
(2010) 04 GAU CK 0037
In the Gauhati High Court
Case No : Writ Petition (C) No. 91 of 2009

Girish Chandra Papnee

APPELLANT

Vs

Union of India (UOI) and Others

RESPONDENT

Date of Decision : 26-04-2010

Acts Referred:

Constitution of India, 1950 — Article 14, 16, 21, 226

Citation : (2010) 4 GLR 640 : (2010) 3 GLT 781

Hon'ble Judges : B.D. Agarwal, J

Bench : Single Bench

Advocate : R.C. Prusty, for the Appellant; Lalremtluanga, for the Respondent

Final Decision : Allowed

Judgement

B.D. Agarwal, J.—The writ petitioner is serving in the Assam Rifles in the rank of Havildar. The petitioner was initially recruited as GD Rifleman in the year 1980 and subsequently promoted to the rank of Lance Naib, Naik and Havildar in the year 1991, 1996 and 1997 respectively. In terms of the Record Office Instruction (ROI), i.e., guidelines for promotion, the writ petitioner became eligible for promotion to the rank of Naib Subedar (General Duty) in the year 2002, after 18 years of total service and 5 years of Havildar GD. However, for the reasons best known to the concerned authority of Assam Rifles, the petitioner was considered for promotion in the year 2006, but the Screening Committee promoted 6(six) Havildars as Naib Subedar, who were junior to the writ petitioner. In this way the writ petitioner was superseded, giving rise to filing of this writ petition under Article 226 of the Constitution of India.

2. According to the writ petitioner, he has been discriminated in the matter of promotion, inasmuch as, although he had fulfilled the requisite qualifications and criteria he has been deprived of promotion. Hence, as contended, it is a clear case of infringement of Articles 14, 16 and 21 of the Constitution of India. As such, the petitioner is praying for a writ in the nature of mandamus so as to direct the respondents" No. 1 to 5 to consider the promotion of the petitioner

giving retrospective effect, i.e., with effect from 1.1.2006, as given to the private respondents.

3. Heard Mr. P.C. Prusty, learned Counsel for the petitioner as well as Mr. Lalremtluanga, learned Counsel for the respondent Nos. 1 to 5. The private respondents have not appeared despite being notified.

4. In the affidavit-in-opposition of the State-Respondents, it has been stated that petitioner's case was considered for promotion but in view of earning the grade of "Average" in the year 2005 in his ACR, he could not be promoted. It has further been stated in the affidavit that both the Initiating Officer, (I.O.) and Reviewing Officer (R.O.) also did not recommend his promotion in the ACR of 2005.

5. As per guidelines for promotion (ROI) 4/2002 dated 22.5.2002, the following criteria has been fixed for promotion of Havildar to Naib Subedar:

(a) Three (3) out of last five (5) reports should not be below "High Average"

(b) Remaining two (2) reports should not be below "Average".

(c) Out of last five (5) reports, two Reports must be from Bn/ARTC & S (Not applicable to GD pers forming part of any AR team of any discipline att to AR/Army fmn).

(d) Should have been recommended for promotion in the last three (3) reports.

6. The writ petition came up for hearing on 23.4.2010 and on that day, I felt it necessary to peruse the ACR of the petitioner for the relevant period, i.e., for the year 2001 to 2005 that were considered by the Screening Committee of the respondents. Accordingly, certified copy of ACR were produced before me. I have perused the same. The ACR for the year 2001 indicates that the writ petitioner was graded as "high average" and both the I.O. and RO. had recommended his promotion. Similarly in the ACR of 2002 and 2003 the petitioner was graded "above high average". In the ACR of 2002 the I.O. has recorded that the "NCO, has performed all tasks assigned to him exceptionally well, commands the respect of his subordinates" and in the ACR of 2003 the I.O. has commented that the petitioner is "a disciplined and an intelligent NCO, willingly shoulders additional responsibility". It may also be mentioned here that both the IO and RO had recommended the petitioner for promotion. It is true that in the year 2004 and 2005 the petitioner was graded as "average". However, in the year 2004 the I.O. observed that the performance of the petitioner was just satisfactory and on the basis of this remark both the IO and RO did recommend his promotion. In this way, only in the year 2005, the concerned authority did not find the petitioner suitable for promotion.

7. From the guidelines of promotion, it is apparent that if a Havildar secures "high average" grading in three reports, out of last five reports, he would be eligible for promotion. In the present case, I find that the petitioner had not only

secured "high average" in the year 2001 he was graded "above high average" in the year 2002 and 2003. Not only that in the worst report of 2005, the petitioner was at least not graded as "below average". In addition to all these gradings and recommendations for promotion the petitioner has also submitted a copy of Certificate of Appreciation dated 15.8.2004, given by the highest authority of Assam Rifles wherein it has been certified that 103588M Hav Girish Chandra Papnee has shown his total sincerity, devotion, dedication and ability in performance of his duty and he is an example to other employees of Assam rifles. However, this letter of appreciation has been totally ignored by the Screening Committee.

8. Fairness, reasonableness and transparency are the touch stone of executive and administrative functions. The Indian judiciary is consistently improving the theory of fair play. Without multiplying authorities on this doctrine, I think the following few trend-setting observations from the hon"ble Supreme Court would suffice to draw the point:

In the case of *Netai Bag and Others Vs. The State of West Bengal and Others*, the hon"ble Supreme Court has re-affirmed fairness in executive actions in the following words:

17. It has been consistently held by this Court that in a democracy governed by the rule of law, the executive Government or any of its officers cannot be allowed to possess arbitrary powers over the interests of the individual. Every action of the executive Government must be in conformity with reason and should be free from arbitrariness. The Government cannot be equated with an individual in the matter of selection of the recipient for its largesse. Dealing with the limits on the exercise of executive authority in relation to rule of administrative justice, Mr. Justice Frankfurter in *Vitarelli v. Seaton* 359 US 535 said:

An executive agency must be rigorously held to the standards by which it professes its action to be judged.... Accordingly, if dismissal from employment is based on a defined procedure, even though generous beyond the requirements that bind such agency, that procedure must be scrupulously observed.... This judicially evolved rule of administrative law is now firmly established and, if I may add, rightly so. He that takes the procedural sword shall perish with that sword.

9. In the case of *Onkar Lal Bajaj Vs. Union of India (UOI) and Another etc. etc.*, the Apex Court reiterated about the concept of probity in governance in the following lucid words:

36. The role model for governance and decision taken thereof should manifest equity, fair play and justice. The cardinal principle of governance in a civilized society based on rule of law not only has to base on transparency but must create an impression that the decision-making was motivated on the consideration of probity. The Government has to rise above the nexus of vested interests and nepotism and eschew window dressing. The act of governance has

to withstand the test of judiciousness and impartiality and¹ avoid arbitrary or capricious actions. Therefore, the principle of governance has to be tested on the touch stone of justice, equity and fair play and if the decision is not based on justice, equity and fair play and has taken into consideration other matters of fact, the reasons are not based on values but to achieve popular accolade, that decision cannot be allowed to operate.

10. In view of the aforesaid observations of the hon''ble Supreme Court it can be said that transparency and fairness in the executive action are the epitome of Articles 14 and 16 of the Constitution and any amount of discrimination would be considered as a direct blow to the fundamental rights guaranteed to the citizens of India. In other words, the executive decision must demonstrate that the authority acted fairly, judiciously and the person, affected by the decision must also be convinced that the decision was not actuated with any malice or discrimination. However, the facts and circumstances of the case before me exhibit and depict a contrary picture. The record of the Writ Petition reveals that the Screening Committee of the Assam Rifles have acted extremely unreasonably, arbitrarily in allowing good numbers of Havildars, junior to the petitioner, to be promoted to the rank of Naib Subedar, without considering good performance of the writ petitioner, as recorded in his ACR as well as ignoring the "Certificate of Appreciation" given by the Director General of Assam Rifles. Situated, thus, I hold that the Superintend promotion of the petitioner was withhold in a perfunctory manner without meticulously examining his ACR for five years.

11. For the reasons alluded hereinabove, I hold that the writ petition has sufficient force. Consequently, writ petition stands allowed. Since the petitioner has suffered mental trauma due to withholding of his promotion arbitrarily and whimsically and has been allowed to be superseded by good number of junior Havildars, I hold that it is a fit case for granting cost incurred by the petitioner in this litigation, which is assessed at Rs. 5,000. Hence, it, ordered that the cost of Rs. 5,000 (five thousand) shall be paid to the petitioner by the respondents Nos. 1 to 5, within a period of two months from today. At the same time, the respondents No. 1 to 5 are directed to constitute a fresh Screening Committee/ DPC to consider the case of the writ petitioner for promotion within the aforesaid period of two months. It is further made clear that if the writ petitioner is either not given promotion or even if the promotion is given, without maintaining seniority-ante, he will still be at liberty to approach this Court by filing writ petition.

12. Registry is directed to the return the copies of ACR to the learned Counsel for the respondent Nos. 1 to 5, keeping a photo copy of the, same in the file. A copy of the judgment shall also be furnished to the learned Counsel for R-1 to R-5 for expediting the implementation of this judgment.