
(1978) 03 BOM CK 0046
In the Bombay High Court
Case No : Spl. C. A. No. 227 of 1972

Govind Sadashiv Aparajit

APPELLANT

Vs

State of Maharashtra and others

RESPONDENT

Date of Decision : 29-03-1978

Acts Referred:

Constitution of India, 1950 — Article 14, 16

Citation : (1978) MhLj 631

Hon'ble Judges : R. D. Tulpule, J; C.S. Dharmadhikari, J

Bench : Division Bench

Advocate : V.R. Manohar, for the Appellant; M.A. Garud, Asstt. Government Pleader, for the Respondent

Judgement

C.S. Dharmadhikari, J.—In this writ petition the petitioner has challenged the promotion of the respondents Nos, 3 and 4 whereby they were promoted as Divisional Joint Registrar, Co-operative Societies, in the month of February 1972. According to the petitioner, the criterion for promotion is one of seniority-CM/n-merit. It is contended by the petitioner that according to the gradation list of Class II officers he is senior to the respondents Nos. 3 and 4. Subsequently by an order dated 15-9-1971 he was permitted to cross the efficiency bar with effect from 1-4-1968 itself, and in spite of this order passed by the Government his case was not considered for promotion when the respondents Nos. 3 and 4 were promoted on 18-2-1972. Hence their promotions are violative of his fundamental right guaranteed under Articles 14 and 16 of the Constitution of India.

2. It is also contended by the petitioner that the confidential record for a period prior to 1-4-1968 could not now be taken into consideration by the Government while making further promotions in view of the order passed by the Government on 15-9-1971 permitting him to cross the efficiency bar with effect from 1-4-1968. He further contended that his service record after 1968 is excellent and, therefore, he was entitled to be considered for promotion when the

respondents Nos. 3 and 4 were promoted as Divisional Joint Registrar, Co-operative Societies.

3. Apart from these allegations, the petitioner has made various other allegations in the petition challenging even the promotion of one Shri B. N. Chavan who was promoted to the post of Joint Registrar, Co-operative Societies, by an order dated 2-1-1970 and of one Shri Ishaquiddin and one Shri Pappoo who were also promoted as Joint Registrar, Co-operative Societies,, on 11-11-1970. However, it is not necessary to make a detailed reference to those allegations in this petition because neither Shri Chavan nor Shri Ishaquiddin nor Shri Pappoo are joined as parties to this petition and, therefore, their promotions cannot now be challenged by the petitioner in this writ petition filed in 1972 and that too without joining them as parties.

4. Mr. Manohar, learned counsel appearing for the petitioner, therefore, confined his arguments to the promotions of the respondents Nos. 3 and 4 who were promoted to the post of Divisional Joint Registrar, vide order dated 18-2-1972. According to Mr. Manohar, as all adverse remarks in the confidential record of the petitioner prior to 1968 cannot now be taken into consideration in view of the subsequent order passed by the Government on 15-9-1971 permitting him to cross the efficiency bar and as his further record is good, by not considering him for promotion in the year 1972 when the respondents Nos. 3 and 4 were promoted as Divisional Joint Registrar, his fundamental right guaranteed under Article 16 is wholly violated and, therefore, the said promotions are liable to be set aside. However, having regard to the fact that subsequent to the filing of the petition, in the year 1973 the petitioner himself was promoted as Divisional Joint Registrar, Mr. Manohar has confined his arguments praying for a writ of mandamus directing the respondents Nos. 1 and 2 to consider the case of the petitioner together with the respondents Nos. 3 and 4 as in February 1972 and then grant him a deemed date and consequential reliefs in accordance with law. Therefore, Mr. Manohar is not now praying for issue of a writ of mandamus for quashing the promotions of the respondents Nos. 3 and 4 in toto.

5. In the return filed on behalf of the respondents Nos. 1 and 2, a reference is made to the adverse remarks which were communicated to the petitioner vide letter dated 30-9-1968. It was then contended that the clearance of an efficiency bar in a certain scale of pay is not necessarily an eligibility for promotion because to become qualified for promotion, the person should possess positive merit and seniority alone is not the criterion. It was then contended in the return that so far as Shri Chavan, Shri Ishaquiddin and Shri Pappoo are concerned, at that time the case of the petitioner was considered for promotion but he was not found suitable. There is nothing in the return to indicate that when the respondents Nos. 3 and 4 were promoted in the year 1972, the case of the petitioner was even considered. To say the least, the return filed by the respondents Nos. 1 and 2 is most unsatisfactory and does not give any details. So far as the respondents Nos. 3 and 4 are concerned, they have not filed any return before us. It appears

from the record of this Court that they are represented by a counsel. However, even the counsel was not present when the present writ petition was being heard. Therefore, we had not the advantage of hearing any arguments on behalf of the respondents Nos. 3 and 4.

6. This writ petition was filed by the petitioner on 28-9-1972. It came for admission before this Court on 1-3-1972 and on that date the rule was issued and the rule was also issued on stay. Subsequently by an order dated 3-7-1972 the stay application was rejected. However, this Court directed that the hearing of the petition should be expedited. By an application dated 11-7-1972 the respondents Nos. 1 and 2 prayed for time to file the return and accordingly one month's time was granted. It appears from the record that in spite of this, the return itself was filed by the respondents Nos. 1 and 2 in June 1975 practically after about three years. From the return itself it is further clear that though it was drafted sometime in August 1973, the affidavit in support of it was sworn on 6-1-1975 and the return itself came to be filed on 25-6-1975. We are making a detailed reference to all these dates because when the matter came up for hearing on 10-3-1978, Mr. Garud, learned Assistant Government Pleader, asked for time till 21-3-1978. Thereafter the arguments of the counsel for the petitioner were heard on 22-3-1978, and at that stage also a request for adjournment was made by the learned Assistant Government Pleader. Hence the case was adjourned to 28-3-1978. Yesterday i.e. on 28-3-1978 a request was also made for adjournment and the case came up for hearing today (29-3-1978). As the record stands today, there is nothing in the return filed by the respondents Nos. 1 and 2 which is duly sworn by the Under Secretary in the Department concerned to indicate as to what was the procedure followed when the respondents Nos. 3 and 4 were promoted as Divisional Joint Registrar. It is not the case of the respondents Nos. 1 and 2 that in the month of February 1972 when the orders of promotion in favour of the respondents Nos. 3 and 4 were issued, the case of the petitioner was considered. In this state of affairs, in our opinion, it is quite obvious from the allegations made in the petition which are not controverted that the case of the petitioner was not considered when the respondents Nos. 3 and 4 were promoted as Divisional Joint Registrar.

7. It is no doubt true that during the course of arguments Mr. Garud wanted to rely on certain files of the Government but the said files do not form part and parcel of the record of this Court, nor those files were relied upon in the return. Even otherwise, it appears that even after the perusal of the files it is not possible for anybody to come to a definite conclusion that the petitioner's case was considered in February 1972. In this state of affairs we have no other alternative but to record a finding that the petitioner's case was not considered for promotion when the respondents Nos. 3 and 4 were promoted as Divisional Joint Registrar.

8. With the return, Annexure R-V is filed, which, according to the respondents Nos. 1 and 2, indicates the procedure for promotion. As to on what basis this

procedure is based is also not known. If this Annexure is read as a whole, it appears that it is a copy of some departmental note submitted by some officer while preparing a parawise report in reply to the allegations made in the petition. Therefore, this document is of very little assistance for understanding the exact procedure which is either followed or is contemplated to be followed while making such promotions.

9. However, the contention raised by Mr. Manohar that the adverse remarks in the record of the petitioner for a period prior to 1968 cannot be taken into consideration at all while deciding the further promotion cannot be accepted. According to the respondents Nos. 1 and 2, after clearing the efficiency bar by the competent authority, the petitioner will be entitled to get an increment in the same scale in the same post. At best it relates to the efficiency in the same cadre; but this efficiency is distinct from the type of efficiency which is required for promotion, that is, for being promoted from a lower to a higher cadre. Therefore, mere clearance of the efficiency bar in a certain pay-scale is not necessarily a qualification for promotion as the criterion for promotion is entirely different. Thus, according to the respondents Nos. 1 and 2, so far as the question of promotion is concerned, the service record of an employee as a whole will have to be taken into consideration to decide the question of positive merit. If this is so, it is not correct to say that only because a person is allowed to cross the efficiency bar, adverse remarks in his record are wholly washed out for all purposes. On the other hand, according to Mr. Manohar, once such an order permitting the crossing of the efficiency bar is issued by the competent authority, the earlier record is wholly washed out and it cannot form the basis for not promoting the employee to a higher post.

10. In support of this contention, Mr. Manohar has strongly relied upon a decision of the Supreme Court in *The State of Punjab Vs. Dewan Chuni Lal*, . Apart from this decision, Mr. Manohar has also relied upon a decision of the Punjab and Haryana High Court in *Shadi Lal v. Deputy Commissioner, Gurgaon* 1974 (1) S L R 217; a decision of the Allahabad High Court in *Satish Chandra v. State of U. P.* 1975(1) S L R 65 and a decision of this High Court in *Bari Trimbak v. State of Maharashtra Spl. C. A No. 515 of 1972* decided ON 12-7-1974 and relying upon these decisions it is contended by him that the earlier bad record is wholly washed out once an order permitting the crossing of the efficiency bar is issued and therefore the earlier service record cannot be taken into consideration at all for any purpose. On the other hand, Mr. Garud, the learned Assistant Government Pleader, has relied upon a decision of this Court in *Shankar v. Chief Conservator of Forests, Poona* 1977 Mh. L J 536 and a decision of the Full Bench of the Orissa High Court in *S. S. S Venkatruo v. State of Orissa* 1974 Lab. I C 1192. In our opinion, there is much substance in the contention raised by Mr. Garud. It will be laying down the law too broadly to say that merely because an officer has been allowed to cross the efficiency bar, all adverse entries prior to that stage are not to be taken into consideration for any purpose whatsoever. As observed by the Supreme Court in *Mir Ghulam Hussan and Others Vs. The Union*

of India (UOI) and Others, , absence of adverse complaint against an officer does not entitle him to claim promotion. Promotion is not made on the basis of absence of complaint but on the basis of positive merit. As observed by the Orissa High Court in *S. S. S. Venkatrao v. State of Orissa* (cit. sup.) the personality of an officer cannot be disintegrated and the scales for allowing the crossing of efficiency bar and for giving promotion are different. What is sufficient for the former may be wholly insufficient for the latter. Adverse character roll not construed as a deterrent for crossing efficiency bar is not obliterated, only because the order crossing the efficiency bar is issued. We respectfully agree with the view taken by the Full Bench of the Orissa High Court in preference to the view taken by the Punjab and Haryana High Court. The Full Bench of the Orissa High Court has duly considered the earlier decision of the Supreme Court in *State of Punjab v. Dewan Chuni Lal* and has rightly held that this decision is distinguishable and does not lay down any general proposition that the character roll prior to the crossing of the efficiency bar has to be ignored. *Dewan Chuni Lal*'s case was a case of dismissal of a Government Servant. A specific charge of inefficiency was levelled against the respondent-employee, and in that context it was held by their Lordships that the charge was unsustainable as he was allowed to cross the efficiency bar. In this context a reference can usefully be made to the observations of the Orissa High Court in paragraph 26 of the aforesaid judgment:

" "Efficiency bar" has not been defined. Rule 78 of the Orissa Service Code lays down that where an efficiency bar is prescribed in a time-scale the increment next above the bar shall not be given to a Government Servant without the specific sanction of the authority empowered to withhold increments. It would thus be seen that an order allowing to cross the efficiency bar is to take into consideration the only factor whether the officer would get the next increment at that stage. The considerations weighing with the authority empowered to allow crossing the efficiency bar are of a very limited nature. Even if an officer's calibre is quite ordinary but on serious defects are noticed in him he may be allowed to cross the efficiency bar and that is what is exactly done in practice. The consideration when a question of inter se promotion comes is altogether different. There may not be anything adverse against an officer in particular but on a comparison of merits the officer below him may be much more superior to him in performances. It would be extremely unreasonable to say that merely because an officer has been allowed to cross the efficiency bar all adverse entries prior to that stage are not to be taken into consideration for other purposes. The personality of an officer cannot be disintegrated. Character roll reflects the developments in his official career. Ordinarily superior authorities at the time of considering promotion place greater weight on the performance of the officer near about the time of promotion. This does not, however, mean that the earlier character roll can be ignored.

Reliance was placed on some observations of the Supreme Court in *The State of Punjab v. Dewan Chuni Lal*. Their Lordships held in that case that reports earlier

to 1942 should not have been considered at all inasmuch the respondent was allowed to cross the efficiency bar in that year. They said that it is unthinkable that if the authorities took any serious view of the charge of dishonesty and inefficiency contained in the confidential reports of 1941 and 1942 they could have overlooked the same and recommended the case of the officer as one fit for crossing the efficiency bar in 1944. This decision is distinguishable and does not lay down any general proposition that character roll prior to crossing of efficiency bar is to be ignored. The case before their Lordships was one of dismissal of a Government servant. One of the charges levelled against him was of dishonesty and inefficiency contained in the confidential reports of 1941 and 1942. Despite those reports the officer concerned had been allowed by the Government to cross the efficiency bar. The case was decided in his favour on the ground that reasonable opportunity of conducting his defence had been denied to him by the enquiry officer. As there was specific charge of inefficiency against the respondent it was held by their Lordships that the charge was unsustainable as he was allowed to cross the efficiency bar. This Supreme Court decision does not support the broad contention urged by Mr. Murty.

In *Shadi Lal v. The Dy. Commr., Gurgaon* a learned Single Judge followed the aforesaid Supreme Court decision. As we have already said, the Supreme Court decision is distinguishable on its own facts and circumstances. We accept the distinction pointed out by the learned Single Judge in *Shikar Chand Jain v. State of U. P.* 1974 Serv. L J 106 (All).

It would be profitable in this regard to bear in mind the observations in *Mir Ghulam v. Union of India* to the effect:

" ** **" promotion is not made on the basis of absence of complaint but on the basis of positive merit. Absence of adverse remarks is no criterion of the quality of an officer**** "(para 8).

The scales for allowing the crossing of efficiency bar and for giving promotion are different. What is sufficient for the former may be wholly insufficient for the latter. Adverse character roll not construed as a deterrent for crossing efficiency bar is not obliterated. It can be taken into consideration for negating a claim of promotion."

11. The decision of this Court in *Hari Trimbak v. State of Mah.* on which reliance is placed by Mr. Manohar is also distinguishable, because that case also related to the retention of an employee in service in the same cadre and the post and was not one of promotion of an employee from a lower to a higher post or cadre. The view taken by the Allahabad High Court in *Satish Chandra v. State of U. P.* is also not relevant for deciding the question involved in the writ petition. That was a case where the employee was already granted promotion by selection based on service record and merit and was tried to be reverted on the basis of the same service record subsequently. In this context, it was held by a single Judge of the Allahabad High Court that the order of reversion cannot be made on the basis of

such entries which were already taken into consideration while directing the promotion of the employee by selection based on service record and merit. Therefore the said case is also distinguishable.

12. Once it is held that the promotion is to be made on the basis of positive merit, in our opinion, it would be extremely untenable to say that merely because an officer has been allowed to cross the efficiency bar, all adverse entries upto that stage cannot be taken into consideration for the purposes of promotion. It is no doubt true that no general rule in this behalf can be laid down and everything must depend on the facts and circumstances of each case. Further the fact that a person was permitted to cross the efficiency bar is also relevant while considering his service record. In this view of the matter, it is not possible to accept the broad proposition made by the learned counsel for the petitioner that all the prior service record of the petitioner is wholly washed out in view of the order passed by the Government dated 15-9-1971 permitting him to cross the efficiency bar with effect from 1-4-1968. However, it is not necessary to probe into this question in detail in this particular case, as we have already recorded a finding that the petitioner's case was not considered for promotion when the respondents Nos 3 and 4 were promoted as Divisional Joint Registrar in February 1972.

13. In this case, it is pertinent to note that at least after the filing of the petition in the year 1973 the petitioner was found fit for promotion to such a post. Therefore, in the background of this subsequent order of promotion issued in 1973 promoting the petitioner to the post of Divisional Joint Registrar, it is difficult for us to accept the oral submissions made by Mr. Garud, the learned Assistant Government Pleader, that the petitioner was not a fit person even for consideration of his claim for promotion in the year 1972 itself. Once it is held that his case for promotion itself was not considered in 1972 on the basis of some surmises or speculation, it is not possible for us to deny him his right for consideration in February 1972 when the respondents Nos. 3 and 4 were promoted as Divisional Joint Registrar. As a matter of fact, as a necessary consequence of this finding the promotions of the respondents Nos. 3 and 4 could have been set aside but for the concession and the submissions made before us by the learned counsel for the petitioner based on the changed circumstances, namely, that the petitioner himself was promoted in 1973 as Divisional Joint Registrar. Therefore, we do not propose to set aside the promotions of the respondents Nos. 3 and 4. However, in our opinion, this is a fit case where the respondents Nos. 1 and 2 should be directed to consider the case of the petitioner for promotion to the post of Divisional Joint Registrar on the basis of his service record as it stood in February 1972 and then decide his claim for promotion in accordance with the law and rules in the field. In case the petitioner is found fit for promotion on that date, then the respondents Nos. 1 and 2 are directed to assign to him a deemed date of promotion including granting him notional seniority as well as other consequential benefits to which he will be entitled. In that case promotion already granted to him will date back

when respondents Nos. 3 and 4 were promoted.

14. In the result, therefore, the petition is allowed to the extent indicated hereinbefore and the respondents Nos. 1 and 2 are directed to consider the case of the petitioner for promotion as in February 1972 and readjust the promotion after considering his case. The respondents Nos. 1 and 2 are further directed to assign him a deemed date of promotion as well as seniority in case, after consideration, he is found to be fit for promotion on that date. The respondents Nos. 1 and 2 are also directed to give him further consequential benefits to which he will be entitled as a result of this consideration. The petition is partly allowed with costs. Respondents Nos. 1 and 2 to pay the costs of this petition to the petitioner.