of eligible officers who are within the zone of consideration with reference to the prescribed Benchmark. It has also provided that a candidate is to obtain the prescribed Bench-mark for each of the last 5 years in order to be graded as "Fit" by DPC and only those who are graded as "Fit" can be included in the select panel in order of seniority position in the feeder grade. Those officers who do not meet the requirement of the Bench-mark, as discussed above, are to be graded as "Unfit" by the DPC and such officers cannot be included in the select panel. It is also not in dispute that there has not been any case of supersession in promotion from among those candidates who are graded "Fit" by the DPC.

(v). Like in any other service, the gradation of entries in the ACKs of officers belonging to Border Road Engineer Service are as follows :

(i) outstanding

(ii) very good

(iii) good

(iv) average

(v) fair

(vi) poor

Thus, it is clear that in view of the modified guidelines issued under-O.M. dated 8.2.2002, a candidate with 4 years "Outstanding" ACR to his credit could still be graded "Unfit" if the remaining one year under consideration is graded only "Good", i.e., below the Bench-mark of "Very Good" and, therefore, the focus in this case is that such incumbent needs to be given an opportunity to represent against the grading of "Good" for upgradation to the level of the prescribed bench-mark or above though "Good" may not perse be regarded as an adverse remark as per the Government instructions and guidelines.

3. It is alleged by the petitioner that during the period from 2005-2007, while working under one Brigadier K.T. Gajaria, his immediate superior, officer, there appeared to have existed some unhappy official relationship between the petitioner and his aforesaid immediate superior officer as mentioned above, and as such, the petitioner strongly felt that there could possibly be some bias entry made in his ACR for the years 2005-2006 and 2006-2007. Accordingly, a representation dated 7.4.2008 was submitted to the Director General Border Roads, Headquarter, New Delhi, with a request for review of his ACRs for the aforesaid period. However, the petitioner was informed by the office of the DGPR through a communication dated 25.8.2008 that his representation could be considered only by an authority superior to the reviewing authority and accordingly, the petitioner was advised to submit his representation to the superior authority, i.e., the appropriate Secretary, Government of India. Pursuant to the aforesaid communication, the petitioner again submitted a representation dated 4.6.2008 to the Defence Secretary, Government of India with a request for reviewing his ACR for the aforesaid period, i.e., 2005-2006 and 2006-2007 but the second representation for upgradation/modification of the ACRs was rejected by the Ministry of Shipping and Transport Highways, Government of India, vide Communication dated 19.8.2008, on the ground that reporting and reviewing officers had become functus officio in view of the DoPTs note dated 4.6.2008 and as such, the ACRs in respect of petitioner for the aforesaid period could not be upgraded/ modified. It is submitted by the learned Counsel for the petitioner that the representation of the petitioner was considered and rejected not on merit as can be seen from the contents of the communication dated 19.8.2008 which is reproduced hereinbelow :

Subject : Representation of Shri P.K. Mahajan, SE (Civ) Regarding Upgradation of ACRs Gradings

With reference to Dte GBR's letter No. 16703/ACR/DGBR/EID dated 10.7.2008

and Shri P.K. Mahajan's representation dated 4.6.2008 on the above mentioned subject, it is informed that as per DOPT's note No. 14030/1(s)/2008-Estt, (B) dated 4.6.2008, once the Reporting and Reviewing Officers have given their respective assessment/remarks on the ACR, they become functus officio. If the report has been taken on record, there is no question of alteration or modification of the report. As per existing instructions, even when adverse remarks have been decided by the Competent Authority to be expunged, the final grading given in the ACR shall not be modified. Therefore, ACRs in respect of Shri P.K. Mahajan, SE (Civ) for the years 2005-2006 and 2006-2007 cannot be upgraded/modified.

Sd/- (Manmohan Pipil) Under Secretary to the Government of India/.

4. In view of the above communication dated 19.8.2008, as extracted above, it is submitted by the petitioner that he had a reasonable apprehension that the entry/grading in his ACR for the aforesaid period, was below the Bench-mark of "Very Good". This factual position with regard to the grading of the ACRs of the petitioner for the aforesaid period was already known to the competent authority on or before 19.8.2008 and the respondent Nos. 1 to 6 cannot feign ignorance of the aforesaid situation.

5. The admitted position is that against 2 posts of Chief Engineer, 8 eligible officers having the rank of Superintending Engineer (Civil) and who are within the zone of consideration, were considered by the DPC in its meeting held on 3.10.2008, under the chairmanship of a member of the UPSC, for the purpose of selection and promotion. The petitioner and the respondent Nos. 7 and 8 who are placed at Sl. Nos. 4, 3 and 6 respectively in the seniority list of eligible officers, were considered by the DPC and the petitioner was assessed as "Unfit" as he failed to meet the prescribed Bench-mark of "Very Good" in the ACRs of last 5 years taken into account by the DPC in terms of DoPT O.M. dated 18.2.2008 and as such his name was not recommended for inclusion in the panel for promotion whereas the, respondent Nos. 7 and 8 were assessed by the DPC as "Fit" and their names were recommended for inclusion in the select panel. These facts are disclosed, without any ambiguity, in the affidavit of respondent No. 4 and the relevant para 6.1 and 6.2 of the affidavit are quoted below :

6.1 A DPC meeting was held on 3rd October, 2008 under the Chairmanship of a Member of the Union Public Service Commission to consider selection of officers for promotion to the post of Chief Engineer (Civil) in the Border Roads Organization under Border Roads Development Board, Ministry of Shipping, Road Transport and Highways against 2 vacancies pertaining to the year 2008-2009 as per extant instructions of DOP&T contained In their O.M. No. 22011/5/86-Estt. (D) dated 10.4.1989 as amended from time to time. The Director General Border Roads participated in the deliberations of the DPC as its Member. The DPC considered Five years CRs from 2002-2003 to 2006-2007 in respect of the officers in the zone of consideration in terms of the DOP&T guidelines/ instructions.

6.2 Eight eligible officers, including the petitioner, falling in the zone of consideration were considered by the DPC. The petitioner Shri Pavanesh Kumar Mahajan was considered at S. No. 4 of the zone of consideration. However, he was assessed as "Unfit" as he failed to attain the prescribed bench mark of "Very Good" in all the five ACRs taken into account by the DPC, in terms of DOP&T O.M. dated 18.2.2008 referred to in para 5.6 above and was therefore, not recommended for inclusion in the panel for promotion. The officer immediately junior to the petitioner was also assessed as "unfit" and the sixth officer was assessed as "Fit" as he attained the prescribed of "Very Good" and was, therefore, recommended for inclusion in the panel for promotion along with the officer immediately senior to the petitioner, who was also assessed as "Fit". The Minutes of the DPC were forwarded to the Department on 7.10.2008 for implementation.

6. Broadly speaking, the thrust, in the submission of the writ petitioner, is that any entry/grading in the ACR of an incumbent for a particular year(s), which does not meet the requirement and conform to the prescribed Bench-mark, is required to be communicated to the concerned incumbent within a reasonable period with an opportunity to represent for upgradation and upward grading of his ACRs and the competent authority is, under legal obligation, to consider and decide such representation fairly taking into account all the attending facts and circumstances. The concept of adverse remark is not to be confined and determined on the basis of terminology alone but on the basis of actual impact likely to have on the career advancement of the incumbent and, as such, any grading below the Bench-mark is required to be communicated to the concerned incumbent. This issue is no longer res integra in view of the affirmative decision rendered by the Apex Court in Dev Dutt Vs. Union of India (UOI) and Others, As disclosed by para 6.1 and 6.2 of the affidavit of respondent No. 4, as extracted above, the case of the petitioner was considered by the DPC along with the uncommunicated entry/grading recorded below the bench mark and as a result the petitioner was assessed as "Unfit" and consequently he was not recommended for inclusion in the select panel.

7. Relying on Dev Dutt's case (supra) and also on a decision of a Division Bench of this Court dated 27.4.2009 passed in WP(C) No. 435 of 2005 (Principal Seat), the learned Counsel for the petitioner submits that the DPC held on 3.10.2008 without communicating the ACR entry/grading below the Bench-mark, is vitiated and the recommendation made thereto is illegal as it does not have the mandate of law. Thus, a writ of mandamus is sought for directing the respondent, particularly respondent No. 2, to communicate the entry/gradation which are below the Bench-mark with an opportunity to submit representation for upgradation and in case the authority finds sufficient justification to upgrade the relevant ACRs of the petitioner to the level of Bench-mark or above, holding of a review DPC may be directed. In the alternative, it is prayed that a review DPC be ordered on the basis of available ACR by ignoring the uncommunicated ACR/upgradation which are allegedly below the Bench-mark. The petitioner had also

prayed for issuing a writ of certiorari by quashing the communication dated 19.8.2008 (Annexure 8 to the writ petition) as the same is not sustainable both on facts and law.

8. The stand taken by respondent Nos. 1 to 6 are more or less the same though separate affidavits have been filed, one on behalf of respondent Nos. 1, 2, 3, 5 and 6 and another on behalf of respondent No. 4, the UPSC. The common ground taken in both the affidavits is that on the basis of the O.M. dated 8.2.2002 and 18.2.2008 issued by the DoPT, Government of India and in terms of the Extant Recruitment Rules, the case of the petitioner was considered along 7 others for selection and promotion against 2 vacant posts of Chief Engineer, by the DPC in its meeting held on 3.10.2008 and the case of the petitioner was not recommended by the DPC for inclusion in the select list as the ACRs of the petitioner for the last five years did not meet the requirement of the prescribed Bench-mark of "Very Good" and as such, the petitioner had no case. The second ground is that any entry/grading in an ACR of an incumbent below the Bench-mark is perse not adverse remark and therefore, the same is not to be communicated to the officer concerned and this position is in terms of DoPT O.M. No. 21011/4/87-Estt(A) dated 10/11.9.1987. It is also contended that 2 eligible officers, one above the petitioner and another below the petitioner in the seniority list of eligible officers, were assessed "Fit" and accordingly they were recommended for inclusion in the select list against the 2 posts of Chief Engineer and the said 2 officers who are now arrayed as respondent Nos. 7 and 8, meet the requirement of the prescribed Bench-mark of "Very Good". Thus, it is further submitted by the learned Counsel for the respondents that no illegality has been committed in the above process which led to the recommendation of the respondent Nos. 7 and 8 for inclusion in the select list for promotion to the post of Chief Engineer. It is further submitted that considering the limited scope of judicial review against the decision of selection committee, no interference is called for from this Court.

9. At the outset it is submitted by the learned Counsel for the respondent Nos. 7 and 8 that the writ petition is not maintainable due to nonjoinder of necessary party inasmuch as the former Brigadier K.T. Gajaria against whom an allegation has been made by the petitioner in the writ petition, has not been made a party in the case. It is also submitted by the learned Counsel for the petitioner that as the representation of the petitioner for upgradation and upward gradation, by way of review, of his ACR for the period of 2005-2006 and 2006-2007 had already been considered and rejected by the competent authority, it will be futile and no meaningful purpose will be served to give further chance to file the representation for upgradation of his ACRs. Further submission is that such an exercise will be nothing but a "useless formality" and in support of the "useless formality theory" the respondent had cited the following cases :

(i) S.L. Kapoor Vs. Jagmohan and Others,

(ii) M.C. Mehta Vs. Union of India (UOI) and Others,

(iii) Aligarh Muslim University and Others Vs. Mansoor Ali Khan,

It is further contended that the DoPT O.M. dated 8.2.2002 prescribes higher selectivity in promotion to the posts categorized under revised pay scale of Rs. 1200-16500 and above. Further submission has also been made by the learned Counsel for the respondent Nos. 7 and 8 that it is the assessment of the reviewing authority which was taken into consideration by the DPC, not the assessment of the initiating officer and as such, the allegation that Brigadier K.T. Gajaria, initiating officer, spoiled the ACR of the petitioner for the aforesaid period is beyond logic and truth.

10. From the above narration of facts and the respective contentions raised by the contesting parties, the following issues emerge for consideration of the court:

(i) Whether it is required under law to communicate any of the petitioner's ACRs where the entry/grading has been assessed/ recorded below the prescribed Bench-mark with an opportunity of making representation for upgrading his ACR entries from "Average/ Good" to "Very Good" or above irrespective of the stipulation made by the Government O.M. dated 10/11.9.1987 that only the adverse remark can be communicated to the incumbent concerned?

(ii) In case the first issue is answered in the affirmative, whether the DPC held on 3.10.2008 without communicating the entry/grading below the Bench-mark to the petitioner, is vitiated or not?

(iii) Whether the communication dated 19.8.2008 which is issued on the basis of DoPT's note No. 14030/1(s)/2008-Estt.(B) dated 4.6.2008 is liable to be quashed in view of the decision of the Apex Court in Dev Dutt's case (supra) or not?

(iv) Whether the petitioner is entitled to any of the reliefs sought for in the writ petition ?

11. Mr. Lalit Mahajan, Desk Officer, UPSC, who is present before the court along with the relevant file, has submitted a Xeroxed copy of the ACR assessment sheet and some other connected documents. These documents which are marked as "XI" and "X2" for identification, are placed on record. Perused the assessment sheet and other connected documents. Perusal of the aforesaid documents reveal that the statement of the respondent No. 4 that the petitioner did not meet the requirement of prescribed bench mark of "Very Good", is correct inasmuch as the ACR of the petitioner for 2005-2006 has been assessed as "Good" and "Average" for 2006-2007. Both these entries are below the prescribed Bench-mark. As a result, in the DPC held on 3.10.2008 the petitioner was eliminated from being placed in the select panel as he did not meet the requirement of the Bench-mark.

12. The issue No. 1 is no longer res integra in view of the clear and affirmative decision of the Apex Court rendered in Dev Dutt's case (supra) in the aforesaid case, the Apex Court held that whether an entry is adverse or not depends upon the actual impact on the employees' career, not on the terminology. Even "Good"

entry can be adverse in the context of eligibility for promotion. The Apex Court further held that all grading whether "Very Good", "Good", "Average" or "Poor" are required to be communicated to the employees working in Government offices, statutory bodies, public sector undertaking or other state instrumentalities where the constitutional obligation and principle of natural justice and fairness apply with the exception of military service, within a reasonable period so that employee concerned gets an opportunity of filing representation for improvement of his grading and such representation is to be decided fairly and within a reasonable period of time by the authority higher than the one which made the final entry.

13. The Apex Court had already considered the legality or otherwise of the O.M. dated 10/11.9.1987 which stipulated that only the adverse entries were to be communicated to the employee concerned but this O.M. was found arbitrary by the Apex Court in the aforesaid case and the same was declared illegal being violative of the Article 14 of the Constitution of India. The Apex Court further held that similar rules/ Government orders/office memoranda issued in this regard is illegal and are liable to be ignored.

It is also noticed that the petitioner before the Apex Court in the aforesaid case was an officer of the Border Road Engineering Service Group "A" and the grievance raised by the petitioner therein is against the non-selection to the post of Superintending Engineer on the ground that the petitioner did not meet the requirement of the prescribed Benchmark of "Very Good". The DPC, which did not recommend the petitioner therein for inclusion in the panel of Superintending Engineer, proceeded with the selection process with an entry below the Benchmark for the year 1993-94 without communicating the same to the petitioner and the non-communication of the ACR below the Bench mark is held by the Apex Court as arbitrary and violative of the Principles of natural justice in the following words :

Every entry in the ACR of a public servant must be communicated to him within a reasonable period, whether it is a poor, fair, average, good or very good entry. This is because non-communication of such an entry may adversely affect the employee in two ways : (1) had the entry been communicated to him he would know about the assessment of his work and conduct by his superiors, which would enable him to improve his work in future; (2) he would have an opportunity of making a representation against the entry if he feels it is unjustified, and pray for its upgradation. Hence, non-communication of an entry is arbitrary. It is not only when there is a Bench-mark but in all cases that an entry (whether it is poor, fair, average, good or very good) must be communicated to a public servant, otherwise there is violation of principle of fairness, which is the soul of natural justice.

14. It's a matter of record that the aforesaid Dev Dutt's case was finally decided by the Apex Court on 12.5.2008 and the review petition No. 1824 of 2008 filed against the aforesaid order dated 12.5.2008 was dismissed on 11.11.2008

whereas, in the instant case, affidavits on behalf of respondent Nos. 1, 2, 3, 5 and 6 and the respondent No. 4 were filed on 9th January, 2009 and 19.2.2009 respectively. There can not be any denial that almost all the pleas taken in the affidavit of respondent Nos. 1 to 6, were already discussed and held as arbitrary and illegal by the Apex Court in Dev Dutt's case. As the contesting official respondents in the instant were also parties in the Dev Dutt's case before the Apex Court, they are bound by the finding and direction contained in the judgment of the aforesaid case. In view of the above, the plea of the respondent that adverse remark alone shall be communicated to an employee in terms of O.M. dated 10/11.9.1987 is not available to respondent Nos. 1 to 6 and such plea is rather contemptuous. Again, in view of what has been discussed above, the plea of respondent Nos. 7 and 8, i.e., "useless formality" is not acceptable in as much as any representation submitted by an incumbent to his superior authority expressing normal apprehensions/grievances prior to communication of any deficient ACR(s) or ACR(s) below the Benchmark, can not be equated with a representation to be submitted by an incumbent for improvement after communication of such deficient ACR(s), under legal obligation, from the competent authority.

15. Further, it is to be noted that relying on the aforesaid Dev Dutt's case, as already discussed above, a Division Bench of this Court (Principal Seat) disposed of Writ Appeal No. 435 of 2005, vide judgment and order dated 27.4.2009, holding that non-communication of ACR/entry below the Bench-mark was violative of the Principles of natural justice as held in Dev Dutt's case and accordingly a direction was issued to communicate the "Average" entry in the ACR of the petitioner therein for enabling him to make a representation for upward gradation of his ACR. The instant case is no different from the above two cases, one before the Apex Court and another before the Division Bench of this Court and incidentally, in both the cases, the controversy relates to officers of the Border Road Engineering Service and General Reserve Engineering Force. In view of the above, this Court is of the opinion that there is no need for any discussion on the scope of judicial review and power of DPC as contended by the respondent as this Court is not deciding this case on the merit of the decision of the DPC. In view of what has been discussed above, this Court is of the considered opinion that the official respondents are legally and constitutionally bound to communicate the "Good" entry for the year 2005-2006 and "Average" entry for 2006-2007 to the petitioner with an opportunity to file a representation for improving and upward grading of his ACRs for the aforesaid period and the respondent, particularly respondent No. 2 is to consider and decide the representation fairly within a reasonable period.

16. Having answered the first issue in the manner indicated above, the DPC held on 3.10.2008 for selection of candidate for promotion against 2 posts of Chief Engineer in the Border Road Engineering Service under GREF, stands vitiated and any recommendation made thereto by the aforesaid DPC held on 3.10.2008, shall also be treated as non est in the eyes of law.

17. With regard to the issue No. 3, the impugned communication dated 19.8.2008 issued in terms of DoPT's note No. 14030/1(s)/2008-Estt, (B) dated 4.6.2008 is inconsistent and contrary to the decision of the Apex Court in Dev Dutt's case (supra) and as such, the same can not be allowed to continue any further. Accordingly, the impugned communication dated 19.8.2008 is hereby quashed.

18. In view of the finding of the court in issue Nos. 1 and 2 above, the respondent, more particularly respondent No. 2 is directed to communicate the un-communicated ACRs of 2005-2006 and 2006-2007 to the petitioner within a reasonable period, enabling the petitioner to submit a representation for improvement and upgradation of his ACR for the aforesaid period from "Average/Good" to "Very Good" and above and the respondent shall consider and decide the representation of the petitioner fairly within a reasonable period of time. On consideration of such representation, if the respondent/competent authority finds justification to improve the entry in the ACRs of the petitioner for the aforesaid period to the level of prescribed Bench-mark and above, a review DPC shall be held for consideration of promotion to the post of Chief Engineer. The above exercise shall be completed within the period of 4 (four) months from the date of receipt of the certified copy of this order.

19. In the result, the writ petition is allowed. Considering the nature of the case, there should be no order as to costs.