

(1985) 11 BOM CK 0018
In the Bombay High Court
Case No : O.S. Writ Petition No. 1673 of 1981

Harisingh Varma	Vs	APPELLANT
Union of India (UOI) and Others		RESPONDENT

Date of Decision : 03-11-1985

Acts Referred:

Citation : (1986) 1 BomCR 352

Hon'ble Judges : S.P. Bharucha, J

Bench : Single Bench

Advocate : G.K. Masand, for the Appellant; C.G. Rege, and V.T. Lutia, for respondent No. 3., for the Respondent

Judgement

S.P. Bharucha, J.—The petition is by a Western Railway Servant. He is a member of the Scheduled Castes. He was appointed as a clerk on 2nd September, 1967. In 1972 he was promoted as a senior clerk, in 1978 as a head clerk and in 1980 as a chief clerk, in which position he was working when the petition was filed.

2. The 3rd respondent is, on the admission of the Western Railway authorities, junior to the petitioner and is so shown in the seniority list. The 3rd respondent has filed a suit in the City Civil Court at Bombay claiming a higher seniority. To this suit the petitioner is not a party. For the purposes of this petition the petitioner shall, on the basis of the seniority list, be considered senior to the 3rd respondent.

3. The 3rd respondent is also a member of the Scheduled Castes. On 31st October, 1981, the 3rd respondent was placed by the authorities on a select list for promotion to the post of Office Superintendent. This order stated that the petitioner had not been considered suitable for the promotion to the post of Office Superintendent. The petition challenges this order.

The 3rd respondent was appointed an Office Superintendent pursuant to this order. Subsequent to the filing of the petition, the petitioner has also been promoted to the post of Office Superintendent.

It is not in dispute that all the posts aforementioned are Class III posts.

4. In the affidavit in reply filed by one Padmnabhan, it is stated that the case of the petitioner had been justly and fairly considered and after full application of mind and on proper consideration of his confidential reports for the years 1978-79, 1979-80 and 1980-81 he had been adjudged unsuitable by the competent authority for promotion to the post of Office Superintendent.

5. In the affidavit of one M.N. Surti, also filed on behalf of the authorities, it is stated that the post of Office Superintendent is a non-selection post filled in on the basis of seniority-cum-suitability. The petitioner satisfied the criterion of seniority but he failed to satisfy the competent authority in respect of suitability. Suitability was adjudged on the basis of, inter alia, confidential reports. In the confidential reports regarding the performance of the petitioner for the relevant years, the assessing authority had not found the petitioner fit for promotion at the relevant stage.

6. Rule 212, in Chapter II of the Indian Railway Establishment Manual, deals with promotions in non-selection posts. It provides that non-selection posts will be filled by promotion of the senior most suitable railway servant, suitability being determined by the authority competent to fill the posts on the basis of the record of service and/or departmental tests if necessary. A senior employee may be passed over only if he has been declared unfit for holding the post in question. A declaration of unfitness should, ordinarily have been made some time previous to the time the promotion of the railway servant was being considered. When, in filling any non-selection post a senior railway servant was passed over, the authority making the promotion was obliged to record briefly the reason for such supersession.

7. The petitioner being, on the admission of the authorities, senior to the respondent, it was obligatory for the promoting authority to record the reason why he was passed over and his junior, the 3rd respondent, promoted to the post of Office Superintendent. Mr. Rege, learned Counsel for the authorities, made available to me the reason recorded by the promoting authority which was that all the petitioner's confidential reports were adverse and he was, therefore, not considered suitable for promotion. In Padmanbhan's affidavit, referred to above, it has been stated that the confidential reports meant were those for the years 1978-79, 1979-80 and 1980-81. Mr. Rege made available to me these confidential reports.

8. I have gone through these confidential reports. The worst that can be said of the petitioner upon the basis thereof is that his performance was of an average character. Except for a remark in the earliest of these confidential reports, to which I shall refer, there is no adverse remark. Admittedly, no adverse remark has been communicated to the petitioner. The promoting authority was, therefore, not justified in stating that the confidential reports were all adverse to the petitioner, and in denying him promotion on that ground.

9. The petitioner's confidential report for 1978-79 notes that the petitioner was "not yet fit" for promotion. The confidential report for the year 1979-80 says nothing on this aspect. The confidential report for the year 1980-81 says that the petitioner was "not yet fit " in regard to promotion to Class II service. There is, therefore, nothing in these confidential reports upon which as Surti has averred in his affidavit, the promoting authority could have found the petitioner not fit for promotion to the Class III post of Office Superintendent.

10. The only adverse remark against the petitioner is found in the earliest confidential report considered, viz., 1978-79. It is that he was not yet fit for promotion. It is not in dispute that this remark was not conveyed to the petitioner. To say of an employee that he is not fit for promotion even in the class in which he is employed is to make an adverse remark against him. In as much as it was not communicated to the petitioner, the promoting authority could not have relied upon it to deny the petitioner promotion to the post of Office Superintendent.

11. There are numerous authorities for the proposition just mentioned. I need refer only to the judgment of the Supreme Court in *Gurdial Singh Fijji Vs. State of Punjab and Others*, . It was there stated :

"The principle is well-settled that in accordance with the rule of natural justice, an adverse report in a confidential roll cannot be acted upon to deny promotional opportunities unless it is communicated to the person concerned so that he has an opportunity to improve his work and conduct or to explain the circumstances leading to the report. Such an opportunity is not an empty formality, its object, partially, being to enable the superior authorities to decide on a consideration of the explanation offered by the person concerned, whether the adverse report is justified."

The judgment in *Gurdial's* case was considered by a Full Bench of this Court in *Y.V. Thatte v. State of Maharashtra*, 1984 *Maharashtra Law Journal*, page 1019. Upon the Full Bench judgment Mr. Lullia, learned Counsel for the 3rd respondent, placed great emphasis. The Full Bench was considering the effect of non-communication of adverse remarks in the context of a reversion. It held that the reversion did not automatically fail. This has not application here.

12. As I have said, there is nothing adverse in the relevant confidential records of the petitioner except for the remark in that for the year 1978-79 that he was not yet fit for promotion. This remark was not communicated to the petitioner. Even so, the promoting authority characterised the petitioner's confidential reports as adverse and, on that erroneous basis considered him not suitable for promotion. If the promoting authority considered the only adverse remark, he denied promotion on the ground of a remark which had not been communicated to the petitioner and was in error in doing so.

13. Accordingly, the authorities, i.e. the 1st and 2nd respondents are directed to treat the petitioner as having been promoted to the post of Office Superintendent

from the date on which the 3rd respondent was promoted to that post and to give him all consequential benefits.

14. The order will not prejudice the decision of the suit filed by the 3rd respondent in City Civil Court at Bombay claiming that he has a higher seniority.

15. The 1st and 2nd respondents shall pay to the petitioner the costs of the petition.

Rule accordingly.