

(2008) 08 BOM CK 0167
In the Bombay High Court
Case No : Writ Petition No. 208 of 2004

Dr. A.J. Varghese, Lecturer in English, Government
Polytechnic

APPELLANT

Vs

The Director of Technical Education, Directorate of Technical
Education, State of Goa and The Goa Public Service
Commission

RESPONDENT

Date of Decision : 14-08-2008

Acts Referred:

Constitution of India, 1950 — Article 14, 16, 226

Citation : (2008) 08 BOM CK 0167

Hon'ble Judges : Santosh Bora, J;S.C. Dharmadhikari, J

Bench : Division Bench

**Advocate : Nikhil Vaze, for the Appellant; S.R. Rivonkar, Government Advocate,
for the Respondent**

Final Decision : Allowed

Judgement

S.C. Dharmadhikari, J.—By this petition under Article 226 of the Constitution of India, the petitioner prays for a writ of mandamus or a writ in the nature of mandamus or any other appropriate writ, order or direction, commanding the respondents to promote him to the Post of Head of Department of Modern Office Practice in Government Polytechnic, Panaji Alternatively, the petitioner prays for a direction to the respondents to consider the petitioner for his promotion to this post by not taking into consideration adverse remarks for the relevant period.

2. The petitioner has been appointed as a Lecturer in Government Polytechnic at Panaji. He possesses educational qualifications, more particularly set out in paragraph 2 of the petition. Upon retirement of the then Head of Department, there was a clear vacancy and as per the Recruitment Rules in force, the post of Head of Department was to be filled in by promotion from amongst the Lecturers and more particularly having 5 years service in the grade. The petitioner was fully eligible for promotion on the date when the vacancy arose. However,

respondents No. 1 and 2 did not fill in the vacancy despite the recommendations and that is how the petitioner was deprived of an opportunity for being considered for promotion.

3. Subsequently, 2 sets of Recruitment Rules were framed and the last in point of time was the subject matter of challenge by the petitioner himself in a Writ Petition filed in this Court. The said writ petition was placed before a Division Bench of this Court and by a Judgment and Order delivered on 25.6.03, the Division Bench directed that the petitioner would be qualified for being considered for promotion and there is no necessity of striking down the Rules which were challenged before it.

4. It is the case of the petitioner that pursuant to this Judgment and Order, he ought to have been promoted, but it was communicated to him that the Departmental Promotion Committee has not recommended the petitioner's name for the post Head of Department. The petitioner contends that the adverse remarks which have been inserted in his Annual Confidential Report and communicated to him are the basis for denying him the promotion.

5. It is not in dispute that what has been relied upon by respondents No. 1 and 2 to deny promotion to the petitioner are the remarks which are more particularly set out in the affidavit filed in reply to this petition. The affidavit, in paragraph 24, reads thus:

24. With reference to ground (B) of Para 23 it is submitted that pursuant to the Office Memorandum No. 12/14/89-PER dated 26/9/1990, the minimum bench mark required in respect of Promotion is "Very Good", whereas the Petitioner was holding "Good" in his ACRs. It is submitted that in view of acceptance by the Government the recommendations of AICTE, the Government upgraded the posts in technical education. When a particular post requires a candidate of specified level, it does not justify any candidate having lesser grade be considered for promotion only because such candidate is a lone candidate in fray.

6. From a perusal of this paragraph, it is apparent to us that the minimum bench mark required in respect of the promotion is "Very Good", whereas, the petitioner was holding remarks as "Good". Thus, the petitioner did not reach the required level, is the contention.

7. However, Mr. Vaze, appearing for the petitioner contended before us that if the bench mark for promotion is "Very Good", then, the remark "Good" is an adverse remark. That remark ought to have been communicated to the petitioner and further, in accordance with the principles of nature justice, an opportunity should have been afforded to make a representation against it. Such remarks which are adverse in character having not been communicated and yet relied upon to deny promotion to the petitioner, demonstrate that respondents No. 1 and 2 have violated the mandate of Articles 14 and 16 of the Constitution of India..

8. Reliance is placed by Shri Vaze on a decision of the Hon"ble Supreme Court

rendered in Dev Dutt v. Union of India and Ors. Civil Appeal No. 7631 of 2002, decided on 12.5.08.

9. From a perusal of the Judgment, it is apparent to us that the Supreme Court, after referring to earlier views and decisions, concluded that if the bench mark is "Very Good", then, a remark "Good" is indeed adverse and such remarks, are therefore, require to be communicated to the employee. Further, right to make representation against an adverse entry at once becomes available and representation also should be permitted to be made in such cases.

10. After this decision was brought to our notice by the petitioner's Counsel, we called upon Shri Rivonkar to make an appropriate statement in the light of the law laid down by the Supreme Court and considering the undisputed factual position.

11. Once respondents No. 1 and 2 could not dispute their stand, which is now placed on record by way of an affidavit in this petition, then, it is apparent to us that the law laid down in this decision would apply. Consequently, the petitioner must be afforded an opportunity to make a representation against the remarks which are relied upon and referred to more particularly in paragraph 24 reproduced above.

12. Once such a representation is duly considered after it is forwarded, then, needless to state that upon appropriate decision on the same the petitioner's case must be once again considered for promotion to the post of Head of Department.

13. However, we say nothing more at this stage. The petition succeeds to the extent that the petitioner shall have right to make a representation against the above remarks and such representation may be made within a period of 4 weeks from today. If such a representation is made and received, respondents No. 1 and 2 to duly consider the same and pass appropriate orders within a period of 4 weeks from the date of its receipt. Depending upon the outcome of the representation, the respondents to then consider the case of the petitioner for promotion to the post of Head of Department in the subject Institute. Petition allowed in the above terms. No order as to costs.